



Legal Representation of Children in Canada

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1) Executive Summary

Almost twenty-five years have passed since Canada ratified the U.N. Convention on the Rights of the Child (the “Convention”).¹ Article 12 of the Convention reads:

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.² [Emphasis added.]

Keeping in mind Canada’s commitment to the principles in the Convention and in particular Article 12, the objective of this paper is to provide an overview of the extent to which children in Canada are provided with independent legal representation in judicial proceedings.

The timing of this paper is particularly significant in light of the release, on December 15, 2015, of the Final Report of the Truth and Reconciliation Commission of Canada (the “Final Report”).³ The Final Report is a testament to the deep and lasting impact of our laws on the lived experiences of children, families, communities and our society.

¹ *Convention on the Rights of the Child*, UN Doc. A/RES/44/25 (20 November 1989); Canada ratified the Convention on December 13, 1991. See Unicef Canada: “About the Convention on the Rights of the Child”, online: <http://www.unicef.ca/en/policy-advocacy-for-children/about-the-convention-on-the-rights-of-the-child>.

² The United Nations. “Convention on the Rights of the Child.” *Treaty Series* 1577 (1989).

³ See the Final Report of the Truth and Reconciliation Commission of Canada, online: <http://www.trc.ca/websites/trcinstitution/index.php?p=3>.

The focus of this paper is on the *legal* representation of children (i.e. the situations and circumstances in which a lawyer acts on behalf of a child and not where the child is heard directly by the court or through an intermediary who is not a lawyer). It is one piece of a much larger discussion as to how our society defines, upholds, advances and protects the rights of children. This paper seeks to answer the following questions:

1. When is legal representation available for children?
2. What legislation have provinces and territories enacted regarding the legal representation of children?
3. What is the role of the lawyer when representing children (*amicus curiae*, *guardian ad litem*, or advocate)?
4. In what circumstances is the lawyer independent or a government lawyer?
5. Have guidelines been created for lawyers who represent children?

The first question requires some preliminary discussion as to when children are party to a proceeding. For example, in civil proceedings across Canada, children are generally required to act through litigation guardians.⁴ The child is a party to the proceeding but it is the *litigation guardian* who instructs the lawyer. Litigation guardians in civil proceedings cannot proceed without retaining counsel⁵; so, assuming a child has someone to act as their litigation guardian, it might be argued that the child is receiving “indirect” legal representation.

This paper does not closely examine those situations where the child’s interests are advanced through a litigation guardian who instructs counsel. For one, it may be argued that the requirement for children to act through litigation guardians is more of a *barrier* to the child accessing the justice system than anything else; children who have no one to act as their litigation guardian are pre-empted from

⁴ See, e.g. Ontario’s *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 7.01(1) or *Alberta Rules of Court*, Alta Reg 124/2012, Rule 2.11.

⁵ See, e.g. Ontario’s *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 15.01 (1) or for Newfoundland and Labrador *Rules of the Supreme Court*, 1986 SNL 1986, c 42 Sch D, Rule 8.01(1).

even commencing proceedings.⁶ Moreover, it is the litigation guardian who instructs the lawyer, not the child, and while both the litigation guardian and the child are required to act in what they believe to be is the child's best interests, neither is required to put forward the child's *own* position.

In other situations, the child may not need a litigation guardian to be party to the proceedings (as in the youth criminal justice system). In these situations, it is clear that the child can retain and instruct counsel of their choice. Depending on the area of law in question, legal aid may be available to the child. These children would theoretically have the choice between being self-represented or retaining counsel.⁷ However, outside of the youth criminal justice system, situations where children may be party to legal proceedings without a litigation guardian are extremely rare.⁸

In yet other contexts, such as child protection and custody and access⁹, court appointed legal representation may be available for children who, while not party to the proceedings, are directly affected by them. The bulk of this paper will focus on these contexts, as it is here that the most significant developments in statutory and jurisprudential evolution have taken place. This paper will also look at the appointment of legal representation in the areas of mental health and secure treatment, in light of the state's ability to confine the child.

Child protection and custody and access are the areas that have sparked the greatest level of academic and theoretical debate regarding the proper role of the child's lawyer. This debate relates to whether the child's lawyer should: (1) simply

⁶ In contrast, if a child is a defendant to a civil proceeding, the court may appoint a public litigation guardian.

⁷ No cases involving self-represented children in Canada have been found.

⁸ See, for example, *C.M.M. v. D.G.C.*, 2015 ONSC 2447 (under appeal), which held that children in Ontario may commence support proceedings against a parent without a litigation guardian. See also *B. (S.G.) v. L. (S.J.)*, 2010 ONCA 578, where a child was granted intervener status on his parent's appeal to the Ontario Court of Appeal. As an intervener, the child is a party to the case and, assuming he or she has capacity, may instruct counsel.

⁹ It is acknowledged that, while at the federal level (i.e. the *Divorce Act*), the traditional terminology of "custody and access" is used, the terminology varies in different jurisdictions (e.g. use of terms such as contact, guardianship in Alberta and British Columbia) and is generally evolving.

advocate for the child's own views and preferences; (2) assume an *amicus curiae*-like role (not advocate for a position but rather ensure that the court has all relevant information before it), or (3) take a *guardian ad litem* approach, advancing the position that the *lawyer* believes is in the child's best interests (even where the lawyer's position differs from the child's expressed views).

No paper on the legal representation of children would be complete without a discussion of the superior courts' *parens patriae* jurisdiction to appoint legal counsel for a child who is affected by a legal proceeding where legislation does not otherwise provide for it. Indeed, in many provinces, the *parens patriae* jurisdiction is the *only* way that counsel may be appointed to advocate on a child's behalf.

In terms of methodology, the authors reviewed and compared Canadian statutes and regulations that provide for the appointment of legal counsel for children in select areas of law, as well as academic literature and reports on the legal representation of children in Canada over the past decade. A search for guidelines that aim to assist lawyers in representing children was also undertaken, revealing that no Canadian law societies or bar associations currently have any such guidelines in place.

This paper does not specifically address the legal representation of Aboriginal children and youth. The statutory provisions examined in this paper, however, would apply to Aboriginal children and youth.¹⁰ The importance of the findings of this paper should be noted in light of the overrepresentation of Aboriginal women and girls among crime victims¹¹, the overrepresentation of Aboriginal girls and

¹⁰ The authors recognize the need for lawyers to understand Aboriginal history and culture when providing services to Aboriginal children and youth and for lawyers similarly to understand the culture and communities of other children that such lawyers serve; however, it is beyond the scope of this paper to explore this important topic.

¹¹ Truth and Reconciliation Commission of Canada. Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015), p. 180, online: http://www.myrobust.com/websites/trcinstitution/File/Reports/Executive_Summary_English_Web.pdf.

Aboriginal boys of youth admitted to custody¹², and the disproportionate rates of child apprehension among Aboriginal people¹³.

This paper concludes that, despite Canada's ratification of the Convention in 1991, there is little consistency between provinces in terms of how and when legal counsel is appointed for a child. The inconsistency was noted by the Committee on the Rights of the Child in 2012:

While welcoming numerous legislative actions related to the implementation of the Convention, the Committee remains concerned at the absence of legislation that comprehensively covers the full scope of the Convention in national law. In this context, the Committee further notes that given the State party's federal system and dualist legal system, the absence of such overall national legislation has resulted in fragmentation and inconsistencies in the implementation of child rights across the State party, with children in similar situations being subject to disparities in the fulfilment of their rights depending on the province or territory in which they reside.¹⁴

While the legal representation of children is well established in the federal youth criminal justice system, in provincial domains (i.e. family law and child protection law) the variances between provinces are concerning. The limited availability for the appointment of legal counsel in the area of mental health raises similar concerns. While the Convention espouses values that are supposed to be *universal* (i.e. equally applicable to all Canadian children), what is clear is that children receive very different treatment depending on the province in which they live. Perhaps more concerning is that, apart from the above-noted areas of law, the independent legal representation of children is virtually non-existent.

However, things are changing (albeit slowly). As Birnbaum and Bala note, "the judiciary and legislatures are [...] increasingly recognizing the value of having the views and perspectives of the child before the court when making decisions

¹² *Ibid*, p. 177-178.

¹³ *Ibid.*, p. 137-138. The Report notes: "that a 2011 Statistics Canada study found that 14,225 or 3.6% of all First Nations children aged fourteen and under were in foster care, compared with 15,345 or 0.3% of non-Aboriginal Children", p. 138.

¹⁴ United Nations. Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012) (6 December 2012), p. 2.

about the child's best interests." The authors point to a "growing acceptance of the legal principle that children have the *right* to be heard when post-separation parenting arrangements are being made".¹⁵

This paper will provide a snapshot of the current situation in Canada, regarding the legal representation of children. It is hoped that it will lend further support to this positive trend of change to our laws and the lived experience of our children.

2) Legal Representation of Children in Canada: Legislative Authority

In this section of the paper, federal legislation, in addition to the legislation of all ten provinces and three territories, is analyzed to determine the extent to which children are afforded legal representation by statute. At Appendix "A", the reader will find the legislative provisions, which provide for the appointment of legal counsel for the child in Canada (federally and then by jurisdiction), as well as provisions for the appointment of *amicus curiae* and for intervener status. The areas of divorce, criminal law and immigration in the federal context will first be examined. This will be followed by a comparative analysis of provincial legislation in the areas of child protection, family law, as well as mental health and secure treatment.

As noted above, there is little uniformity between jurisdictions and sometimes even within a jurisdiction regarding the appointment of legal counsel to the child. Variances are not only evident between provinces but also between areas of law. This has not escaped the scrutiny of academics, such as Fleishman, who writes that "[t]he interests of the children involved in family law proceedings are somehow seen as less deserving of representation than those of a child who has been accused of a crime."¹⁶

¹⁵ Rachel Birnbaum & Nicholas Bala. "The child's perspective on legal representation: young people report on their experiences with child lawyers" (2009) *Canadian Journal of Family Law* 25(1), 11–71.

¹⁶ Jodi Fleishman. "Mandatory Legal Representation for Children in Custody, Access and Child Protection Proceedings". (2005) McGill University Faculty of Law [unpublished].

a) Federal legislation

i) Divorce

The *Divorce Act*¹⁷ provides that “any...person” can apply for a custody or access order, or the variation of such an order, with leave of the court.¹⁸ As the Alberta Court of Appeal noted in *Puszczak v. Puszczak* in *obiter*, this language is broad enough that it could include a child of the marriage who brings his or her own application for a custody or access order.¹⁹ As a party to the case, the child would be able to retain legal representation (assuming the child had the capacity to do so). However, to date there are no known decisions where a child has brought an application regarding their own custody or access pursuant to these statutory provisions. Where courts have appointed legal counsel for a child in a custody and access case, this has been done pursuant to provincial legislation and/or via the court’s *parens patriae* jurisdiction as will be further discussed below.

ii) Criminal law

The *Youth Criminal Justice Act*²⁰ unequivocally affirms the right of a child to legal representation both before and during criminal proceedings:

s. 25 (1) A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and before and during any consideration of whether, instead of starting or continuing judicial proceedings against the young person under this Act, to use an extrajudicial sanction to deal with the young person.

As can be seen from the above, the young person’s participation as a party with decision-making capacity is presumed.²¹ Note that some jurisdictions provide for

¹⁷ RSC 1985, c 3 (2nd Supp).

¹⁸ *Ibid.*, s. 16-17.

¹⁹ *Puszczak v. Puszczak*, 2005 ABCA 426 at para 13. See also *Wahl v. Wahl* (2000), 2000 ABQB 10 (CanLII), 257 A.R. 212 (Q.B.).

²⁰ SC 2002 c. 1.

²¹ Canadian Foundation for Children, Youth & the Law/Justice for Children and Youth. “Children’s Right to be Heard in Canadian Judicial and Administrative Proceedings”. (Submission for the

similar provisions for the appointment of counsel in the criminal context. For example, New Brunswick and the Northwest Territories have similar statutory procedures for children who are accused of provincial offenses.²² Nunavut's *Young Offenders Act* contains a similar provision that applies to all children before its youth court.²³

The importance of the obligation to advise the child of the right to retain and instruct counsel is reflected by the inadmissibility of any statements made to police where the police fail to explain this right or fail to provide the young person with the opportunity to consult with counsel.²⁴ The child may privately retain a lawyer if they have the means to do so, or they may receive legal aid. While the availability of legal aid is beyond the scope of this paper, the author points the reader to Wilson's text which provides an appendix that lists by province, the eligibility requirements for legal aid, the method of delivery of legal services, and the application process and procedures for legal aid assistance.²⁵

Importantly, s. 25(4)(b) of the *Youth Criminal Justice Act* states that "if no legal aid program or assistance program is available or the young person is unable to obtain counsel through the program, [the youth justice court] may, and on the request of the young person shall, direct that the young person be represented by counsel" [emphasis added], making it clear that a child's right to state-funded legal counsel trumps. That being said, courts have interpreted the language "unable to obtain counsel" to either provide or deny the appointment of legal counsel. For example, the Ontario Court of Appeal in *R. v. J. (H.)*²⁶, held that to

Committee on the Rights of the Child General Day of Discussion) (2006), online: <http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf>.

²² *Provincial Offences Procedure for Young Persons Act*, SNB 1987, c P-22.2, s. 12; *Youth Justice Act*, SNWT 2003, c 31, s. 14.

²³ *Young Offenders Act*, RSNWT (Nu) 1988, ss. 11-12.

²⁴ Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf, 7A.19 where the text cites *R. v. Suberu*, [2009] S.C.J. NO.33; *R. v. L(T.A.)*, [1986] A.J. No. 87 (Prov. Ct.).

²⁵ Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf, Appendix 25: Legal Aid for Young Persons.

²⁶ [1999] O.J. No. 3894; Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf, 7A.21.

determine if a young person was “unable” to obtain a lawyer, the court must examine the reasons why legal counsel was denied and held that parents’ resources were relevant to such inquiry. In contrast, the Alberta Court of Queen’s Bench held that courts have no discretion to decline to direct that legal counsel be appointed where the youth has been unable to obtain counsel due to the unavailability of legal aid.²⁷ Significant for the purposes of this paper, is the fact that even in the criminal context, where a child’s right to counsel receives heightened support and protections, a lawyer will not be appointed for a youth in every circumstance.

Notable, is the court’s authority, when the young person is not represented by counsel to allow the young person to be assisted by an adult.²⁸ However, such authority is to be used in limited circumstances, as noted by Cohen J. when dismissing the application by a young person for an order permitting a paralegal to assist him in *R. v. K.P.D.*²⁹ Cohen J.’s comments are telling regarding the importance of representation by legal counsel in protecting the rights of young people:

[41] These limited entitlements speak to parliament’s intention that “assistance” be carefully circumscribed, such that assistants will not be mistaken for lawyers by unsophisticated youth and their families. The *Act* and the jurisprudence are clear: youth are vulnerable and lacking in knowledge or understanding of the justice system. Since a paralegal is permitted to provide legal services in some circumstances, he/she may be perceived as an inexpensive equivalent to a lawyer by a young person and his family. Difficulties in accessing legal aid, such as occurred in this case, compound the risk. If assistance is treated as the equivalent of representation in the youth context, there is no doubt that, over time, the statutory scheme intended to protect the rights of young people will be eroded.

...

[43] Lawyers have the widest right of audience in the courts. As Justice Fuerst points out in *R. v. Lippa*, [2013] O.J. No. 3003 (Ont. S.C.J.) at paragraph 15.

...licensed paralegals are not barristers and solicitors. The fact that paralegals are regulated and licensed by the Law Society of Upper Canada and that they provide certain legal services to the public does not make them lawyers. They are not required to obtain a law degree, or to complete articles of clerkship, in order to become licensed. They are not required to write the same licensing examination as lawyers.

²⁷ *Ibid.*, 7A.21 citing *R. v. C(S.T.)*; *R. v. T(D.M.)*, [1993] A.J. No. 350; *R v. D.T.*, [2002] S.J. No. 70 (Prov. Ct.).

²⁸ *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 25(7).

²⁹ [2015] O.J. No. 828.

They are not authorized to provide the broad scope of legal services performed by lawyers...

...

[46] It is important that courts recognize the inherent limitations imposed on a person providing assistance under section 25(7). Counsel play a crucial role in protecting not only the rights and interests of the young people they represent, but in maintaining the edifice of the Act itself. The court cannot sanction the use of section 25(7) by professionals purporting to offer what can only be a modicum of legal services, in the guise of assistance.³⁰

iii) Immigration

In the immigration context, although there is a right to counsel, there is no requirement that a child have legal counsel appointed for them. More often than not, the child will be represented by a designated representative, who is often a relative. This is despite the recognition, as noted by Justice Cohen above, of the importance of legal representation for children and youth.

Children continue to have no independent standing in proceedings under the *Immigration and Refugee Protection Act ("IRPA")*.³¹ Under the *IRPA*, all individuals have a right to counsel, including children but, as noted, there are no provisions for such appointment for minors:

Right to counsel

167. (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

Representation

(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

Thus, children are required to have a designated representative (similar to a litigation guardian) before the Immigration and Refugee Board. The *IRPA* states

³⁰ *Ibid.*, para. 41-46.

³¹ SC 2001, c 27.

that “[i]f a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.”³² Although the best interests of the child must be considered under the *IRPA*, there is no corresponding requirement that the child’s *own personal* views and wishes be considered.³³

In most cases where a child’s claim is heard with a parent or adult relative, that adult will be the designated representative of the child. The role of the designated representative is similar to a litigation guardian and is not that of counsel.³⁴ The Immigration and Refugee Board has created guidelines regarding child refugee claimants.³⁵ Those guidelines state that the duties of the 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.

As of 2013, there was no national policy on designating representatives and the lack of a standard procedure regarding same was noted as a concern by the

³² *Immigration and Refugee Protection Act*, SC 2001, c. 27, s. 167(2). Emphasis added.

³³ Canadian Foundation for Children, Youth & the Law/Justice for Children and Youth. “Children’s Right to be Heard in Canadian Judicial and Administrative Proceedings”. Submission for the Committee on the Rights of the Child General Day of Discussion. (2006), online: <http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf>.

³⁴ Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf, 9.24.

³⁵ Immigration and Refugee Board of Canada website. “Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues”. (September 30, 1996), online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir03.aspx>.

U.N. Committee on the Rights of the Child.³⁶ The three provinces that receive the greatest volume of separated children have each developed their own means of providing a designated representative:

- In Quebec, Service d'aide aux réfugiés et aux immigrants du Montréal métropolitain (SARIMM), a group of community service centre personnel with expertise in services for refugees and immigrants, is notified by the federal government when an unaccompanied minor arrives. Each minor is assigned two caseworkers: one for the Immigration and Refugee Board process, and one for settlement services.
- In British Columbia, the Ministry of Children and Family Development has a Migrant Services team that provides representation at Immigration and Refugee Board hearings as well as reception, screening and placement services for unaccompanied minors.
- In Ontario, a panel composed primarily of immigration lawyers acts as the designated representative for unaccompanied minors before the Immigration and Refugee Board.³⁷

Given the importance of representation by legal counsel, it is questionable how the designated representative in the absence of legal counsel, can act in the best interests of the child. As Justice for Children and Youth notes, "immigration-related decisions are another example of administrative decisions in which respect for the child's views and wishes is sorely lacking."³⁸

³⁶ Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf, 9.24.1.

³⁶ *Family Law Act*, SA 2003, c F-4.5, s. 95(3).

³⁷ Sandra Elgersma. "Unaccompanied and Separated Minors as Refugee Claimants" (October 11, 2007) Parliament of Canada, Political and Social Affairs Division, online: <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0715-e.htm>.

³⁸ Canadian Foundation for Children, Youth & the Law/Justice for Children and Youth. "Children's Right to be Heard in Canadian Judicial and Administrative Proceedings". Submission for the Committee on the Rights of the Child General Day of Discussion. (2006), online: <http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf>.

b) Provincial Legislation

For the purposes of comparing the appointment of legal representation for a child, this paper focuses on three areas, namely, child protection, family law (custody and access), and mental health and secure treatment. It will also touch on the area of civil proceedings and estates. As will be detailed below, there is little consistency between provinces in terms of how and when legal counsel is appointed for a child.³⁹

i) Child protection

In the area of child protection, all provinces and territories, with the exception of British Columbia⁴⁰ and Newfoundland and Labrador⁴¹, have legislation that provides for the appointment of legal counsel for a child. A chart comparing the applicable provisions of such legislation is found at Appendix “B” to this paper. Only in Ontario, and in the case of a minor parent, is such appointment

³⁹ A similar observation was made by Justice for Children and Youth in 2006, where they stated: “The right of children and youth under the age of 18 to participate and be heard in judicial and administrative decisions affecting them is recognized inconsistently throughout Canada depending upon region and the nature of the decision. The state of the law can best be described as a patchwork without evidence of a sound rationale for particular approaches even within the same area of law or the same Province or Territory”. See: Canadian Foundation for Children, Youth & the Law/Justice for Children and Youth. “Children’s Right to be Heard in Canadian Judicial and Administrative Proceedings”. Submission for the Committee on the Rights of the Child General Day of Discussion. (2006), online: <http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf>.

⁴⁰ While the *Child, Family and Community Service Act*, RSBC 1996, c 46, s. 70(1)(m), recognizes that children in care have the right to “to privacy during discussions with a lawyer”, there are no provisions in the legislation for the appointment of legal counsel for the child.

⁴¹ While the legislation in Newfoundland and Labrador recognizes that the child might have their own legal counsel in a protection proceeding, there are no explicit provisions respecting the appointment of such counsel:

Children and Youth Care and Protection Act, SNL 2010, c C-12.2

PART V: GENERAL COURT MATTERS

....

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

- (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.

mandatory.⁴² What is notable when comparing legislation across the country, are the discrepancies as to who can make such appointment, the listed criteria to be considered before such appointment is made, and the type of lawyer (i.e. independent or government) that provides the legal service. In most provinces and territories, such discretion is in the hands of the court. With respect to the criteria to be considered prior to making an appointment, five jurisdictions provide extensive criteria for consideration in their legislation, whereas the other six jurisdictions provide much more narrow guidance. Whether broad or narrow, the listed criteria to be considered before legal counsel is appointed for a child differs between jurisdictions. The lawyer that is appointed is almost always an independent lawyer. Whether or not the independent lawyer is funded through legal aid is not clear on the face of the applicable legislation and is beyond the scope of this paper. Only three jurisdictions, namely Alberta, Ontario, and the Northwest Territories have separate government bodies that provide legal counsel to the child either from its own in-house department or from its designated roster of lawyers.

The first notable difference regarding the appointment of legal counsel for a child in a protection proceeding is who can make such appointment. In Manitoba, the Northwest Territories, Nova Scotia, Nunavut, and Prince Edward Island, and Quebec, this decision falls to the court. While this is a common feature to these seven jurisdictions, there are nuanced differences as to how such appointment is made as noted below. In Manitoba, in the case of a child that is subject to a hearing, the court may order that legal counsel be appointed to represent the interests of the child.⁴³ If the child is twelve years of age or older, the court may further order that the child have the right to instruct legal counsel.⁴⁴ In Nova Scotia, where a child is at least twelve years of age, upon request of the child, the court may order that a child be made a party to the proceeding and be represented by a lawyer.⁴⁵ Notably, the Nova Scotia *Child and Family Services*

⁴² *Child and Family Services Act*, RSO 1990, c C.11, s. 38(5).

⁴³ *The Child and Family Services Act*, CCSM c C80, s. 34(2).

⁴⁴ *Idem*.

⁴⁵ *Child and Family Services Act*, SNS 1990, c 5, s. 37(2).

*Act*⁴⁶, provides that a child who is sixteen years old or over is a party unless otherwise ordered by the court and is entitled, upon request by the child, to legal representation, although there are no provisions mandating the court to appoint such counsel.^{47 48} In the Northwest Territories and in Nunavut, the court “shall ensure” that a child who is a subject of a hearing before the court is represented by legal counsel where it appears that the interests of the child and the parents are in conflict or where it would be in the child’s best interest to have her own lawyer.⁴⁹ Although the Office of the Children’s Lawyer in the Northwest Territories (“NWT OCL”) does not feature in the legislation, it is under s. 86 of the *Child and Family Services Act*, that the Territorial Court appoint the NWT OCL.⁵⁰ In Prince Edward Island and Quebec, the court may order that any child under the age of eighteen be represented by counsel.⁵¹

In Alberta, Saskatchewan, New Brunswick, Ontario and the Yukon, the appointment of legal counsel differs from the provinces and territories noted above. In Alberta, such appointment can be by court order or at the discretion of the Child and Youth Advocate (“OCYA”). In particular, a court may direct that a lawyer represent a child by referring the child to the OCYA pursuant to the *Child, Youth and Family Enhancement Act*.⁵² Such referral cannot be made by motion

⁴⁶ SNS 1990, c 5.

⁴⁷ *Ibid.*, s. 37(1).

⁴⁸ The court is also authorized, further to s. 37(3) of the *Child and Family Services Act*, upon its own motion or the application of a party, to order that a *guardian ad litem* be appointed for a child, and, where the child is not a party to the proceeding, that the child be made a party if such appointment is deemed to be desirable and the child is twelve years of age or more and not capable of instructing counsel.

⁴⁹ *Child and Family Services Act*, SNWT 1997, c 13, s. 86(1); *Child and Family Services Act*, SNWT (NU) 1997, c 13, s. 86(1); note that the Northwest Territories *Child and Family Services Act* contains the following provision set to come into force in April 2016, regarding the right of the child who is able to express her views and preferences to be informed of the right to be represented by counsel, further to proposed s.3.1(1)(b) and role of the Director in facilitating the child’s access to legal counsel at s.3.1(2) of both acts: “After advising a person of the right to be represented by legal counsel, the Director or a Child Protection Worker shall endeavour, to the extent that it is practicable, to facilitate that person’s access to legal counsel and, where appropriate, the services of an interpreter.”

⁵⁰ *Child and Family Services Act*, SNWT 1997, c 13, s. 86(1).

⁵¹ *Child Protection Act*, RSPEI 1988, c C-5.1, s. 34(1)(b); *Youth Protection Act*, CQLR c P-34.1, s. 80.

⁵² RSA 2000, c C-12; pursuant to s. 112(1) if an application is made for a supervision order, a private guardianship order or a temporary or permanent guardianship order, or a child is the subject of a supervision order or a temporary or permanent guardianship order or a permanent

of the court and can only be made if the child, the guardian of the child or a director requests the court to do so⁵³ and if “the Court is satisfied that the interests or views of the child would not be otherwise adequately represented.”⁵⁴ Upon such referral the OCYA is mandated to provide legal counsel to the child.⁵⁵ The OCYA, on its own initiative, can also appoint legal counsel for a child in specific circumstances in the absence of a court order. In particular, the OCYA is authorized by the *Child and Youth Advocate Act*⁵⁶ and its regulations,⁵⁷ to appoint lawyers “to represent children with respect to any matter under the *Child, Youth and Family Enhancement Act* or the *Protection of Sexually Exploited Children Act* or any matter or proceeding prescribed by regulation.”^{58 59}

In Saskatchewan, the process for appointment of counsel is similar to that in Alberta. If an application for a protection hearing is made, the court may direct that a child be represented by legal counsel and must refer the child to the public

guardianship agreement, and the child is not represented by a lawyer in a proceeding under Part, 1 (Intervention Services), Division 3 (Court Orders – apprehension of child in need of protection), 4 (Secure Treatment) or 5 (Private Guardianship), the court may direct that the child be represented by a lawyer by referring the child to the OCYA which shall appoint a lawyer for the child.

⁵³ N. (A.), Re, 2009 CarswellAlta 1651 (Prov. Ct.) at para. 15.

⁵⁴ *Child Youth and Family Enhancement Act*, RSA 2000, c C-12, s.112(a)-(b).

⁵⁵ *Ibid.*, s. 112.

⁵⁶ SA 2011, c C-11.5 and *Child and Youth Advocate Regulation*, Alta Reg 53/2012.

⁵⁷ *Child and Youth Advocate Regulation*, Alta Reg 53/2012.

⁵⁸ *Child and Youth Advocate Act*, SA 2011, c C-11.5, s.9(2)(c).

⁵⁹ Also see: *Child and Youth Advocate Regulation*, Alta Reg 53/2012, s. 1:

Appointment of lawyer to represent child

1(1) If a child is the subject of a permanent guardianship order or a permanent guardianship agreement under the *Child, Youth and Family Enhancement Act*, the *Child and Youth Advocate* may appoint or cause to be appointed a lawyer to represent the child where

- (a) the child is the subject of a guardianship application under the *Family Law Act*,
- (b) the child is the subject of a guardianship application, a trusteeship application, or both, under the *Adult Guardianship and Trusteeship Act*, or
- (c) the child is the subject of an application, proceeding or other matter under the *Citizenship Act* (Canada).

(2) If a child is receiving any intervention services under the *Child, Youth and Family Enhancement Act* or any services under the *Protection of Sexually Exploited Children Act*, the *Child and Youth Advocate* may appoint or cause to be appointed a lawyer to represent the child

- (a) where the child wishes to apply for an order under the *Protection Against Family Violence Act*, or
- (b) for matters, other than those under the *Youth Criminal Justice Act* (Canada) or the *Youth Justice Act*, where the *Child and Youth Advocate* is of the opinion that the child requires independent representation.

guardian and trustee. The public guardian and trustee is then mandated to appoint a lawyer for the child.⁶⁰ In addition to receiving referrals from the court, the public guardian and trustee, upon referral “from anyone other than the court” may appoint a lawyer to represent a child with respect to all matters regarding the protection of the child.⁶¹

In New Brunswick, the appointment of counsel is made by referral by the Court to the Minister or the Attorney General. Such appointment by either the Minister or the Attorney General seems to be discretionary. Note that although the *Family Services Act*⁶² acknowledges the child’s right to be heard in any proceeding under that Act affecting a child, the right to appointment of counsel is limited to proceedings in respect of custody.⁶³ In these circumstances the court shall, if the Minister is not a party to the proceeding, advise the Minister of the proceeding and it is the Minister that may appoint counsel to “assist in the representation of the interests and concerns of the child”.⁶⁴ Where the Minister is a party and the court is of the view that counsel “should” represent the interests and concerns of the child, the court shall advise the Attorney General that counsel “should” be made available.⁶⁵ The use of the word “should” seems to give the Attorney General discretion to decide if counsel will be appointed.⁶⁶

In Ontario, a child “may have legal representation at any stage” in a child protection proceeding.⁶⁷ Although there are no explicit provisions in the *Child and Family Services Act*, authorizing the Office of the Children’s Lawyer (“OCL”) to act on its own initiative to represent a child in a protection proceeding (as there is in Alberta, discussed above), there is nothing in the legislation that seems to preclude such initiative. The legislation provides that where the court determines

⁶⁰ *Queen’s Bench Act, 1998*, C. Q-1.01, s. 33.1(2)-(3); *Public Guardian and Trustee Act*, SS 1983, c P-36.3, s. 6.3(2)-(3); *Provincial Court Act*, 1988, SS 1998, c. P-30.11, s. 64.1(2)-(3).

⁶¹ *Public Guardian and Trustee Act*, SS 1983, c P-36.3, s. 6.3(4).

⁶² SNB 1980, c F-2.2.

⁶³ Under the *Family Services Act* or “any other Act” further to s. 7.

⁶⁴ *Family Services Act*, SNB 1980, c F-2.2, s. 7(a).

⁶⁵ *Ibid.*, s. 7(b); note that where the court advises the Attorney General that counsel should be made available under s. 7(b), pursuant to s. 7.1(2), the court must provide reasons justifying such decision.

⁶⁶ This is the authors’ view; no case law could be found addressing this point.

⁶⁷ *Child and Family Services Act*, RSO 1990, c C.11, s. 38(1).

that legal representation is desirable to protect the interests of a child under the age of eighteen, it “shall” direct that legal representation be provided for the child.⁶⁸ The OCL has no discretion to refuse to represent the child in this instance. As noted above, if a parent is under the age of eighteen in a child protection proceeding, it is mandatory that the OCL represents that parent.⁶⁹ Noteworthy is the fact that the *Child and Family Services Act* provides that where the OCL is of the opinion that a child has a cause of action or claim because such child has suffered abuse, the OCL may commence proceedings on behalf of the child for recovery or damages or other compensation.⁷⁰

In the Yukon, in contrast to New Brunswick, Alberta and Saskatchewan, the appointment of legal counsel in protection proceedings is in the hands of the official guardian pursuant to the *Child and Family Services Act*.⁷¹ The official guardian is also authorized by the *Child and Family Services Act*, if it believes that the child’s representation is best achieved by the appointment of someone other than legal counsel, to so appoint someone other than a lawyer to represent the child.⁷²

Not only are there discrepancies across the country as to who can appoint legal counsel to a child in a protection proceeding, there are remarkable differences as to the listed criteria to be considered prior to such an appointment being made. The legislation of Alberta, Nova Scotia, Prince Edward Island, Quebec, the Northwest Territories and Nunavut contains very limited direction concerning such criteria. Despite the narrow guidance provided for in the legislation of these jurisdictions there is a remarkable lack of consistency between them.

In Prince Edward Island, the child must be twelve years old and “apparently capable of understanding the circumstances”.⁷³ Whereas in Alberta, where the appointment of counsel is being considered by the court, the court may direct

⁶⁸ *Child and Family Services Act*, RSO 1990, c C.11, s. 38(3).

⁶⁹ *Child and Family Services Act*, RSO 1990, c C.11, s. 38(5).

⁷⁰ *Child and Family Services Act*, RSO 1990, c C.11, s. 81(1)-(2).

⁷¹ S.Y. 2008, c. 1.

⁷² *Ibid.*, s. 76(4).

⁷³ *Child Protection Act*, RSPEI 1988, c C-5.1, s. 34(1).

that a lawyer represent the child if it is satisfied “that the interests or views of the child would not be otherwise adequately represented”.⁷⁴ Where the appointment for counsel is made directly by the OCYA, without a court referral, the legislation only speaks to the particular types of cases where the OCYA can appoint legal counsel and is silent as to criteria to be considered.⁷⁵ In Quebec pursuant to the *Youth Protection Act*,⁷⁶ where the court establishes that the interests of the child are opposed to a parent, “it must see that an advocate is specifically assigned” to represent the child.⁷⁷ Similarly, in the Northwest Territories and Nunavut, the court shall ensure that counsel represents the child where it appears to the court that the interests of the child and that of the parents are in conflict.⁷⁸ The legislation in these two territories adds the criteria that it would be in the child’s best interest to have her own lawyer.⁷⁹ The latter is the only criteria provided in Nova Scotia for a child who is twelve years old or over and less than sixteen.⁸⁰

In contrast to the limited criteria noted above, the legislation from Manitoba, New Brunswick, Ontario, Saskatchewan and the Yukon provide more detailed direction as to the factors to be considered for the appointment of legal counsel for a child in a protection proceeding. However, once again, there is a lack of consistency between these jurisdictions in terms of such criteria. Even where there are similarities as to the factors to be taken into account, there are nuanced differences in language which impact how each factor might be understood or applied.

The one common criteria between these five jurisdictions is that there is a difference in views and/or interests between the child and the other parties to the proceeding. As noted above, there are nuanced differences as to how this is

⁷⁴ *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s. 112(1)(b).

⁷⁵ *Child and Youth Advocate Regulation*, Alta Reg 53/2012, s. 1.

⁷⁶ CQLR c P-34.1.

⁷⁷ *Ibid.*, s. 80; note that the provisions in the *Code of Civil Procedure*, CQLR c C-25 that address the appointment of legal representation of minors (in particular s. 394.1) do not seem to apply with respect to the *Youth Protection Act*. In particular, see s. 85 of the latter.

⁷⁸ *Child and Family Services Act*, SNWT 1997, c 13, s. 86(1)(a); *Child and Family Services Act*, SNWT (NU) 1997, c 13, s. 86(1)(b).

⁷⁹ *Child and Family Services Act*, SNWT 1997, c 13, s. 86(1)(b); *Child and Family Services Act*, SNWT (NU) 1997, c 13, s. 86(1)(b).

⁸⁰ *Child and Family Services Act*, SNS 1990, c 5.

articulated in the legislation depending on the jurisdiction. The legislation in New Brunswick, Manitoba and Saskatchewan provide for a consideration of both the views and interests of the parties,⁸¹ though in New Brunswick the term “concerns” is used instead of “views”.⁸² In the Yukon, a consideration of any conflict of “interests” between the parties must be considered but the legislation is silent as to a consideration of a conflict between “views”.⁸³ For Ontario, consideration is to be given for the appointment of counsel to a child if there is a difference of “views” (the legislation is silent as to interests) and if the society proposed that the child be removed from a person’s care or be made a Crown Ward.⁸⁴ Notable is the fact that the legislation of all these jurisdictions does not define the terms “views” or “interests”.

As for the other criteria listed in the legislation that is to be considered before an appointment of legal counsel is made, there is little uniformity between these five jurisdictions. For example, only the legislation in Manitoba and Saskatchewan mandate a consideration of the capacity of the child to express her views to the court, the views of the child regarding separate representation,⁸⁵ and consideration of the nature of the hearing including the seriousness and complexity of the issues to be determined.⁸⁶ Manitoba’s legislation adds to this criterion, as to whether an agency is requesting the child be removed from the home.⁸⁷ With the exception of the latter, Ontario’s legislation does not provide for any of the criteria noted above.⁸⁸ Only Manitoba and Ontario require consideration as to whether or not the parents or guardians are present at the

⁸¹ *The Child and Family Services Act*, CCSM c C80, s. 34(3)(a)(b); *Queen’s Bench Act*, 1998, C.Q.-1.10, s. 33.1(4)(a), (c),(d); *Public Guardian and Trustee Act*, SS 1983, c P-36.3, s. 6.3(9)(a),(c); *Provincial Court Act*, 1988, SS 1998, c. P-30.11, s. 64.1(a),(c).

⁸² *Family Services Act*, SNB 1980, c F-2.2, s. 7(a),(b), s.7.1(1)(c)-(e).

⁸³ *Child and Family Services Act*, S.Y. 2008, c. 1, s.76(3)(b)(ii).

⁸⁴ *Child and Family Services Act*, RSO 1990, c C.11, s. 38(4)(a).

⁸⁵ *Queen’s Bench Act*, 1998, C.Q-1.01, s. 33.1(4)(c)-(d); *Public Guardian and Trustee Act*, SS 1983, c P-36.3, s. 6.3(9)(c), (d); *Provincial Court Act*, 1988, SS 1998, c. P-30.11, s. 64.1(4)(c),(d).

⁸⁶ *Queen’s Bench Act*, 1998, C.Q-1.01, s. 33.1(4)(b); *Public Guardian and Trustee Act*, SS 1983, c P-36.3, s. 6.3(9)(b); *Provincial Court Act*, 1988, SS 1998, c. P-30.11, s. 64.1(4)(b).

⁸⁷ *The Child and Family Services Act*, CCSM c C80, s. 34(3)(c).

⁸⁸ *Child and Family Services Act*, RSO 1990, c C.11, s. 38(4)(b)-(b).

hearing.⁸⁹ In the Yukon, consideration must be given to the ability of the child to comprehend the proceeding and to any advice or recommendations from the judge and any party to the proceeding.⁹⁰ The legislation from the Yukon and New Brunswick, but not others, takes into account whether the parties to the proceeding will put or are putting before the court the relevant evidence regarding the interests of the child that can be reasonably adduced.⁹¹

New Brunswick's legislation includes the following factors that are not found in the other four jurisdictions, which may be particular to the unique procedure by which a child may have a lawyer appointed (detailed above). In particular, the court shall consider whether the child is twelve years old or older, whether the child's wishes have been given consideration in determining her interests or concerns, whether the Minister has been able to identify the child's interests and concerns, and whether counsel is better able to identify the child's interests and concerns.⁹²

The flexibility provided to the court by the legislation in its consideration of listed criteria is striking. For example, in Manitoba the judge or master "shall consider all relevant factors including" those listed in *The Child and Family Services Act*.⁹³ Similarly, in New Brunswick, the court *shall* consider the listed factors and "any other factors the court considers relevant".⁹⁴ In sharp contrast, in Alberta, the court *may* direct that the child be represented by a lawyer if the child, the guardian of the child, or a director requests the Court to do so *and* the court is satisfied that the interests or views of the child would not otherwise adequately be represented.⁹⁵ The legislation is silent as to other factors the court can

⁸⁹ *The Child and Family Services Act*, CCSM c C80, s. 34(3)(c); *Child and Family Services Act*, RSO 1990, c C.11, s. 38(4)(b)(i).

⁹⁰ *Child and Family Services Act*, S.Y. 2008, c. 1, s. 76(3)(a)(b)(i).

⁹¹ *Child and Family Services Act*, S.Y. 2008, c. 1, s. 76(3)(b)(iii); *Family Services Act*, SNB 1980, c F-2.2, s. 7.1(1) (f).

⁹² *Family Services Act*, SNB 1980, c F-2.2, s. 7.1(1)(a)-(f).

⁹³ *The Child and Family Services Act*, CCSM c C80, s. 34(3).

⁹⁴ *Family Services Act*, SNB 1980, c F-2.2, s. 7.1(1)(f).

⁹⁵ *Child Youth and Family Enhancement Act*, RSA 2000, c C-12, s. 112(a)-(b).

consider or whether or not the court can take into account any other considerations.

Regarding the lawyer to be appointed, in most jurisdictions, the lawyer that is appointed is almost always an independent lawyer. Whether or not the independent lawyer is funded through legal aid is not clear on the face of the applicable legislation and beyond the scope of this paper. Only three provinces, namely Alberta, Ontario and the Northwest Territories, have separate government bodies that provide legal counsel to the child either from its own in-house department or from its designated roster of lawyers. In particular, these are the Legal Representation for Children and Youth through OCYA in Alberta and the Office of the Children's Lawyer in Ontario and the Office of the Children's Lawyer in the Northwest Territories.

ii) Family law

Although there is no custody or access legislation in the country that gives the child party status, a court can appoint a lawyer to a child in this context.⁹⁶ However, and as is the case in child protection, there is little consistency between provinces regarding the appointment of legal representation of children involved in domestic family law disputes. The legislation in Alberta, British Columbia, Ontario, Quebec and the Yukon provide for discretion for the appointment of legal counsel. Of these five jurisdictions, only the statutes of British Columbia, Quebec and the Yukon provide factors to be considered in the making of such appointment. The legislation of the remaining eight jurisdictions do not contain provisions authorizing the appointment of a lawyer for a child, although the legislation of six of these eight jurisdictions recognizes that the child might have a lawyer.

As noted above, the legislation of Alberta, British Columbia, Ontario, Quebec and the Yukon provide for the discretion to appoint legal counsel to a child in a family

⁹⁶ Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf, 2.15.

law dispute. Alberta’s legislation provides that “[t]he court may at any time appoint an individual to represent the interests of a child” in a proceeding under the *Family Law Act*.⁹⁷ The individual does not have to be a lawyer,⁹⁸ and there are no provisions regarding the payment of such an individual. In contrast to the provisions in Alberta for the appointment of a lawyer in protection matters, there are no listed criteria in the legislation for the court to consider when making such appointment.

Similarly, in Ontario, there are no guidelines provided in the legislation for the making of such appointment in family disputes, whereas in the child protection context Ontario’s *Child and Family Services Act* provides a detailed list of factors for the court to consider. Authority to appoint a lawyer for the child in a family matter is found in the *Courts of Justice Act* and the *Family Law Rules*. In particular, courts may request, pursuant to the *Courts of Justice Act*, that the Office of the Children’s Lawyer (“OCL”) “act as the legal representative of a minor [...] who is not a party to a proceeding.”⁹⁹ Ontario’s *Family Law Rules* are broader and state that “in a case that involves a child who is not a party, the court may authorize a lawyer (*i.e. not just the OCL*) to represent the child, and then the child has the rights of a party, unless the court orders otherwise.”¹⁰⁰ In contrast to child protection and property cases, the OCL is not required to provide such representation when a custody and access case is referred to it by the court.¹⁰¹ Where the custody of or access to a child is before the court, the Children’s Lawyer can also, of its own initiative or on the request of a court or any other person, investigate and make recommendations to the court on these issues¹⁰² — though the Children’s Lawyer acting in such a capacity is not necessarily advocating for the child’s own views.

⁹⁷ *Family Law Act*, SA 2003, c F-4.5, s. 95(3).

⁹⁸ For a discussion of s. 95(3) of Alberta’s *Family Law Act*, see *Smith v. Lagace*, 2011 ABQB 405 (CanLII) and *L.M.H. v. S.R.H.*, 2010 ABQB 769 (CanLII).

⁹⁹ *Courts of Justice Act*, R.S.O. 1990, Chap. C. 43, s. 89(3.1).

¹⁰⁰ See Rule 4(7) of the *Family Law Rules*, O Reg 114/99.

¹⁰¹ Office of the Auditor General of Ontario, “2011 Annual Report”. (Queen’s Printer for Ontario: 2011), Ch.3, p.218.

¹⁰² *Courts of Justice Act*, R.S.O. 1990, Chap. C. 43, s. 112.

In Quebec and British Columbia, a lawyer may be appointed to represent a child involved in family law proceedings. Regarding criteria to be considered, the court in British Columbia may make such appointment at any time if the court is satisfied that the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the child's best interest, and that such appointment is necessary to protect the child's best interests.¹⁰³ In British Columbia, the legislation goes further and states that if the court appoints a lawyer for the child, "the court may allocate among the parties, or require one party alone to pay, the lawyer's fees and disbursements."¹⁰⁴ It would thus appear that in British Columbia, the parties themselves must have the means to pay the child's lawyer.

Similarly, in Quebec, where the court ascertains that it is necessary for the safeguard of the interests of the minor that a lawyer be represented, the court may make any order that is necessary to ensure such representation.¹⁰⁵ The court in Quebec may also rule on the fees to be payable to the lawyer and who will be responsible for such payment.¹⁰⁶

In the Yukon, under the *Children's Law Act*, the official guardian has "the exclusive right to determine whether any child requires separate representation by a lawyer or any other person that will be paid for at public expense chargeable to the Yukon Consolidated Revenue Fund."¹⁰⁷ The *Children's Law Act* provides for the most extensive list of criteria, as compared to any other jurisdiction, to be considered in the appointment of counsel to a child in domestic family law

¹⁰³ *Family Law Act*, SBC 2011, c 25, s. 203(1)(a)-(b).

¹⁰⁴ *Family Law Act*, SBC 2011, c 25, s. 203(2).

¹⁰⁵ See s. 394.1 of the *Code de procédure civile*, RLRQ c C-25 and s. 203(1) of the *Family Law Act*, SBC 2011, c 25. For a discussion of the role of counsel in Quebec, see *C. B. c. R. L.*, 2003 CanLII 48319 (QC CS). The authors note the decision of *F.(M.) c. L.(J.)*, 2002 CanLII 36783 (QC CA), the leading case on the role of counsel in Quebec.

¹⁰⁶ *Idem*.

¹⁰⁷ *Children's Law Act*, RSY 2002, c 31, s. 168(2). For a discussion of the role of the child's lawyer, see *T.E.A. v. R.S.A.*, 2012 YKSC 65 (CanLII), *B.L. v. M.L.*, 2011 YKSC 67 (CanLII), and *A.L.H. v. D.B.B.*, 2010 YKSC 54 (CanLII).

disputes. Interestingly, the criteria to be considered are the same as in the child protection context. They include consideration of recommendations from the judge, the ability of the child to comprehend the proceeding, whether the interests of the child conflict with the interests of any other party to the proceeding, and whether the parties are putting the relevant evidence with respect to the child's interests before the court.¹⁰⁸ As in Alberta, the person appointed to represent the child can be, but does not have to be, a lawyer.¹⁰⁹

In Manitoba, New Brunswick, Newfoundland, Nova Scotia, the Northwest Territories, Nunavut, Prince Edward Island and Saskatchewan, the legislation governing family law disputes does not contain any provisions authorizing the appointment of legal counsel for a child. With the exception of Manitoba and New Brunswick, the legislation of the remaining six jurisdictions has provisions that acknowledge that the child might have legal counsel. For example, Saskatchewan's *Queens Bench Rules* state that "[a] minor may commence, continue or defend a family law proceeding as if of the age of majority."¹¹⁰ Thus, a child with capacity may retain and instruct a lawyer where they are party to a family law proceeding. This is similar to the situation in Nova Scotia, where the *Family Court Rules* allow children to commence or defend family law proceedings without a litigation guardian unless the court orders otherwise. However there are no provisions relating to the appointment of counsel for children.¹¹¹

In a similar vein, legislation from Nunavut and the Northwest Territories acknowledges that a child might have a lawyer but does not contain provisions for such appointment. In both territories, for example, in applications involving custody, access, or guardianship, the court may interview the child to determine

¹⁰⁸ *Children's Law Act*, RSY 2002, c 31, s. 168(5).

¹⁰⁹ *Children's Law Act*, RSY 2002, c 31, s. 168(6).

¹¹⁰ Rule 15-95.

¹¹¹ *Family Court Rules*, NS Reg 20/93, Rule 5.05.

the views of the child, and legislation recognizes that “the child is entitled to be advised by and to have his or her counsel, if any, present during the interview.”¹¹²

In Newfoundland and Labrador and Prince Edward Island, family law legislation mentions “counsel representing the child” — suggesting that a child may in fact have independent counsel — but contains no provisions regarding the appointment or payment of same.¹¹³ However, in divorce actions in Prince Edward Island, the Director of Child Protection can motion the court, pursuant to that province’s rules of civil procedure, to designate a lawyer as a child advocate who “may intervene for the purpose of protecting the interest of the children concerned.”¹¹⁴ ¹¹⁵ The legislation provides no guidance as to the scope of the child advocate’s role. Furthermore, and practically speaking, the last case in which a “child advocate” was appointed in Prince Edward Island was in 1997.¹¹⁶

Presumably, where there are no provisions that allow for the appointment of counsel, the court, assuming it has such jurisdiction, will rely on its *parens patriae* legislation to appoint a lawyer for the child. This is the case in the Northwest Territories where the Supreme Court relies on such jurisdiction to appoint the Office of the Children’s Lawyer in custody and access issues.¹¹⁷ There is a standard order used in this context which speaks to the role played by the NWT OCL when appointed to act in custody and access cases.¹¹⁸

¹¹² *Children’s Law Act, SNWT (Nu) 1997, c 14, s. 83; Children’s Law Act, SNWT 1997, c 14, s. 83.*

¹¹³ *Children’s Law Act, RSNL 1990, c C-13.* See, for example, s. 36 of the Act. See also s. 4.1(10) of *Custody Jurisdiction and Enforcement Act, RSPEI 1988, c C-33.*

¹¹⁴ *Rules of Civil Procedure, PEI, Rule 70.16(12).*

¹¹⁵ Note that Rule 71.06 of P.E.I.’s *Rules of Civil Procedure*, which falls under the title “Family Law Proceedings” states that “Subrules 70.16(1) to (8) (Director of Child Protection’s Report)” of the *Rules* “apply, with necessary modifications, to proceedings under the Custody Jurisdiction and Enforcement Act”. Rule 70.16(12) addresses the appointment of counsel for a child. Thus it is unclear whether such provision would apply to a child in a proceeding under the *Custody Jurisdiction and Enforcement Act*.

¹¹⁶ Pursuant to a search on WestlawCarswell for the term “child advocate” in case law from Prince Edward Island.

¹¹⁷ See *Lafferty v Angiers*, 2013 NWTSC 3 (CanLII), *Wagner v. Melton*, 2012 NWTSC 41 (CanLII).

¹¹⁸ The standard order was a result of discussions between the NWT OCL and members of the Supreme Court and the Territorial Court of the Northwest Territories. In 2015, the NWT OCL also created its Office of the Children’s Lawyer Policy Statement.

As noted above, Ontario appears to have the most developed system for providing legal representation to children involved in domestic family law disputes. Even so, the number of children who receive representation is only a small percentage of the total number of children involved in the family law system. Of the 9907 open files in 2014-2015, 25% were access/custody cases.¹¹⁹ ¹²⁰ In 2015, the OCL reported that it accepts approximately 65% of the referrals received from the court in the area of custody and access.¹²¹

Mamo, Jaffe, and Chiodo, in a comprehensive 2007 study on Ontario's unified family courts, reviewed a sampling of files from five different cities within Ontario. Of the 330 cases that involved children, the OCL was involved in only 9% of those cases.¹²² According to Ontario's OCL, in 2011/2012, its lawyers represented children in 1,338 new custody and access matters and 2,365 new child protection matters. Clinicians investigated 1,358 new cases and provided assistance to lawyers in 678 new matters. The OCL states that at any given time, it carries a steady volume of over 10,000 files, serving approximately 20,000 children.¹²³

The availability of resources has deep implications for the availability of counsel to children, even where the legislation provides for the discretion of such appointment. Semple notes that pre-1987, publicly funded investigations were mandatory in every divorce case involving children in Ontario. However, public funding was unable to keep pace with the increasing number of custody and

¹¹⁹ *Ibid.*, Ch. 2; note that 47% were child protection cases, 20% of these were property rights cases, and 8% were minor's funds cases.

¹²⁰ Office of the Children's Lawyer. "Annual Update 2014-2015". Ontario Ministry of the Attorney General (July 2015), online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/ocl_annual/OCL_annual_report_2015.html.

¹²¹ *Idem.*

¹²² Alfred Mamo, Peter Jaffe and Debbie Chiodo. "*Recapturing and Renewing the Vision of the Family Court*" (2007) Ministry of the Attorney General of Ontario, at 82 and 131, online: <http://www.learningtoendabuse.ca/sites/default/files/Family%20Court%20Study%202007.pdf>.

¹²³ Lucy McSweeney and Nancy Webb. "Clinical Services at the Office of the Children's Lawyer" (October 2012) Ontario Bar Association *Matrimonial Affairs*. Volume 25, No. 1, online: http://www.oba.org/en/pdf/sec_news_fam_oct12_Clinical_McSweeney_Webb.pdf.

access cases and now the OCL declines approximately half of the requests for its involvement in custody and access cases.¹²⁴ Savoury also observes costs of independent legal representation and assessments for children are prohibitively high. She notes that of the 3% of children who are independently represented, only a portion of those children is represented (at no cost to the family) by the OCL.¹²⁵

iii) Mental Health and Secure Treatment

The discrepancies between jurisdictions for the appointment of legal counsel for children are also evident in the area of mental health. Only in Ontario, where a child is subject to a secure treatment order under the *Child and Family Services Act*,¹²⁶ is such appointment mandatory. However in Ontario, like Alberta, the appointment of legal counsel for the child will differ depending on the legislation pursuant to which the child is confined to a mental health program. In both provinces, a child can be confined to either a secure treatment program under that province's child protection legislation or a mental health program under its general mental health statutes and regulations. In Nova Scotia, though a child can be similarly placed pursuant to two types of legislation, access to legal counsel is the same under both statutes. Only Alberta, Ontario and Nova Scotia have secure treatment programs, which are "programs for the treatment of children with mental disorders, in which continuous restrictions are imposed on the liberty of the children."¹²⁷ In all remaining jurisdictions, if a child is confined to a mental health program it will be under that jurisdiction's general mental health legislation and access to legal counsel will be the same for an adult as it is for a

¹²⁴ Noel Semple. "Whose Best Interests? Custody and Access Law and Procedure" (Summer 2010), 48 Osgoode Hall L.J. 287, citing Rachel Birnbaum & Dena Moyal, "How Social Workers and Lawyers Collaborate to Promote Resolutions in the Interests of Children: The Interface between Law in Theory and Law in Action" (2003) 21 Can. Fam. L.Q. 379 at 383 and Kevin Marron. "Child rule changed: checks on divorces no longer required" (11 February 1987) *The Globe and Mail*, A11.

¹²⁵ Carolyn Savoury. "A Voice for The Small: Judicial Meetings in Custody and Access Disputes" (2013) *Canadian Journal of Family Law*, 28 Can. J. Fam. L. 225., citing Alfred Mamo & Danielle Gauvreau, "Judicial Interviews of Children in Custody/Access Disputes" (2011) [unpublished, archived at County of Carleton Law Association] at 1.

¹²⁶ *Child and Family Services Act*, R.S.O. 1990, c. C.11.

¹²⁷ *Ibid.*, s. 113(1).

child. The result is a noticeable difference either within a jurisdiction or between jurisdictions regarding the appointment of legal counsel to a child. At Appendix “C” and “D” of this paper, charts comparing the provisions regarding the appointment of counsel in the context of a secure treatment order and under general mental health legislation can be found.

In Alberta, a child can be confined to a mental health program under either of the *Child, Youth and Family Enhancement Act*¹²⁸ or the *Mental Health Act*.¹²⁹ The discretion to appoint a lawyer for a child who is subject to a secure services order under Division 4 of the *Child, Youth and Family Enhancement Act*¹³⁰ is in the hands of the court and the Office of the Child and Youth Advocate. Where the court makes a secure services order, the court is mandated under the legislation to provide a written statement to the child showing that the child may be represented by a lawyer at any application to the court, must provide the child with the address and telephone number of the Child and Youth Advocate and must provide the child’s guardian with the contact information of the nearest Legal Aid Society. Pursuant to section 112 of the Act, the Court may direct that a lawyer is appointed for a child but only if the child, the guardian of the child or the director requests the court to do so and only if the court is satisfied that the interests or views of the child would not be otherwise adequately represented. If such referral is made, the Child and Youth Advocate is mandated to appoint a lawyer for the child.¹³¹ The Child and Youth Advocate may, in the absence of a court order and on its own initiative, provide legal representation to the child.¹³²

In contrast, where a child is committed to a mental health facility under Alberta’s *Mental Health Act*,¹³³ there are no provisions specific to minors. There are also no provisions which require that a patient be advised of the right to legal counsel, with the exception of a situation where the Patient Advocate, under the

¹²⁸ RSA 2000, c C-12.

¹²⁹ RSA 2000, c M-13.

¹³⁰ RSA 2000, c C-12.

¹³¹ *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s.112.

¹³² *Child and Youth Advocate Act*, SA 2011, c C-11.5, s. 9(2)(c) and *Child and Youth Advocate Regulation*, Alta Reg 53/2012, s. 1.

¹³³ RSA 2000, c M-13.

regulations, is in receipt of a complaint at which point the Patient Advocate is mandated to provide to the patient, “as far as it is reasonable”, information including how the patient may obtain legal counsel”.¹³⁴

Similarly, in Ontario, the right to counsel depends upon the Act under which the child is committed to a mental health facility. As noted above, if such commitment is made to a secure treatment facility under the *Child and Family Services Act*, the legislation mandates that a lawyer be provided for the child.¹³⁵ In contrast, under Ontario’s *Mental Health Act*, although there are provisions which specifically address the provision of legal counsel to minors, in contrast to all other jurisdictions in the country, the appointment of legal representation for the child is discretionary.¹³⁶ Wilson notes that the rights of children are better protected under the *Child and Family Services Act*, “but recourse to this statute in lieu of the more general *Mental Health Act* depends on the availability of resources within the particular child’s community”.¹³⁷ As the *Child and Family Services Act* only applies to designated “secure treatment program”, where such facilities are not available, the provisions of the *Mental Health Act* will necessarily apply.

Although, like Alberta and Ontario, Nova Scotia has provisions under its *Children and Family Services Act* for a child to be committed to a secure treatment program, the rights of a child as it relates to representation by counsel, do not appear to differ from those for general patients under Nova Scotia’s general mental health legislation. In Nova Scotia’s *Children and Family Services Act*,

¹³⁴ *Mental Health Patient Advocate Regulation*, Alta Reg 148/2004, s. 3(5).

¹³⁵ *Child and Family Services Act*, RSO 1990, c C.11, s. 124(8), s. 114(6).

¹³⁶ *Mental Health Act*, RSO 1990, c M.7, s.43, In particular:

Counsel for patient under 16

43.If a patient who is less than 16 years old is a party to a proceeding before the Board under section 13 or 39 and does not have legal representation,

(a) the Board may direct the Children’s Lawyer to arrange for legal representation to be provided for the patient; and

(b) the patient shall be deemed to have capacity to retain and instruct counsel. 1996, c. 2, s. 72 (27).

¹³⁷ Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf at 5.25.

there are no provisions that mandate or provide discretion for the appointment of legal counsel to the child¹³⁸ though the legislation does require that the child be advised that she may be represented by counsel at any hearing and is to be provided with the address and phone number of the nearest legal aid office.¹³⁹ Similarly, under Nova Scotia's *Involuntary Psychiatric Treatment Act*¹⁴⁰ and regulations,¹⁴¹ patients must be advised about their right to legal counsel, but there are no provisions providing for such appointment.

In all other jurisdictions, when a child is confined to a mental health facility it will be pursuant to that jurisdiction's general mental health legislation. An examination of the mental health legislation in each province reveals that, with the exception of Alberta, there is an obligation to notify a patient (and hence the child) about her right to counsel. Only British Columbia's *Mental Health Act* has a specific provision regarding the obligation to notify a child of her right to legal counsel.¹⁴² Only two jurisdictions, namely Ontario and the Yukon, have provisions in their general mental health legislation that specifically provide for the appointment of legal representation for a child. In both cases such appointment is discretionary. In particular, under Ontario's *Mental Health Act*, if a patient who is less than sixteen years old and is party to a proceeding under the Act¹⁴³ does not have legal representation, the Consent and Capacity Board may direct the Children's Lawyer to arrange for legal representation to be provided to the child, and the patient will be deemed to have the capacity to retain and instruct counsel.¹⁴⁴ In the Yukon, the "Minister may make available legal services

¹³⁸ It does not appear that the provisions in s. 37 of the *Children and Family Services Act*, SNS 1990, c 5, for discretionary appointment of legal counsel would apply in light of s. 31 of the Act.

¹³⁹ *Children and Family Services Act*, SNS 1990, c 5, s. 55(2)(d),(3).

¹⁴⁰ SNS 2005, c. 42, s. 26(c).

¹⁴¹ *Involuntary Psychiatric Treatment Regulations*, NS Reg 235/2007, s. 4(1)(c), s. 4(3).

¹⁴² Pursuant to the *Mental Health Act*, RSBC 1996, c 288, s. 4.1(2)(b), the director must give notice to patients under sixteen years of age to "the right set out in section 10 of the Canadian Charter of Rights and Freedoms".

¹⁴³ Specifically s. 13 or s. 39.

¹⁴⁴ *Mental Health Act*, RSO 1990, c M.7, s. 1.1, s. 43.

or patient advisor services for persons who are detained as involuntary patients”.¹⁴⁵

Notably, six jurisdictions, though not child-specific, have provisions for the appointment of a mental health representative for patients. The range of service provided varies and it is unclear whether or not these advisors are or must be lawyers. These include the “Psychiatric Patient Advocate Services” and “Psychiatric Patient Advocates” in New Brunswick¹⁴⁶, the “Rights Advisor” in Newfoundland and Labrador,¹⁴⁷ Nova Scotia’s “Patient Advisor Service”,¹⁴⁸ Ontario’s “Rights Adviser”,¹⁴⁹ the “official representative” in Saskatchewan,¹⁵⁰ and “patient advisor services” in the Yukon.¹⁵¹ The legislation in Alberta, British Columbia, Manitoba, the Northwest Territories, Nunavut, and Prince Edward Island do not appear to provide for such patient advocate services through their legislation.

iv) Civil Proceedings and Estates

As noted above, in civil proceedings throughout the country, children are generally required to act through a litigation guardian. For example the *Alberta Rules of Court* provide that an individual under the age of eighteen “must have a litigation representative to bring or defend an action or to continue or to participate in an action, or for an action be brought or to be continued against them.”¹⁵² The *Rules of the Supreme Court* in Newfoundland and Labrador mandate that a person under disability (which would include a minor) “may not commence, defend, intervene or appear in any proceeding except by his or her guardian ad litem.”¹⁵³ Provincial legislation mandates that a lawyer represent the

¹⁴⁵ *Mental Health Act*, RSY 2002, c 150, s. 45.

¹⁴⁶ *General Regulations*, NB Reg 94-33, ss.21-221(2).

¹⁴⁷ *Mental Health Care and Treatment Act*, SNL 2006, c. M-9.1, s.13-15.

¹⁴⁸ *Involuntary Psychiatric Treatment Act*, SNS 2005, c42, s.61.

¹⁴⁹ *Mental Health Act*, RSO 1990, c M.7, s. 1.1, s.38(1)-(9), s.29()-(-4).

¹⁵⁰ *Mental Health Services Regulations*, RRS c M-13.1 Reg 1, s. 13.

¹⁵¹ *Mental Health Act*, RSY 2002, c 150, s. 45.

¹⁵² *Alberta Rules of Court*, Alta Reg 124/2012, Rule 2.11.

¹⁵³ *Rules of the Supreme Court*, 1986 SNL 1986, c 42 Sch D, Rule 8.01(1).

litigation guardian who acts for a minor.¹⁵⁴ Although the child is a party to the proceeding, it is the litigation guardian who instructs the lawyer. For example, in New Brunswick, a “litigation guardian or committee shall act through a solicitor and shall instruct that solicitor in the conduct of the proceeding”.¹⁵⁵ In the Northwest Territories “a party to a proceeding who is under disability or acts in a representative capacity shall be represented by a solicitor”.¹⁵⁶

Given the important role of the litigation guardian in advancing and defending claims concerning a minor, a comparative study of legislation pursuant to which a litigation guardian is appointed and acts would be an extremely useful exercise to determine to what extent children’s rights to representation are being properly advanced in Canada through this medium. Such inquiry would necessarily address the following questions: Under what statute are the provisions for the appointment of a litigation guardian found? Is the term minor used interchangeably with the term “person under disability”? What is the terminology used to describe the litigation guardian (litigation representative, litigation guardian, tutor, *guardian ad litem*)? Who is authorized to act as litigation guardian? What is the procedure for appointment (self-appointed, court-appointed, court-approved) of a litigation guardian? Under what circumstances is a lawyer appointed as litigation guardian? How do the role and duties of a lawyer acting as litigation representative differ from the role of lawyer representing a litigation guardian? What is the scope of duties of the litigation guardian? How does the legislation address any duty of the litigation guardian to act in the child’s best interest? Is the scope of participation of a litigation guardian defined by statute? If yes, what is the extent of participation of the litigation guardian in a proceeding (Can the litigation guardian do anything that another party in the proceeding would be authorized to do? Can the litigation guardian be examined for discovery? Can the litigation guardian submit evidence via affidavit? What are

¹⁵⁴ With the exception, for example, as in British Columbia that “A litigation guardian must act by a lawyer unless the litigation guardian is the Public Guardian and Trustee” pursuant to *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 20-2(4).

¹⁵⁵ *Rules of Court of New Brunswick*, N.B. Reg. 82-73, Rule 7.04(3).

¹⁵⁶ *Rules of the Supreme Court of Northwest Territories*, N.W.T. Reg 101-96, Rule 7(1).

the obligations of disclosure?)? What is the extent of participation of the child in a proceeding when represented by a litigation guardian? What is the authority of the court as to the costs of the litigation guardian? If the legislation is silent as to costs, how are the costs of the litigation guardian addressed? How does the cost of the litigation guardian impact a child's right or access to the court system? Are there guidelines for the role and responsibilities of the litigation guardian?

Any discussion and analysis of the appointment, role and duties of litigation guardian would necessarily include an analysis of the Public Guardian and Trustee ("PGT"). Each jurisdiction has legislation that provides for the appointment of a PGT and, in the case of minors, the role of the PGT is to protect their legal and financial interests. The questions above would necessarily apply to such analysis and would also include an inquiry as to whether or not the PGT is required to act as litigation guardian or as legal counsel, and how the roles and responsibilities differ depending on such role.

A brief discussion of the role of Ontario's OCL is worthwhile given its mandate to provide children with representation in not only child protection and custody and access disputes, but in the area of estates and civil litigation as well. This differs remarkably from the OCYA in Alberta, which is limited to representing children in matters under the *Child, Youth and Family Enhancement Act* and the *Protection of Sexually Exploited Children Act*, and the Office of the Children's Lawyer in the Northwest Territories, which represents children in protection matters and custody and access disputes.

As is the case in child protection, when appointed by the court or when required by legislation in property cases, the OCL in Ontario must provide such legal representation.¹⁵⁷ As of July 2015, of the 23 in-house lawyers at the OCL, 11 are Property Rights lawyers (the remaining 12 are Personal Rights Lawyers).¹⁵⁸ Of

¹⁵⁷ Office of the Auditor General of Ontario, "2013 Annual Report". (Queen's Printer for Ontario: 2011), Ch.3, p.218.

¹⁵⁸ Office of the Children's Lawyer. Annual Update 2014-2015. Ontario Ministry of the Attorney General. July 2015, Ch.2, online:

the 9907 open files in 2014-2015, 20% of these were property rights cases, and 8% were minor's funds cases.¹⁵⁹ In Ontario, the OCL represents minors who are involved in estate litigation, including applications by trustees for directions, applications for dependent's relief, applications for the removal of trustees, will challenges/interpretations, and applications involving the sale or guardianship of a minor's property.¹⁶⁰

The OCL also acts for minors in civil litigation cases as follows: acts as litigation guardian for a minor plaintiff or defendant where there is no other person willing and able to act; protects a minor's interest in a proceeding where there is a litigation guardian other than the Children's Lawyer; reviews minors' settlements and makes recommendations to the court when directed by the court; and represents a minor's interest in ensuring that settlement funds are appropriately managed on behalf of a minor.¹⁶¹

3) Legal Representation of Children in Canada: *Parens Patriae* Jurisdiction

If legislation does not provide for the appointment of independent legal representation for a child, or if existing statutory requirements are not met, superior courts may resort to their *parens patriae* jurisdiction to appoint counsel for a child. This jurisdiction empowers the court to "act in the stead of a parent for the protection of a child."¹⁶² However, as noted in *Kerfoot v. Pritchard*, "[i]t is in rare circumstances that the court will exercise its *parens patriae* jurisdiction to appoint separate legal counsel for a child."¹⁶³ As there are many circumstances where legislation does not provide for the appointment of counsel

http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/ocl_annual/OCL_annual_report_2015.html.

¹⁵⁹ *Ibid.*, Ch. 2; Note that 47% were child protection cases, 25% were access/custody cases.

¹⁶⁰ Office of the Children's Lawyer. Annual Update 2014-2015. Ontario Ministry of the Attorney General. July 2015. Ch.3, online:

http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/ocl_annual/OCL_annual_report_2015.html.

¹⁶¹ *Idem.*

¹⁶² *A.C.B. v. R.B.*, [2010] O.J. No. 4558, at para. 23.

¹⁶³ *Kerfoot v. Pritchard*, 2005 CarswellSask 942, [2006] W.D.F.L. 3807 at para 3; also see: *M. B.-W. v R.Q.*, 2015 NLCA 28 (CanLII) at para. 41.

for the child, the limited circumstances in which a child is provided counsel through the court's exercise of its *parens patriae* jurisdiction, are noteworthy.

Notably, not all courts have *parens patriae* jurisdiction. Only courts with inherent authority of the Chancery Courts can exercise such jurisdiction. This necessarily includes judges of the superior courts, for example. Provincial courts and provincial appellate courts, as statutory courts, do not have inherent jurisdiction to use *parens patriae* power to appoint counsel for a child.¹⁶⁴

Because of its role of protecting the vulnerable, there is no clearly defined limit to the exercise of *parens patriae* jurisdiction. The case most frequently referred to regarding this jurisdiction is the unanimous Supreme Court of Canada decision of *E. (Mrs.) v. Eve*,¹⁶⁵ where the Court reviewed the history and application of *parens patriae* jurisdiction, explaining:

The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in *J. v. C.*, [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion" In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X*, supra, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

...

Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its

¹⁶⁴ N.A., Re, 2009 ABPC 305 at para 11; Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf, 1.173.

¹⁶⁵ [1986] 2 S.C.R. 388, [1986] S.C.J. No. 60.

underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised ...¹⁶⁶

The Alberta Court of Appeal, in *Puszczak v. Puszczak*,¹⁶⁷ considered a chambers' judge's decision to exercise his *parens patriae* jurisdiction and appoint a lawyer for a child who was the subject of a custody and access dispute. The court cited a previous decision of the Ontario Court of Appeal¹⁶⁸ which held that where the rights and best interests of a child may not be adequately represented by his or her parents, it may be appropriate to appoint a legal representative for the child. It also cited with approval an Australian decision suggesting that independent representation for the child is advisable when:

- (i) there are allegations of child abuse,
- (ii) there is apparently intractable conflict between the parents,
- (iii) the child is apparently alienated from one or both parents,
- (iv) there are real issues of cultural or religious difference affecting the child,
- (v) the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge on the child's welfare,
- (vi) the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare,
- (vii) there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the child;
- (viii) on the material filed by the parents, neither seems a suitable custodian,
- (ix) a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or

¹⁶⁶ *Ibid.*, paras. 73-74 and 77.

¹⁶⁷ *Puszczak v. Puszczak*, 2005 ABCA 426.

¹⁶⁸ *Strobridge v. Strobridge*, (1994) 18 O.R. (3d) 753 (Ont. C.A.).

a complete denial of access to one parent,
(x) one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practical purposes exclude the other party from the possibility of access to the child,
(xi) it is proposed to separate siblings,
(xii) the case involves custody and none of the parties is legally represented, and
(xiii) the case involves child welfare (in particular, medical treatment) and the child's interests are not adequately represented by one of the parties.¹⁶⁹

Ultimately, the Court of Appeal in *Puszczak* overturned the chambers' judge's decision to appoint counsel for the child. It did so on the grounds that the chambers' judge had not fully considered the appropriateness of appointing counsel for the child. It also questioned the perceived independence of the particular lawyer appointed by the court, who had previously been retained by the father and who had become involved in the case without the mother's knowledge or consent.

In *Bhajan v. Bhajan*,¹⁷⁰ a Superior Court judge *ordered* the Office of the Children's Lawyer ("OCL") to become involved in the proceedings, exercising his *parens patriae* jurisdiction instead of *requesting* the OCL to provide the particular services under ss. 89(3.1) and 112 of the *Courts of Justice Act*. This decision was appealed to the Ontario Court of Appeal, which joined the case with five other similar appeals, all from orders of the same Superior Court judge. All of the appeals were allowed, with the Court stating:

Assuming, without deciding, that Superior Court judges can, in the appropriate circumstances, exercise their *parens patriae* jurisdiction to order the OCL to act, that jurisdiction ought not to have been exercised in these six appeals. The Superior Court judge ought to

¹⁶⁹ *K, Re* [(1994), 17 Fam. L.R. 537 (Australia Fam. Ct.) FLC 92-461.

¹⁷⁰ *Bhajan v. Bhajan*, 2010 ONCA 714.

have respected the structure of ss. 89(3.1) and 112 in the CJA, which give the OCL discretion in considering requests for their involvement. He ought not to have circumvented the existing statutory structure for engaging the OCL. Prior to exercising his *parens patriae* jurisdiction to make an order, it was incumbent on the Superior Court judge to consider and avail himself of the other available avenues for assistance that were responsive to the specific factual problems before him.¹⁷¹

In *Wagner v. Melton*,¹⁷² the Northwest Territories Supreme Court noted that before exercising its *parens patriae* jurisdiction to appoint legal representation for a child, courts must consider whether doing so would be in the best interests of the child and whether the child is capable of providing instructions to a lawyer. The Court noted that the discretion to appoint counsel should be used sparingly and only where the adult litigants cannot adequately represent the child's views to the court.¹⁷³

In *M. B.-W. v R.Q.*,¹⁷⁴ the Newfoundland and Labrador Court of Appeal recognized that the appointment of legal counsel for the child in a custody and access case is usually limited to high conflict situations. However, the Court emphasized the importance of the exercise of a court's *parens patriae* jurisdiction to appoint counsel to a child and held that it was appropriate for the exercise of such jurisdiction at the case management stage:

Even more fundamentally, however, the making of a child representation order is integral to the exercise of the *parens patriae* jurisdiction of the court. That is a jurisdiction that is not to be cut down or restricted unless there is clear legislative intent to do so [internal citations omitted]

...

The issue of whether a child should have his or her own legal representation can arise at virtually any point in the litigation. Given the emphasis on ensuring that the best interests of the child are

¹⁷¹ *Bhajan v. Bhajan*, 2010 ONCA 714 at para. 79.

¹⁷² *Wagner v. Melton*, 2012 NWTSC 41.

¹⁷³ *Wagner v. Melton*, 2012 NWTSC 41 at paras. 6-8.

¹⁷⁴ *M. B.-W. v R.Q.*, 2015 NLCA 28 (CanLII).

protected, there is no reason in principle why the issue could not be appropriately dealt with at any stage in the process, including at case management or even at a trial readiness inquiry just prior to trial. Clearly, if the circumstances are such that protection of the child's interests requires appointment of separate counsel even just before trial, that is something that can and should be addressed. I see no reason, therefore, why the necessity of such an appointment could not be raised during case management or trial readiness discussions. It is integral to the process of managing the case and getting it ready for trial.

It has been suggested that the process of case management is not appropriate to determining the issue of legal representation of a child and that such an issue should only be dealt with on a formal application brought in applications court outside of the case management process. I disagree. The prime imperative of ensuring that the best interests of a child, both procedurally and substantively, are advanced dictates that the courts can and should intervene at any stage of the process to appoint counsel for a child if such a step is warranted. It is true, of course, that considerations of fairness to all parties may, in most cases, require the filing of further documentation and the conduct of a separate hearing to determine the question. While it may usually be preferable that the issue of legal representation for a child be dealt with in a separate hearing, the manner of dealing with the issues and the exact procedure to be followed must, in the last analysis, be determined by the court when the issue arises as the exigencies of the particular case dictate. As long as the matter can be dealt with fairly to all concerned, the issue should be dealt with whenever it arises and in whatever forum that is engaged at the time. The fact that in most cases it might be better to deal with the matter outside of the case management process and upon a separate application does not mean that there is no jurisdiction to deal with it in an appropriate case as part of the case management or trial readiness process.¹⁷⁵

Despite the comments above, resorting to the court's *parens patriae* jurisdiction is a last resort for many courts. The appointment of legal counsel for a child via *parens patriae* is fraught with challenges, including the question of *when* such an order should be made, who will pay for the child's counsel, and what the proper role of counsel will be.¹⁷⁶ In *Kalaserk v. Nelson*,¹⁷⁷ the Northwest Territories

¹⁷⁵ *Ibid.*, at paras. 34-37.

¹⁷⁶ *Ibid.*, at paras. 40-46.

¹⁷⁷ *Kalaserk v. Nelson*, 2005 NWTSC 4.

Supreme Court explained that clear statutory guidelines for the legal representation of children are preferred over the much less defined *parens patriae* jurisdiction:

The lack of an express appointment power in the [Northwest Territories'] *Children's Law Act* means that a judge and the parties are left to rely on the court's *parens patriae* jurisdiction to appoint legal representation for a child. While this has been done in the past it would be preferable to have the parameters of such appointment power delineated expressly so that the role of the child's counsel is clearly understood. As Professor Christine Davies notes, independent legal representation for children is now seen as the favoured tool for relaying the child's views. But there are still differing opinions as to the role to be adopted by the legal representative, when such an appointment is appropriate, what skills and training a child's representative should have, and who should pay for the representation: see Davies, *op.cit.*, at 164-165. There are public policy, legal and financial implications to these questions and, in my respectful opinion, it may be preferable to have these points addressed in legislation, after debate by the public's political representatives, as opposed to discretionary direction by judges in isolated cases.¹⁷⁸

4) Children as Interveners

While there are many cases in which organizations have been granted leave to intervene in litigation so as to advocate a position believed to be in the interests of children *generally*,¹⁷⁹ there is only one case in Canada where a child himself was granted leave to intervene *as a party*. That case is *B. (S.G.) v. L. (S.J.)*,¹⁸⁰ which involved a motion by the child for leave to intervene as an added party to the custody and access appeal brought by his father. The mother opposed the motion. The Ontario Court of Appeal noted that:

A motion of this kind is highly unusual in a custody dispute. Typically, if the child is to be heard, an application would be made for the appointment of

¹⁷⁸ *Kalaserk v. Nelson*, 2005 NWTSC 4 at para. 11.

¹⁷⁹ See, for example, the number of cases in which Justice for Children and Youth has intervened, online: <http://jfcy.org/en/cases-decisions/>.

¹⁸⁰ 2010 ONCA 578.

the Children's Lawyer to represent the child. That was not done here, and we can only presume that the reason was tactical.¹⁸¹

The Court cited the relevant rule of civil procedure governing leave to intervene, which states that a party may be added as an intervener if (1) they have an interest in the subject matter of the proceeding; (2) they may be adversely affected by a judgment in the proceedings; or (3) there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

The Court noted that the child met all of the requirements of the rule, any one of which would be sufficient. The Court pointed out that the child obviously had an interest in his own custody. He could be adversely impacted by the judgment. The questions of fact and law in the proceeding were common to his parents and him. The Court also pointed out that it had the discretion to refuse to make the intervention order despite the above, and opined that “[o]rdinarily, in a custody case we would think an order permitting a child who is the subject of the dispute to be added as a party would rarely be made.”¹⁸²

However, in this particular case, the Court decided to grant the child’s motion to be added as an intervener, citing the child’s age (sixteen) and the significant impact that the custodial order would have on his life. The Court cited no other decisions where a child has been granted leave to intervene and there have been no subsequent decisions relying on this case where a child has been granted leave to intervene.

5) Amicus Curiae

The traditional role of *amicus curiae* (also known as a “friend of the court”) is to assist the court with its decision-making by ensuring that all relevant evidence and arguments are properly presented to the court. In most jurisdictions, the court’s ability to appoint *amicus curiae* is legislated. Such is the case in Manitoba,

¹⁸¹ *B. (S.G.) v. L. (S.J.)*, 2010 ONCA 578 at para. 12.

¹⁸² *B. (S.G.) v. L. (S.J.)*, 2010 ONCA 578 at para. 15.

New Brunswick and Newfoundland and Labrador,¹⁸³ whereas in other jurisdictions, such as Alberta, British Columbia and the Yukon, the ability to appoint *amicus curiae* is part of the court's inherent jurisdiction.

In some cases, the court may appoint *amicus curiae* in a case that involves children, so as to help the court in determining what is in the best interests of the children. For example, in *G. (C.M.) v. S. (D.W.)*,¹⁸⁴ a Superior Court judge first made an Order requesting the involvement of the OCL pursuant to s. 89(3.1) of Ontario's *Courts of Justice Act*. The OCL declined to become involved on the grounds that the court was not asking for the child's position on the matters in contention to be put forward, but rather was seeking assistance to create a proper evidentiary record to assist with the required decision-making. As a result of the OCL's refusal to represent the child in these circumstances, the court appointed *amicus curiae*, noting that the questions in issue (whether it was in the child's best interests to be vaccinated) were of general public importance and would have an impact beyond the immediate parties.

Traditionally, *amicus curiae*'s role is not to advocate on behalf of a particular party. However, recent cases have evolved the role of *amicus curiae* in family law proceedings.¹⁸⁵ Despite the fact that, to date, there are no known cases where *amicus curiae* has been appointed specifically to advocate on behalf of a non-party child, it remains to be seen whether the law will develop in this direction.

¹⁸³ See respectively: *Court of Queen's Bench Rules*, Man Reg 553/88, Rule 13.02; *Rules of Court*, NB Reg 82-73, Rule 15.03; *Rules of the Supreme Court*, 1986, SNL 1986, c 42, Sch D, Rule 7.06.

¹⁸⁴ *G. (C.M.) v. S. (D.W.)*, 2015 ONSC 2201.

¹⁸⁵ See: *Morwald-Benevides v. Benevides*, unreported. Decision of Justice Keast released September 29, 2015. Parry Sound File FO-12-54-0000 (currently under appeal). In this decision, Justice Keast appointed one *amicus curiae* to advocate on behalf of the mother, and one *amicus curiae* to advocate on behalf of the father (a significant departure from the traditional role of *amicus curiae* which is to act in a more neutral manner). The court felt that the *amicus curiae* were necessary to help the court determine the best interests of the children involved.

6) The Proper Role of Child's Counsel

Much of the literature on the legal representation of children focuses on what model of representation should be employed in representing children.¹⁸⁶ As noted by Birnbaum:

There have been many different forms delineated in the literature on the role of the lawyer in child legal representation. The roles range from a strict adherence to what the child wants (the traditional lawyer role), to what the lawyer may believe is in the child's best interests (litigation guardian), to a friend of the court (*amicus curiae* role).¹⁸⁷

In a 2009 study conducted by the National Judicial Institute and the Canadian Research Institute for Law and the Family, participants were asked several questions as to how children are represented in their jurisdictions. Almost one-third of respondents (29.4%) stated that the lawyer never acts as a friend of the court (*amicus curiae*) in their jurisdiction. However, most participants indicated that the lawyer acts as a best interests guardian (*guardian ad litem*) either often (32.4%) or sometimes (43.7%). Most respondents also stated that the lawyer acts as a traditional advocate either often or sometimes (84.3%).¹⁸⁸

Alberta's Legal Representation for Children and Youth ("LRCY") - a division of the Office of the Child and Youth Advocate - has created guidelines for lawyers who are appointed by that office to represent children. These guidelines note that lawyers are generally required to act as traditional advocates:

¹⁸⁶ See, e.g. Rachel Birnbaum, Nicholas Bala, & Lorne Bertrand. "Controversy about the Role of Children's Lawyers: Advocate or Best Interests Guardian? Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers" (October 2013) *Family Court Review*, Vol. 51 No. 4, 681–697; Michael Drews & Pamela Halprin. "Determining the Effective Representation of a Child in Our Legal System: Do Current Standards Accomplish the Goal?" (July 2002) *Family Court Review*. Vol. 40, 383-402; Sheryl Pearson & Jackie Stewart. "Role of Counsel Project: Discussion Paper and Final Guidelines" [unpublished], online: <http://www.lawrights.asn.au/files/Pearson%20and%20Stewart,%20full%20paper.pdf>; Jeffery Wilson. *Wilson on Children and the Law*. (Toronto: Butterworths, 1994) Looseleaf, 6.66.

¹⁸⁷ Rachel Birnbaum. "Independent Child Legal Representation: A Concept in the Making". (January 2005) *Journal of Law and Social Policy*. Vol 20 article 6.

¹⁸⁸ Joanne Paetsch; Lorne Bertrand; Jan Walker; Leslie MacRae & Nicholas Bala. "Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children's Rights" (2009) [unpublished], online: <http://www.criif.ca/Documents/Consultation%20on%20Voice%20of%20the%20Child%20-%20Dec%202009.pdf>.

The lawyer appointed by LRCY must assume an instructional advocacy role when representing a child/youth who is able to express a wish, opinion, or position unless there are conditions present that would preclude counsel from doing so. Counsel must assess each child/youth individually to determine whether there are conditions present that would preclude the lawyer from assuming the role of an instructional advocate. When instructional advocacy is not possible, counsel must exercise discretion in determining which non-instruction-based role to assume.¹⁸⁹

The guidelines further state that “counsel must assess each child/youth individually to determine whether there are conditions present that would preclude counsel from assuming the role of an instructional advocate.”

Conditions that may justify the departure from this role include: where the child is preverbal; where it is easily apparent that the child has low cognitive functioning; or where the child has a mental impairment due to illness or intoxication. The guidelines further state that the simple fact that a child is under a particular age (e.g. twelve years old) “does not necessarily justify a departure from the role of instructional advocate unless, for example, the child is an infant and can be assumed to be preverbal.”¹⁹⁰

Ontario’s OCL also has directives for lawyers appointed through that office; but these are not publicly available. The duties of the OCL lawyer in family law cases include: meeting with the child's parents or anyone asking for custody or access, meeting with the child as many times as he or she believes is necessary, determining the child's wishes, where possible, contacting relevant sources of information (such as teachers, doctors, day care providers, therapists etc.), meeting with the parents or other parties to provide feedback and, where appropriate, suggesting ways to resolve the issues between the parties, taking a position that includes the child's wishes and other important information

¹⁸⁹ Office of the Child and Youth Advocate. “Legal Representation for Children and Youth Policy Manual”. (February 1, 2015), online: http://www.ocya.alberta.ca/wp-content/uploads/2014/08/PolMan_2015Feb_LRCY.pdf.

¹⁹⁰ Office of the Child and Youth Advocate. “Legal Representation for Children and Youth Policy Manual”. (February 1, 2015), online: http://www.ocya.alberta.ca/wp-content/uploads/2014/08/PolMan_2015Feb_LRCY.pdf.

regarding the family, and advising the court what position he or she is taking on behalf of the child.¹⁹¹

7) Child Legal Representation: A Sociological Perspective

Apart from the question that this paper has largely focused on - the issue of *when* legal representation is available to children - there are many other questions that can be asked. How effective is it? How do lawyers and children feel about it? What can be done to improve it?

Some authors, like Birnbaum and Bala, have studied *the child's* perspective on independent legal representation. In a 2007 study, the authors found that while children report being glad to speak to someone who was independent, they also felt as though their lawyer did not really explain the process to them or pay enough attention to their wishes.¹⁹²

Birnbaum has also studied the views of *lawyers* who represent children in custody and access disputes, concluding that “only the most experienced lawyers and clinicians should be retained to represent children given the complex family dynamics involved during pre-and post-separation and/or divorce.”¹⁹³ Birnbaum’s study also showed that both lawyers and clinicians believed that working collaboratively with one another is an effective model that needs to be more fully explored in the future.

¹⁹¹ “Family Law and Protection” Ministry of Attorney General, online: http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/family_law_and_child_protection.php.

¹⁹² Rachel Birnbaum & Nicholas Bala. “The child’s perspective on legal representation: young people report on their experiences with child lawyers” (2009) *Canadian Journal of Family Law* 25(1), 11–71; See also Rachel Birnbaum; Nicholas Bala, & Francine Cyr. “Children’s Experiences with Family Justice Professionals In Ontario and Ohio” (2011) 25 *International Journal of Policy, Law and the Family*, 398–422.

¹⁹³ Rachel Birnbaum. “Hearing the Voices of Lawyers and Clinical Agents Who Represent Children in Child Custody and Access Disputes” (2005) *Canadian Family Law Quarterly*, 24 CFLQ 281.

Birnbaum has written that “lawyers representing these children must not only have an understanding about the rules and the relevant law (i.e. the statutory and constitutional underpinnings) but also have a working knowledge of the literature on child development and family dynamics, interviewing children, and the importance of collaboration and communication when responding to children involved in custody and access disputes where family violence, in particular, is alleged.”¹⁹⁴ Birnbaum points out that “traditional law schools spend very little time on family law training and focus almost exclusively on financial support obligations”.¹⁹⁵ Because of this, Birnbaum argues that “there needs to be a fundamental shift in the way children are being legally represented in Ontario” and that “children should have both a mental health professional and a lawyer advocating for their interest before the court” - rather than the current model which provides legal representation with a clinical assist.¹⁹⁶

Burns has written about the ethical dilemmas faced by lawyers who represent children, including ethical concerns surrounding capacity issues (i.e. how to determine whether the child client has the capacity to give instructions) and confidentiality issues.¹⁹⁷ She notes that representing children “places a heavy burden on counsel because the legislation does not have regard to the developmental realities of providing advice to children.”¹⁹⁸

Studies have been conducted regarding the *effectiveness* of independent legal representation for children. In a 2005 study that examined 500 Ontario cases, Birnbaum concluded that “child legal representation and/or a clinical investigation resolves cases and assists children in having a voice before the court.”¹⁹⁹ A 2009

¹⁹⁴ Rachel Birnbaum. “Independent Child Legal Representation: A Concept in the Making”. (January 2005) *Journal of Law and Social Policy*. Vol 20 article 6, at 133.

¹⁹⁵ Rachel Birnbaum. “Independent Child Legal Representation: A Concept in the Making”. (January 2005) *Journal of Law and Social Policy*. Vol 20 article 6, at 140.

¹⁹⁶ Rachel Birnbaum. “Independent Child Legal Representation: A Concept in the Making”. (January 2005) *Journal of Law and Social Policy*. Vol 20 article 6.

¹⁹⁷ Clare Burns. “Child Clients: An Ongoing Ethical Dilemma” [unpublished], online: <http://docplayer.net/1950417-Child-clients-an-ongoing-ethical-dilemma-clare-e-burns-1.html>.

¹⁹⁸ *Idem*.

¹⁹⁹ Rachel Birnbaum. “Examining Court Outcomes in Child Custody Disputes: Child Legal

multi-disciplinary study found that almost all participants (91%) thought that legal representation for the child is a good mechanism for hearing the child's views: lawyers were most positive about this mechanism (97.2%) while other professionals were least positive (75%). Survey respondents were asked to provide reasons for their view and the most common response was that legal representation is a good mechanism for hearing the voice of the child if the role of the lawyer is clear and the lawyer has training in the proper representation of children.²⁰⁰

8) Guidelines and Directives for Lawyers Representing Children

None of the provincial or territorial law societies currently have guidelines for lawyers regarding the legal representation of children. However in 2006, the Comité Administratif provided a draft report to the Barreau du Québec containing recommendations for changes to the Civil Code and other provincial statutes regarding the legal representation of children.²⁰¹ This draft report also contains suggestions of guidelines for lawyers acting on behalf of children.²⁰² The Law Society of Alberta previously published guidelines, but they are currently under review.²⁰³

Neither the Canadian Bar Association nor any of the provincial branches of that association have guidelines to assist lawyers who represent children.

Alberta's Legal Representation for Children and Youth ("LRCY") - a division of the Office of the Child and Youth Advocate - has created guidelines for lawyers who are appointed by that office to represent children, which are publicly

Representation and Clinical Investigations" (2005), 24 CFLQ 167.

²⁰⁰ Joanne Paetsch; Lorne Bertrand; Jan Walker; Leslie MacRae & Nicholas Bala. "Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children's Rights" (2009) [unpublished], online: <http://www.crilf.ca/Documents/Consultation%20on%20Voice%20of%20the%20Child%20-%20Dec%202009.pdf>.

²⁰¹ Barreau du Québec. "Mémoire: La Représentation des Enfants par Avocat Dix Ans Plus Tard. (May 2006), online: https://www.barreau.qc.ca/pdf/medias/positions/2006/200605-representation_des_enfants.pdf.

²⁰² *Idem*.

²⁰³ The Alberta guidelines were scrutinized in *S. (B.L.), Re*, 2013 ABPC 132.

available.²⁰⁴ The Office of the Children’s Lawyer of the Northwest Territories, which was created five years ago, also has guidelines for lawyers.²⁰⁵ Ontario’s OCL likewise has directives for lawyers appointed through that office. The guidelines of the Ontario OCL are not a public document.

The rules of professional conduct of all provinces and territories except Quebec, Prince Edward Island, and Nunavut contain a rule stating that “when a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.”²⁰⁶ The phrase “normal lawyer and client relationship” would appear to support the view that a child’s lawyer should act as a traditional advocate, but the qualification “as far as reasonably possible” is vague enough to raise the spectre of other possibilities (such as the guidelines adopted by Ontario’s OCL).

Beyond our borders, the American Bar Association has created practice standards for lawyers who represent children in custody cases and in cases of abuse and/or neglect.²⁰⁷ The American Academy of Matrimonial Lawyers has

²⁰⁴ Legal Representation for Children and Youth Policy Manual, Revised December 1, 2015, online: http://www.ocya.alberta.ca/wp-content/uploads/2014/08/PolMan_2015Feb_LRCY-revised-2015Dec.pdf.

²⁰⁵ In 2015, the NWT OCL created its Office of the Children’s Lawyer Policy Statement, and there is also a standard order often used in custody and access cases when the NWT OCL is appointed to represent a child in a custody and access case. This standard order was a result of discussions between the NWT OCL and members of the Supreme Court and the Territorial Court of the Northwest Territories.

²⁰⁶ See: Rule 3.2-9 of the Code of Professional Conduct for BC; Rule 2.02(12) of the Law Society of Alberta Code of Conduct; Rule 2.02(9) of the Law Society of Saskatchewan Code of Professional Conduct; Rule 3.2-9 of the Law Society of Manitoba Code of Professional Conduct; Rule 3.2-9 of the Law Society of Upper Canada’s Rules of Professional Conduct; Section 3.2-9 of the Nova Scotia Barrister’s Society’s Code of Professional Conduct; Section 3.2-9 of the Newfoundland and Labrador Code of Professional Conduct; Rule 4(13) of the Law Society of the Northwest Territories’ Code of Professional Conduct; Section 3.2-9 of the Yukon’s Code of Professional Conduct.

²⁰⁷ American Bar Association, Section of Family Law. “Standards of Practice for Lawyers Representing Children in Custody Cases.” (August 2003), online: http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.pdf and American Bar Association. “Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases. (February 5, 1996), online: http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf .

also created practice standards for lawyers who represent children.²⁰⁸

9) Summary

This paper focused on answering the question: *When is legal representation available for children in Canada?* In short, the answer to that question is that legal representation is almost always available to children accused of a crime, it is sometimes available to children who are the subject of child protection proceedings and to children whose parents are engaged in a custody and access battle, and rarely available to children outside of these areas. Provincial legislation on the legal representation of children varies enormously, with certain provinces (e.g. Alberta and Ontario) having more developed systems than others. There are few guidelines for lawyers who represent children, and the proper role for the child's lawyer continues to be debated.

²⁰⁸ See: Martin Guggenheim. "The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective" (2009) *Journal of the American Academy of Matrimonial Lawyers*. Vol 22.

10) Resource List

a) Statutes and Regulations

i) Federal

Divorce Act, RSC 1985, c 3 (2nd Supp)

Immigration and Refugee Protection Act, SC 2001, c 27

Rules of the Supreme Court of Canada, SOR/2002-156

Youth Criminal Justice Act, SC 2002, c 1

ii) Alberta

Alberta Rules of Court, Alta Reg 124/2010

Child and Youth Advocate Act, SA 2011, c C-11.5

Child, Youth and Family Enhancement Act, RSA 2000, c C-12

Child and Youth Advocate Regulation, Alta Reg 53/2012

Family Law Act, SA 2003, c F-4.5

iii) British Columbia

Court of Appeal Rules, BC Reg 297/2001

Family Law Act, SBC 2011, c 25

iv) Manitoba

Court of Queen's Bench Rules, Man Reg 553/88

The Child and Family Services Act, CCSM c C80

v) New Brunswick

Family Services Act, SNB 1980, c F-2.2

Provincial Offences Procedure for Young Persons Act, SNB 1987, c P-22.2

Rules of Court, NB Reg 82-73

vi) Newfoundland and Labrador

Children's Law Act, RSNL 1990, c C-13

Children and Youth Care and Protection Act, SNL 2010, c C-12.2

Judicature Act, RSNL 1990, c J-4

Provincial Court Family Rules, 2007, N.L.R. 28/07

Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D

vii) Nova Scotia

Children and Family Services Act, SNS 1990, c 5

Family Court Rules, NS Reg 20/93

Nova Scotia Civil Procedure Rules, N.S. Civ. Pro. Rules 2009, s. 36.01

viii) Northwest Territories

Child and Family Services Act, SNWT 1997, c 13

Children's Law Act, SNWT 1997, c 14

Rules of Practice and Procedure, NWT Reg 047-96

Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. 010-96

Youth Justice Act, SNWT 2003, c 31

ix) Nunavut

Child and Family Services Act, SNWT (Nu) 1997, c 13

Children's Law Act, SNWT (Nu) 1997, c 14

Rules of the Supreme Court of the Northwest Territories, NWT Reg (Nu) 010-96

Young Offenders Act, RSNWT (Nu) 1988, c Y-1

x) Ontario

Child and Family Services Act, RSO 1990, c C.11

Courts of Justice Act, R.S.O. 1990, Chap. C. 43

Estates Act, RSO 1990, c E.21

Family Law Rules, O Reg 114/99

Health Care Consent Act, 1996, SO 1996, c 2, Sch A

Land Titles Act, RSO 1990, c L.5

Mental Health Act, RSO 1990, c M.7, s.43

Rules of Civil Procedure, RRO 1990, Reg 194

Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A

xi) Prince Edward Island

Child Protection Act, RSPEI 1988, c C-5.1

Custody Jurisdiction and Enforcement Act, RSPEI 1988, c C-33

Rules of Civil Procedure

xii) Quebec

Code of Civil Procedure, CQLR c C-25

Youth Protection Act, CQLR c P-34.1

xiii) Saskatchewan

Provincial Court Act, 1988, SS 1998, c. P-30.11

Public Guardian and Trustee Act, SS 1983, c P-36.3

Queen's Bench Act, 1998, C.Q-1.01

Queen's Bench Rules, Sask. Q.B. Rules

The Court of Appeal Rules

xiv) Yukon

Child and Family Services Act, S.Y. 2008, c. 1

Children's Law Act, RSY 2002, c 31

Court of Appeal Rules, 2005, 2005

Rules of Court, Y.O.I.C. 2009/65

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B. (S.G.) v. L. (S.J.), 2010 ONCA 578

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T.E.A. v. R.S.A., 2012 YKSC 65 (CanLII)

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APPENDICES

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Appendix A

Legislation: Legal Representation, Amicus Curiae, Intervener Status

- i) Federal
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- v) New Brunswick
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FEDERAL

1. Legal Representation: Federal Court, Divorce, Youth Criminal Justice, Immigration

Federal Matters

Federal Courts Rules, SOR/98-106

Parties

...

Appointment of representatives

115. (1) The Court may appoint one or more persons to represent

(a) unborn or unascertained persons who may have a present, future, contingent or other interest in a proceeding; or

(b) a person under a legal disability against or by whom a proceeding is brought.

Who may be appointed

(2) The Court may appoint as a representative under subsection (1)

(a) a person who has already been appointed as such a representative under the laws of a province; or

(b) a person eligible to act as a representative in the jurisdiction in which the person to be represented is domiciled.

Order binding on represented person

(3) Unless the Court orders otherwise, a person for whom a representative is appointed under subsection (1) is bound by any order made in the proceeding.

...

Representation of Parties

General

Individuals

119. Subject to rule 121, an individual may act in person or be represented by a solicitor in a proceeding.

...

121. Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor.

Custody and Access

Divorce Act, RSC 1985, c 3 (2nd Supp)

CUSTODY ORDERS

Order for custody

16. (1) A court of competent jurisdiction may, on application by either or both spouses **or by any other person**, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Interim order for custody

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses **or by any other person**, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

Application by other person

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

...

VARIATION, RECISSION OR SUSPENSION OF ORDERS

Order for variation, rescission or suspension
17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

Application by other person

(2) A person, other than a former spouse, may not make an application under paragraph (1)(b) without leave of the court.

Youth Criminal Justice

Youth Criminal Justice Act, SC 2002, c 1

PART 3: JUDICIAL MEASURES

Right to counsel

25. (1) A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and before and during any consideration of whether, instead of starting or continuing judicial proceedings against the young person under this Act, to use an extrajudicial sanction to deal with the young person.

Arresting officer to advise young person of right to counsel

(2) Every young person who is arrested or detained shall, on being arrested or detained, be advised without delay by the arresting officer or the officer in charge, as the case may be, of the right to retain and instruct counsel, and be given an opportunity to obtain counsel.

Justice, youth justice court or review board to advise young person of right to counsel

(3) When a young person is not represented by counsel

- (a) at a hearing at which it will be determined whether to release the young person or detain the young person in custody prior to sentencing,
- (b) at a hearing held under section 71 (hearing — adult sentences),
- (c) at trial,
- (d) at any proceedings held under subsection 98(3) (continuation of custody), 103(1) (review by youth justice court), 104(1) (continuation of custody), 105(1) (conditional supervision) or 109(1) (review of decision),
- (e) at a review of a youth sentence held before a youth justice court under this Act, or
- (f) at a review of the level of custody under section 87, the justice or youth justice court before which the hearing, trial or review is held, or the review board before which the review is held, shall advise the young person of the right to retain and instruct counsel and shall give the young person a reasonable opportunity to obtain counsel.

Trial, hearing or review before youth justice court or review board

(4) When a young person at trial or at a hearing or review

referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth justice court before which the hearing, trial or review is held or the review board before which the review is held

(a) shall, if there is a legal aid program or an assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or

(b) if no legal aid program or assistance program is available or the young person is unable to obtain counsel through the program, may, and on the request of the young person shall, direct that the young person be represented by counsel.

Appointment of counsel

(5) When a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General shall appoint counsel, or cause counsel to be appointed, to represent the young person.

Release hearing before justice

(6) When a young person, at a hearing referred to in paragraph (3)(a) that is held before a justice who is not a youth justice court judge, wishes to obtain counsel but is unable to do so, the justice shall

(a) if there is a legal aid program or an assistance program available in the province where the hearing is held,

(i) refer the young person to that program for the appointment of counsel, or

(ii) refer the matter to a youth justice court to be dealt with in accordance with paragraph (4)(a) or (b); or

(b) if no legal aid program or assistance program is available or the young person is unable to obtain counsel through the program, refer the matter without delay to a youth justice court to be dealt with in accordance with paragraph (4)(b).

Young person may be assisted by adult

(7) When a young person is not represented by counsel at trial or at a hearing or review referred to in subsection (3), the justice before whom or the youth justice court or review

board before which the proceedings are held may, on the request of the young person, allow the young person to be assisted by an adult whom the justice, court or review board considers to be suitable.

Counsel independent of parents

(8) If it appears to a youth justice court judge or a justice that the interests of a young person and the interests of a parent are in conflict or that it would be in the best interests of the young person to be represented by his or her own counsel, **the judge or justice shall ensure that the young person is represented by counsel independent of the parent.**

Statement of right to counsel

(9) A statement that a young person has the right to be represented by counsel shall be included in

- (a) any appearance notice or summons issued to the young person;
- (b) any warrant to arrest the young person;
- (c) any promise to appear given by the young person;
- (d) any undertaking or recognizance entered into before an officer in charge by the young person;
- (e) any notice given to the young person in relation to any proceedings held under subsection 98(3) (continuation of custody), 103(1) (review by youth justice court), 104(1) (continuation of custody), 105(1) (conditional supervision) or 109(1) (review of decision); or
- (f) any notice of a review of a youth sentence given to the young person.

Recovery of costs of counsel

(10) Nothing in this Act prevents the lieutenant governor in council of a province or his or her delegate from establishing a program to authorize the recovery of the costs of a young person's counsel from the young person or the parents of the young person. The costs may be recovered only after the proceedings are completed and the time allowed for the taking of an appeal has expired or, if an appeal is taken, all proceedings in respect of the appeal have been completed.

Exception for persons over the age of twenty

(11) Subsections (4) to (9) do not apply to a person who is alleged to have committed an offence while a young person, if the person has attained the age of twenty years at the time of his or her first appearance before a youth

justice court in respect of the offence; however, this does not restrict any rights that a person has under the law applicable to adults.

Immigration²⁰⁹

Immigration and Refugee Protection Act, SC 2001, c 27

PART 4: IMMIGRATION AND REFUGEE BOARD

PROVISIONS THAT APPLY TO ALL DIVISIONS

...

Right to counsel

167. (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

Representation

(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

2. Amicus Curiae

Rules of the Supreme Court of Canada, SOR/2002-156

Appointment of Amicus Curiae

92. The Court or a judge may appoint an amicus curiae in an appeal.

²⁰⁹ For clarity, as discussed in the body of this paper, there are no provisions for the appointment of a legal representative for a child who is the subject of a hearing before the Immigration and Refugee Board; the following provisions deals with the appointment of a designated representative.

ALBERTA

1. Legal Representation

Family Law

Family Law Act, SA 2003, c F-4.5

Part 4 General Powers of Court

Child as party

95(1) Subject to subsection (2), where a child is a party to an application under this Act, the application may be brought or defended

- (a) by a guardian of the child in the name of the child, or
- (b) by a litigation representative or any individual appointed by the court to act on behalf of the child.

(2) A child who is or has been a spouse or adult interdependent partner may make, conduct or defend an application under this Act without the intervention of a litigation representative.

(3) The court may at any time appoint an individual to represent the interests of a child in a proceeding under this Act.

(4) Where the court appoints an individual under this section, the court shall allocate the costs relating to the appointment among the parties, including the child, if appropriate.

Child Protection

Child, Youth and Family Enhancement Act, RSA 2000, c C-12

Legal representative

112(1) If an application is made for a supervision order, a private guardianship order or a temporary or permanent guardianship order, or a child is the subject of a supervision order or a temporary or permanent guardianship order or a permanent guardianship agreement, and the child is not represented by a lawyer in a proceeding under Part 1, Division 3, 4 or 5²¹⁰, the Court may direct that the child be represented by a lawyer if

- (a) the child, the guardian of the child or a director requests the Court to do so, and
- (b) the Court is satisfied that the interests or views of the child would not be otherwise adequately represented.

²¹⁰ Part 1: Intervention Services, Division 3: Court Orders – apprehension of child in need of protection, Division 4: Secure Treatment, Division 5: Private Guardianship.

(2) If the Court directs that a child be represented by a lawyer pursuant to subsection (1),

(a) it shall refer the child to the Child and Youth Advocate.

(b) repealed 2008 c31 s50.

(3) If a referral is made under subsection (2), the Child and Youth Advocate shall appoint or cause to be appointed a lawyer to represent the child.

(4) If a referral is made under subsection (2), the Court may make an order directing that the costs of the lawyer be paid by the child, the guardian of the child or a director or apportioned among all or any of them, having regard to the means of the child and the guardian.

...

Part 4: General

...

Appeal to an Appeal Panel

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Power of the Appeal Panel

119(1) Any Appeal Panel may hear an appeal made pursuant to section 120.

(1.1) An Appeal Panel may

(a) determine whether representations will be oral or by written submission, and

(b) consider any new evidence that is raised or presented in a hearing.

(2) If an appeal is made from a director's decision referred to in section 120(2)(a) to (a.4) or (f.3), the Appeal Panel may, subject to this Act and the regulations, confirm the decision or refer the matter back to the director for further consideration.

(2.1) If an appeal is made from a director's decision referred to in section 120(2)(b) to (f.2), (g) or (5), the Appeal Panel may, subject to this Act and the regulations, confirm, reverse or vary the decision.

(3) Subject to subsection (1.1), the Administrative Procedures Act applies to the proceedings of the Appeal Panel.

(4) An appellant or a child who is the subject of an appeal may be represented at the hearing of the appeal by a lawyer or by any other person.

(5) If no one is present at the hearing of an appeal to represent the interests of a child who is the subject of the appeal, the Appeal Panel may direct that the child be represented at the hearing.

Appeal to the Appeal Panel

120(2) An appeal may be made from a decision of a director that has been reviewed under section 117.1 respecting the following:

(a) the removal from or placement in a residential facility of a child who is the subject of a temporary guardianship order or a permanent guardianship agreement or order;

- (a.1) terms and conditions imposed on a renewal of, but not on the original issuance of, a residential facility licence under section 105.3;
 - (a.2) a refusal to renew a residential facility licence under section 105.3;
 - (a.3) an order made under section 105.6;
 - (a.4) the variation, suspension or cancellation of a residential facility licence under section 105.7;
 - (b) the permitting or refusing to permit any person who has a significant relationship with the child to visit a child who is the subject of a permanent guardianship agreement;
 - (c), (d) repealed 2003 c16 s105;
 - (e) the refusal or failure of a director to enter into an agreement under Part 1, Division 2 or 6 or to apply to the Court under Part 1, Division 3 in respect of a child who, in the opinion of that director, is in need of intervention;
 - (f) repealed 2003 cF- 5.3 s12;
 - (f.1) the refusal to provide financial assistance pursuant to section 56.1 or 81;
 - (f.2) the refusal to provide support or financial assistance pursuant to section 57.3;
 - (f.3) a matter prescribed in the regulations as being
 - (i) subject to an appeal to an Appeal Panel, and
 - (ii) a matter in respect of which the Appeal Panel may only make a decision referred to in section 119(2);
 - (g) any other matter prescribed in the regulations as being subject to an appeal to an Appeal Panel.
- (2.1) Notwithstanding subsection (2)(a), a child who is receiving treatment in a residential facility may not appeal a decision of a director to place the child in that residential facility.

Child and Youth Advocate Act, SA 2011, c C-11.5

Part 2

Advocate's Role, Functions and General Powers

...

Role and functions of Advocate

9(1) The role of the Advocate is to represent the rights, interests and viewpoints of children.

(2) In carrying out the role of the Advocate under subsection (1), the Advocate may

- (a) communicate and visit with a child, or with a guardian or other person who represents a child;
- (b) on the Advocate's own initiative, or at the request of a child, assist in appealing or reviewing a decision relating to a designated service;

(c) appoint, or cause to be appointed, lawyers to represent children with respect to any matter or proceeding under the Child, Youth and Family Enhancement Act or the Protection of Sexually Exploited Children Act or any matter or proceeding prescribed by regulation;

Child and Youth Advocate Regulation, Alta Reg 53/2012

Appointment of lawyer to represent child

1(1) If a child is the subject of a permanent guardianship order or a permanent guardianship agreement under the Child, Youth and Family Enhancement Act, the Child and Youth Advocate may appoint or cause to be appointed a lawyer to represent the child where

(a) the child is the subject of a guardianship application under the Family Law Act,

(b) the child is the subject of a guardianship application, a trusteeship application, or both, under the Adult Guardianship and Trusteeship Act, or

(c) the child is the subject of an application, proceeding or other matter under the Citizenship Act (Canada).

(2) If a child is receiving any intervention services under the Child, Youth and Family Enhancement Act or any services under the Protection of Sexually Exploited Children Act, the Child and Youth Advocate may appoint or cause to be appointed a lawyer to represent the child

(a) where the child wishes to apply for an order under the Protection Against Family Violence Act, or

(b) for matters, other than those under the Youth Criminal Justice Act (Canada) or the Youth Justice Act, where the Child and Youth Advocate is of the opinion that the child requires independent representation.

2. Intervenor Status

Alberta Rules of Court, Alta Reg 124/2010

Part 2 The Parties to Litigation

Division 1 Facilitating Legal Actions

...

Intervenor status

2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the

rights and privileges specified by the Court.

...

Part 14 Appeals

Division 1 The Right to Appeal

Subdivision 2

Parties to an Appeal

Adding, removing or substituting parties to an appeal

14.57 A party or person may be added, removed or substituted as a party to an appeal in accordance with rule 3.74.

Intervenor status on appeal

14.58(1) In addition to persons having a right to intervene in law, a single appeal judge may grant status to a person to intervene in an appeal, subject to any terms and conditions and with the rights and privileges specified by the judge.

(2) A person granted intervenor status in the court appealed from must apply again to obtain intervenor status on an appeal.

(3) Unless otherwise ordered, an intervenor may not raise or argue issues not raised by the other parties to the appeal.

3. **Amicus Curiae:** No statutory provisions

BRITISH COLUMBIA

1. Legal Representative

Family Law

Family Law Act, SBC 2011, c 25

Part 10: Court Processes

...

Division 2 Procedural Matters

...

Children's lawyer

203 (1) The court may at any time appoint a lawyer to represent the interests of a child in a proceeding under this Act if the court is satisfied that

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

(b) it is necessary to protect the best interests of the child.

(2) If the court appoints a lawyer under this section, the court may allocate among the parties, or require one party alone to pay, the lawyer's fees and disbursements.

Child Protection

Child, Family and Community Service Act, RSBC 1996, c 46

Part 4 — Children in Care

Rights of children in care

70 (1) Children in care have the following rights:

(a) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the placement;

(b) to be informed about their plans of care;

(c) to be consulted and to express their views, according to their abilities, about significant decisions affecting them;

(d) to reasonable privacy and to possession of their personal belongings;

(e) to be free from corporal punishment;

(f) to be informed of the standard of behaviour expected by their caregivers or prospective adoptive parents and of the consequences of not meeting the expectations of their caregivers or prospective adoptive parents, as applicable;

(g) to receive medical and dental care when required;

- (h) to participate in social and recreational activities if available and appropriate and according to their abilities and interests;
 - (i) to receive the religious instruction and to participate in the religious activities of their choice;
 - (j) to receive guidance and encouragement to maintain their cultural heritage;
 - (k) to be provided with an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care;
 - (l) to privacy during discussions with members of their families, subject to subsection (2);
 - (m) to privacy during discussions with a lawyer, the representative or a person employed or retained by the representative under the Representative for Children and Youth Act, the Ombudsperson, a member of the Legislative Assembly or a member of Parliament;**
 - (n) to be informed about and to be assisted in contacting the representative under the Representative for Children and Youth Act, or the Ombudsperson;
 - (o) to be informed of their rights, and the procedures available for enforcing their rights, under
 - (i) this Act, or
 - (ii) the Freedom of Information and Protection of Privacy Act.
- (2) A child who is removed under Part 3 is entitled to exercise the right in subsection (1) (l), subject to any court order made after the court has had an opportunity to consider the question of access to the child.
- (3) This section, except with respect to the Representative for Children and Youth as set out in subsection (1) (m) and (n), does not apply to a child who is in a place of confinement.

2. Intervenor Status

Court of Appeal Rules, BC Reg 297/2001

Part 6 Applications

...

Applications for intervenor status

36 (1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.

(2) A party seeking leave under subrule (1) to intervene in an appeal must, within 14 days after the filing of the appellant's factum,

(a) prepare

(i) a notice of motion in Form 6, and

(ii) a memorandum of argument in Form 18,

(b) file 2 copies of that notice of motion and memorandum of argument for use by the court plus such additional copies of those documents as are required for the purposes of paragraph (c), and

(c) serve one filed copy of the notice of motion and memorandum of argument on each of the other parties.

(3) In any order granting leave to intervene, the justice

(a) is to specify the date by which the factum of the intervenor must be filed, and

(b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.

(4) An intervenor must file a factum in Form 10 on or before the date referred to in subrule (3) (a).

(5) Unless a justice otherwise orders, an intervenor

(a) must not file a factum that exceeds 20 pages,

(b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and

(c) is not to present oral argument.

3. **Amicus Curiae:** No statutory provisions

MANITOBA

1. Legal Representation

Child Protection

The Child and Family Services Act, CCSM c C80

Part III: Child Protection

Legal counsel for parent who is a child

34(1.1) Where a parent of a child who is the subject of a hearing under section 27 is a child and is 12 years of age or older, the parent has the right to retain and instruct legal counsel in respect of the hearing without having a litigation guardian appointed for the parent.

Counsel for child

34(2) In the case of the child who is the subject of the hearing, a judge or master may order that legal counsel be appointed to represent the interests of the child and, if the child is 12 years of age or older, may order that the child have the right to instruct the legal counsel.

Factors affecting need for counsel for child

34(3) In making an order under subsection (2), the judge or master shall consider all relevant matters including,

- (a) any difference in the view of the child and the views of the other parties to the hearing;
- (b) any difference in the interests of the child and the interests of the other parties to the hearing;
- (c) 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;
- (d) the capacity of the child to express his or her views to the court;
- (e) the views of the child regarding separate representation, where such views can reasonably be ascertained; and
- (f) the presence of parents or guardians at the hearing.

2. Intervenor

Court of Queen's Bench Rules, Man Reg 553/88

Leave to Intervene as an Added Party

Motion for Leave

13.01(1) Where a person who is not a party to a proceeding claims,

- (a) an interest in the subject matter of the proceeding;
 - (b) that the person may be adversely affected by a judgment in the proceeding; or
 - (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with a question in issue in the proceeding;
- the person may move for leave to intervene as an added party

The Child and Family Services Act, CCSM c C80

Part III: Child Protection

...

Application to intervene

31(1) Prior to the commencement of a hearing under subsection 27(1) and upon giving two clear days notice to the persons entitled to notice under subsection 30(1) any person may apply to court to intervene in the proceedings.

Order

31(2) Upon being satisfied that the person applying under subsection (1)

- (a) has or has had a significant relationship with the child; and
- (b) can make a significant contribution to the hearing which will be in the child's best interests;

a judge or master may order that the person intervene in the proceedings upon the terms and conditions and with the rights and privileges the judge or master determines.

3. Amicus Curiae

Court of Queen's Bench Rules, Man Reg 553/88

Leave to Intervene as a Friend of the Court

13.02 Any person may, with leave of the court or at the invitation of the court and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Leave to Intervene as an Added Party Motion for Leave

13.01(1) Where a person who is not a party to a proceeding claims,
(a) an interest in the subject matter of the proceeding;
(b) that the person may be adversely affected by a judgment in the proceeding; or
(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with a question in issue in the proceeding;
the person may move for leave to intervene as an added party

NEW BRUNSWICK

1. Legal Representation

Child Protection

Family Services Act, SNB 1980, c F-2.2

6(4) In any matter or proceeding under this Act affecting a child, whether before a court or any person having authority to make a decision that affects a child, the child has the right to be heard either on his own behalf or through his parent or another responsible spokesman.

6(5) In any proceeding under this Act the court may waive any requirement that the child appear before the court where it is of the opinion that it would be in the best interests of the child to do so and the court is satisfied that the interests and concerns of the child with respect to the matter before the court will not be thereby prejudiced.

7 In any proceeding with respect to the custody of a child, whether under this or any other Act, the court shall,

(a) if the Minister is not a party to the proceeding, advise the Minister of the proceeding, in which case the Minister may intervene in the proceeding and may take whatever steps he considers necessary to ensure that the interests and concerns of the child are properly represented separate from those of any other person, including the appointment of counsel or a responsible spokesman to assist in the representation of the interests and concerns of the child, and

(b) where the Minister is a party to the proceeding and the court is of the opinion that the interests and concerns of the child should be represented by counsel or by a responsible spokesman, advise the Attorney-General that in his opinion counsel or a responsible spokesman should be made available to assist in the representation of the child's interests and concerns.

7.1(1) The court shall consider the following in order to determine whether counsel should be made available under paragraph 7(b):

(a) whether the child is 12 years of age or older;

- (b) whether the child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him or her, have been given consideration in determining his or her interests and concerns;
- (c) whether the Minister has been able to identify the child's interests and concerns;
- (d) whether the interests and concerns of the child and those of the Minister differ;
- (e) whether counsel is better able to identify the child's interests and concerns; and
- (f) any other factors the court considers relevant.

7.1(2) Upon advising the Attorney General that counsel should be made available under paragraph 7(b), the court shall provide the reasons justifying the decision.

Youth Criminal Offences

Provincial Offences Procedure for Young Persons Act, SNB 1987, c P-22.2

RIGHT TO RETAIN AND INSTRUCT COUNSEL

12(1) A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and prior to and during any consideration of whether, instead of commencing or continuing judicial proceedings against the young person, to use alternative measures to deal with the young person.

12(1.1) Notwithstanding subsection (1), a ticket may be served on a young person before a young person has been advised of or given the opportunity to exercise the rights given under subsection (1).

12(2) Every young person who is arrested or detained shall, forthwith on arrest or detention, be advised by the arresting officer or the officer in charge, as the case may be, of the young person's right to retain and instruct counsel and shall be given a reasonable opportunity to do so.

12(3) If a young person is not represented by counsel

- (a) at a hearing at which it will be determined whether to release the young person or detain the young person in custody prior to disposition of the young person's case,
- (b) at the young person's trial,
- (c) on sentencing of the young person, or
- (d) on an appeal

the youth court judge before whom the hearing, trial or sentencing is held or the judge before whom the appeal is heard shall advise the young person of the young person's right to retain and instruct counsel and shall give the young person a reasonable opportunity to do so.

12(4)If a young person is unable to retain and instruct counsel either through a legal aid program or otherwise and the youth court judge or the judge on appeal before whom the young person appears is of the opinion that the young person should be represented by counsel or by a responsible spokesperson, the judge may advise the Attorney General that, in the judge's opinion, counsel or a responsible spokesperson should be made available to assist in representing the young person.

12(5)If a young person is not represented by counsel at a hearing, trial, sentencing or appeal referred to in subsection (3), the youth court judge or the judge on appeal before whom the proceedings are held may, on the request of the young person, allow the young person to be assisted by an adult whom the judge considers to be suitable.

12(6)In any case where it appears to a youth court judge or a judge on appeal that the interests of a young person and the young person's parents are in conflict or that it would be in the best interests of the young person to be represented by separate counsel, the judge shall advise the young person that the young person is entitled to retain and instruct counsel or to be assisted by a suitable adult independent of the young person's parents.

12(7)Subject to subsection 6(7), notwithstanding that a young person is represented by counsel or agent, no proceedings in relation to a young person as a defendant shall be conducted in the absence of the young person.

2. Intervenor: No statutory provisions

3. Amicus Curiae

Rules of Court, NB Reg 82-73

15.03 Leave to Intervene as Friend of the Court 15.03 Permission

Any person may, with leave of the court or at the invitation of the court, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

NEWFOUNDLAND AND LABRADOR

1. Legal Representation

Family and Law

Note that the *Children's Law Act, RSNL 1990, c C-13* recognizes that a child may have counsel (addresses things such as notice to “counsel representing the child” but there are no provisions for appointment of counsel for the child)

Child Protection

Children and Youth Care and Protection Act, SNL 2010, c C-12.2

...

PART III: PROTECTIVE INTERVENTION

Determining the need for protective intervention

12. (1) Where a manager or social worker receives information in the form of

(a) a request for protective intervention services;

(b) a report under section 11 ; or

(c) other evidence that a child may be in need of protective intervention, the manager or social worker shall investigate whether the child is in need of protective intervention unless, upon assessment, the manager or social worker is satisfied that the information provided was without merit or without reasonable grounds.

...

(b) after an investigation referred to in subsection (1), a manager or social worker has determined that the child is not in need of protective intervention, **the manager or social worker may, where appropriate, refer the child** or the child's parent **to** health care, social, **legal or other services** which may assist the child or the child's parent and may, in exceptional circumstances, enter into a written agreement outlining the plan for the child and the child's parent with respect to the required services.

(4) An agreement under this section shall set out the responsibilities of each party to the agreement.

...

PART V: GENERAL COURT MATTERS

....

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

(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.

Appeals

Judicature Act, RSNL 1990, c J-4

Part I: The Court of Appeal

...

Appointment of counsel

18. Where a person or class of persons affected by a reference are not represented by counsel, the court may appoint counsel to represent the person or class and the reasonable expenses occasioned shall be paid by the Minister of Finance out of the Consolidated Revenue Fund.

2. Intervenor

Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D

RULE 7 CAUSES OF ACTION AND PARTIES

...

Intervenor becoming a party

7.05. (1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto if

(a) that person claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief

(b) claimed, enforcement of the order therein, or otherwise;

(b) that person's claim or defence and the proceeding have a question of law or fact in common; or

(c) that person has a right to intervene under a statute or rule.

(2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.

(3) On the application, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of

the rights of the parties to the proceeding and it may grant such order as it thinks just.

3. Amicus Curiae

Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D

Intervenor as amicus curiae

7.06. Any person may, with the leave of the Court and without becoming a party to a proceeding, intervene in the proceeding as a friend of the Court for the purpose of assisting it.

Provincial Court Family Rules, 2007, N.L.R. 28/07

RULE 1 CITATION, APPLICATION AND INTERPRETATION

Citation

1.01 These rules may be cited as the Provincial Court Family Rules, 2007.

Application

1.02 (1) These rules govern all proceedings in the court under the

- (a) Adoption Act, 2013;
- (b) Change of Name Act, 2009;
- (c) Child, Youth and Family Services Act;
- (d) Children's Law Act;
- (e) Family Law Act;
- (f) Interjurisdictional Support Orders Act;
- (g) Neglected Adults Welfare Act;
- (h) Solemnization of Marriage Act; and
- (i) Support Orders Enforcement Act.

...

Friend of the court

5.10 A person may, with leave of the court and without becoming a party to a proceeding, intervene in the proceeding as a friend of the court for the purpose of assisting the court.

NORTHWEST TERRITORIES

1. Legal Representation

Family Law

Children's Law Act, SNWT 1997, c 14

PART V: General

Procedure

83(1) Child entitled to be heard

In considering an application under Part III²¹¹, a 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.

83(2) Interview by court

The court may interview the child to determine the views and preferences of the child.

83(3) Conduct of interview

Where the court interviews the child, the interview shall be recorded.

83(4) Counsel

The child is entitled to be advised by and to have his or her counsel, if any, present during the interview.

Child Protection

Child and Family Services Act, SNWT 1997, c 13

*** NOTE s. 3.1(1)-(2) are set to come into force on April 1, 2016***

Principles

3.1(1) Notice of right to legal counsel

The following persons are entitled to be informed of the right to be represented by legal counsel throughout the child protection process:

(a) a parent or person having lawful custody or actual care of a child;

(b) a child who is able to express his or her views and preferences respecting decisions affecting him or her.

3.1(2) Facilitating access to legal counsel

²¹¹ Part III is custody, access and guardianship

After advising a person of the right to be represented by legal counsel, the Director or a Child Protection Worker shall endeavor, to the extent that it is practicable, to facilitate that person's access to legal counsel and, where appropriate, the services of an interpreter.

PART IV: GENERAL

Procedure

....

86(1) Counsel for child

The court shall ensure that a child who is the subject of a hearing before the court is represented by counsel independent of his or her parents where it appears to the court that

- (a) the interests of the child and the child's parents are in conflict; or
- (b) it would be in the best interests of the child to be represented by his or her own counsel.

Youth Criminal Justice

Youth Justice Act, SNWT 2003, c 31

14 (5) If a young person at a hearing or proceeding referred to in subsection (4) wishes to obtain counsel but is unable to do so, the youth justice court before which or the justice before whom the hearing or proceeding is held

(a) shall refer the young person to the legal services program established under the Legal Services Act; or

(b) if the young person is unable to obtain counsel through the program referred to in paragraph (a)

(i) may direct that the young person be represented by counsel, and

(ii) except in the case of a hearing or proceeding in respect of an offence

for which a ticket has been issued under the Summary Conviction Procedures Act, shall, on the request of the young person, direct that the young person be represented by counsel.

(6) If a direction is made under paragraph (5)(b) in respect of a young person, the Minister shall appoint counsel, or cause counsel to be appointed, to represent the young person.

(7) If a young person is not represented by counsel at a hearing or proceeding against the young person, the justice before whom or the youth justice court before which the hearing or proceeding is held may, on the request of the young person, allow the young person to be assisted by a parent or another adult whom the justice or court considers to be suitable.

(8) If it appears to a youth justice court judge or a justice that the interests of a young person and the interests of a parent are in conflict or that it would be in the best interests of the young person to be represented by his or her own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of the parent

2. Intervenor

Rules of Practice and Procedure, NWT Reg 047-96

Part III: Procedure

...

Intervention

14. (1) Any interested person or organization may give notice of its desire to intervene in a proceeding by filing with the secretary and serving on the applicant, on or before the date specified in the notice, a written request to intervene.

3. Amicus Curiae

Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. 010-96

PART 7 PARTIES AND JOINDER OF CAUSES OF ACTION

....

Amicus curiae

92. With leave of the Court, a person may intervene in a proceeding, without becoming a party to the proceeding, as amicus curiae for the purpose of rendering assistance to the Court by way of argument or by presentation of evidence, on such terms as to costs or otherwise as the Court may impose.

NOVA SCOTIA

1. Legal Representation

Family Law

Family Court Rules, NS Reg 20/93

Guardian ad litem

5.05 (1) Subject to subrule (2) a person under disability shall commence or defend a proceeding by a guardian ad litem unless the court otherwise orders.

(2) A person under the age of majority is not required to commence or defend a proceeding by a guardian ad litem unless the court so orders.

(3) Unless a Rule otherwise provides, anything in a proceeding that is required or authorized by the Rules to be done by a party shall or may, if the party is a person under disability, be done on the person's behalf by the guardian ad litem.

Child Protection

Children and Family Services Act, SNS 1990, c 5

Child as party and appointment of guardian

37(1) A child who is sixteen years of age or more is a party to a proceeding unless the court otherwise orders and, if a party, is, **upon the request of the child, entitled to counsel for the purposes of a proceeding.**

(2) A child who is twelve years of age or more shall receive notice of a proceeding and, **upon request by the child at any stage of the proceeding, the court may order that the child be made a party to the proceeding and be represented by counsel, where the court determines that such status and representation is desirable to protect the child's interests.**

(3) Upon the application of a party or on its own motion, the court may, at any stage of a proceeding, order that a guardian ad litem be appointed for a child who is the subject of the proceeding and, where the child is not a party to the proceeding, that the child be made a party to the proceeding, if the court determines that such a guardian is desirable to protect the child's interests and, where the child is twelve

years of age or more, that the child is not capable of instructing counsel.

(4) Where a child is represented by counsel or a guardian ad litem pursuant to this Section, the Minister shall in accordance with the regulations, pay the reasonable fees and disbursements of the counsel or guardian as the case may be, including the reasonable fees and disbursements of counsel for the guardian.

Family Court Rules, NS Reg 20/93

Rule 21 - Proceedings under the Children and Family Services Act

...

Interim Hearings

21.08 (7) At the interim hearing, as soon as is practicable in the circumstances, the court shall determine whether the child is a party and entitled to representation in accordance with Section 37 and shall make such directions respecting the child's party status, representation, presence at hearings, participation and service of documents upon the child as are just and necessary in the circumstances, having regard to the child's best interests.

2. Intervenor

Nova Scotia Civil Procedure Rules, Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008

Part 8: Counsel, Parties, and Claims

Rule 35: Parties

The following persons may do the following things, in accordance with this Rule:

35.01 (e) a person may make a motion to be added as a party, including as an intervenor.

...

Person intervening

35.10 A person who is not a party to a proceeding and wishes to be joined may move for an order joining the person as an intervenor.

...

Part 18: Proceedings in the Court of Appeal

..

Intervention

A person may intervene in an appeal with leave of a judge of the Court of Appeal.
90.19 (1)

3. Amicus Curiae

Family Court Rules, NS Reg 20/93

As amicus curiae

5.10 Any person may, with the leave of the court and without becoming a party to a proceeding, intervene in the proceeding as a friend of the court for the purpose of assisting the court.

NUNAVUT

1. Legal Representation

Family Law

Children's Law Act, SNWT (Nu) 1997, c 14

PART V: General

Procedure

83(1) Child entitled to be heard

In considering an application under Part III²¹², a 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.

83(2) Interview by court

The court may interview the child to determine the views and preferences of the child.

83(3) Conduct of interview

Where the court interviews the child, the interview shall be recorded.

83(4) Counsel

The child is entitled to be advised by and to have his or her counsel, if any, present during the interview.

Child Protection

Child and Family Services Act, SNWT (Nu) 1997, c 13

Procedure

....

86(1) Counsel for child

The court shall ensure that a child who is the subject of a hearing before the court is represented by counsel independent of his or her parents where it appears to the court that

(a) the interests of the child and the child's parents are in conflict; or

(b) it would be in the best interests of the child to be represented by his or her own counsel.

²¹² Part III is custody, access and guardianship

Youth Criminal Justice

Young Offenders Act, RSNWT (Nu) 1988

Trial or review before Youth Court or review board

11(2) Where a young person at his or her trial or review referred to in subsection (1)

wishes to obtain counsel but is unable to do so, the Youth Court before which the trial or review is held or the review board before which the review is held

(a) shall refer the young person to the legal services program established under the Legal Services Act; or

(b) where the young person is unable to obtain counsel through the program referred to in paragraph (a), may, and on the request of

the young person shall, direct that the young person be represented by counsel.

Appointment of counsel

(3) Where a direction is made under paragraph (2)(b) in respect of a young person, the Minister shall appoint counsel, or cause counsel to be appointed, to represent the young person.

...

Counsel independent of parents

12. In any case where it appears to a youth court judge or a justice that the interests of a young person and his or her parents are in conflict or that it would be in the best interest of the young person to be represented by his or her own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of his or her parents.

2. Intervenor: N/A (statute repealed)

3. Amicus Curiae

Rules of the Supreme Court of the Northwest Territories, NWT Reg (Nu)

PART 7 PARTIES AND JOINDER OF CAUSES OF ACTION

....

Amicus curiae

92. With leave of the Court, a person may intervene in a proceeding, without becoming a party to the proceeding, as amicus curiae for the purpose of rendering assistance to the Court by way of argument or by presentation of evidence, on such terms as to costs or otherwise as the Court may impose.

ONTARIO

1. Legal Representation

Generally

Courts of Justice Act, R.S.O. 1990, Chap. C. 43

PART VI – JUDGES AND OFFICERS

Children's Lawyer

Duties

89(3) Where required to do so by an Act or the rules of court, the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding.

Same

(3.1) At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding.

Rules of Civil Procedure, RRO 1990, Reg 194

RULE 7 PARTIES UNDER DISABILITY

REPRESENTATION BY LITIGATION GUARDIAN

Party under Disability

7.01 (1) Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian. O. Reg. 69/95, s. 2.

...

REPRESENTATION OF PERSONS UNDER DISABILITY

LITIGATION GUARDIAN FOR DEFENDANT OR RESPONDENT

...

Legal representative for minor who is not a party

7.04(2) Where, in the opinion of the court, the interests of a minor who is not a party require separate representation in a proceeding, the court may request and may by order authorize the Children's Lawyer, or some other proper person who is willing and able to act, to act as the person's legal representative.

...

RULE 15 REPRESENTATION BY LAWYER

WHERE LAWYER IS REQUIRED

15.01 (1) A party to a proceeding who is under disability or acts in a representative capacity shall be represented by a lawyer.

Family Law

Family Law Rules, O Reg 114/99

RULE 2: INTERPRETATION

2(1) In these rules, “special party” means a party who is a child or who is or appears to be mentally incapable for the purposes of the Substitute Decisions Act, 1992 in respect of an issue in the case and who, as a result, requires legal representation, but does not include a child in a custody, access, child protection, adoption or child support case

RULE 4: REPRESENTATION

...

PRIVATE REPRESENTATION OF SPECIAL PARTY

(2) The court may authorize a person to represent a special party if the person is,
(a) appropriate for the task; and
(b) willing to act as representative. O. Reg. 114/99, r. 4 (2).

PUBLIC LAW OFFICER TO REPRESENT SPECIAL PARTY

(3) If there is no appropriate person willing to act as a special party’s representative, the court may authorize the Children’s Lawyer or the Public Guardian and Trustee to act as representative, but only with that official’s consent.

...

LAWYER FOR CHILD

4(7) In a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise.

CHILD’S RIGHTS SUBJECT TO STATUTE

(8) Subrule (7) is subject to section 38 (legal representation of child, protection hearing) and subsection 114 (6) (legal representation of child, secure

treatment hearing) of the Child and Family Services Act. O. Reg. 114/99, r. 4 (8).

...

RULE 21: REPORT OF CHILDREN'S LAWYER

REPORT OF CHILDREN'S LAWYER

21. When the Children's Lawyer investigates and reports on custody of or access to a child under section 112 of the Courts of Justice Act,

(a) the Children's Lawyer shall first serve notice on the parties and file it;

(b) the parties shall, from the time they are served with the notice, serve the Children's Lawyer with every document in the case that involves the child's custody, access, support, health or education, as if the Children's Lawyer were a party in the case;

(c) the Children's Lawyer has the same rights as a party to document disclosure (rule 19) and questioning witnesses (rule 20) about any matter involving the child's custody, access, support, health or education;

(d) within 90 days after serving the notice under clause (a), the Children's Lawyer shall serve a report on the parties and file it;

(e) within 30 days after being served with the report, a party may serve and file a statement disputing anything in it; and

(f) the trial shall not be held and the court shall not make a final order in the case until the 30 days referred to in clause (e) expire or the parties file a statement giving up their right to that time.

Courts of Justice Act, R.S.O. 1990, Chap. C. 43

Part VII: Court Proceedings

Investigation and report of Children's Lawyer

112. (1) In a proceeding under the Divorce Act (Canada) or the Children's Law Reform Act in which a question concerning custody of or access to a child is before the court, the Children's Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning custody of or access to the child and the child's support and education.

Idem

(2) The Children's Lawyer may act under subsection (1) on his or her own initiative, at the request of a court or at the request of any person.

Report as evidence

(3) An affidavit of the person making the investigation, verifying the report as to facts that are within the person's knowledge and setting out the source of the person's information and belief as to other facts, with the report attached as an exhibit thereto, shall be served on the parties and filed and on being filed shall form part of the evidence at the hearing of the proceeding.

Attendance on report

(4) Where a party to the proceeding disputes the facts set out in the report, the Children's Lawyer shall if directed by the court, and may when not so directed, attend the hearing on behalf of the child and cause the person who made the investigation to attend as a witness.

Adoption

Family Law Rules, O Reg 114/99

**RULE 34: ADOPTION
INDEPENDENT LEGAL ADVICE, CHILD'S CONSENT**

34(11) The consent of a child to be adopted (Form 34) shall be witnessed by a representative of the Children's Lawyer, who shall complete the affidavit of execution and independent legal advice contained in the form.

**INDEPENDENT LEGAL ADVICE, CONSENT OF PARENT
UNDER 18**

(11.1) The consent of a person under the age of 18 years who is a parent of the child to be adopted (Form 34F) shall be witnessed by a representative of the Children's Lawyer, who shall complete an affidavit of execution and independent legal advice (Form 34J).

...

COPY OF CONSENT FOR PERSON SIGNING

(13) A person who signs a consent to an adoption shall be given a copy of the consent and of the affidavit of execution and independent legal advice.

WITHDRAWAL OF CONSENT BY PARENT

(13.1) A parent who has given consent to an adoption under subsection 137 (2) of the Act may withdraw the consent under subsection 137 (8) of the Act in accordance with the following:

1. If the child is placed for adoption by a children's aid society, the parent who wishes to withdraw the consent shall ensure that the children's aid society receives the written withdrawal within 21 days after the consent was given.

2. If the child is placed for adoption by a licensee, the parent who wishes to withdraw the consent shall ensure that the licensee receives the written withdrawal within 21 days after the consent was given.

3. If a relative of the child or a spouse of a parent proposes to apply to adopt the child, the parent who wishes to withdraw the consent shall ensure that the relative or spouse receives the written withdrawal within 21 days after the consent was given.

WITHDRAWAL OF CONSENT BY CHILD AGED SEVEN OR OLDER

(13.2) A child who has given consent to an adoption under subsection 137 (6) of the Act may withdraw the consent under subsection 137 (8) of the Act in accordance with the following:

1. The withdrawal shall be signed within 21 days after the consent was given, and witnessed by the person who witnessed the consent under subrule (11) or by another representative of the Children's Lawyer.

2. The person who witnesses the withdrawal shall give the original withdrawal document to the child and promptly serve a copy on the children's aid society, licensee, relative or spouse, as the case may be. O. Reg. 337/02, s. 3 (9); O. Reg. 140/15, s. 5.

Child and Family Services Act, RSO 1990, c C.11

PART VII: ADOPTION

Consent to Adoption

Consent of parent, etc.

137 (2) An order for the adoption of a child who is less than sixteen years of age, or is sixteen years of age or more but has not withdrawn from parental control, shall not be made without,

(a) the written consent of every parent; or

...

Consents by minors: role of Children's Lawyer

137(11) Where a person who gives a consent under clause (2) (a) is less than eighteen years of age, the consent is not valid unless the Children's Lawyer is satisfied that the consent is fully informed and reflects the person's true wishes.

Affidavits of execution

(12) An affidavit of execution in the prescribed form shall be attached to a consent and a withdrawal of a consent under this section.

Form of foreign consents

(13) A consent required under this section that is given outside Ontario and whose form does not comply with the requirements of subsection (12) and the regulations is not invalid for that reason alone, if its form complies with the laws of the jurisdiction where it is given.

Dispensing with consent

138. The court may dispense with a consent required under section 137 for the adoption of a child, except the consent of the child or of a Director, where the court is satisfied that,

(a) it is in the child's best interests to do so; and

(b) the person whose consent is required has received notice of the proposed adoption and of the application to dispense with consent, or a reasonable effort to give the notice has been made. R.S.O. 1990, c. C.11, s. 138.

Late withdrawal of consent

139. (1) The court may permit a person who gave a consent to the adoption of a child under section 137 to withdraw the consent after the twenty-one day period referred to in subsection 137 (8) where the court is satisfied that it is in the child's best interests to do so, and where that person had custody of the child immediately before giving the consent, the child shall be returned to him or her as soon as the consent is withdrawn.

Exception: child placed for adoption

(2) Subsection (1) does not apply where the child has been placed with a person for adoption and remains in that person's care. R.S.O. 1990, c. C.11, s. 139.

...

Child may participate

153.4 A child who receives notice of a proceeding under section 145.1, 145.1.2, 145.2, 153.1 or 153.2 is entitled to participate in the proceeding as if he or she were a party.

Legal representation of child

153.5 (1) A child may have legal representation at any stage in a proceeding under section 145.1, 145.1.2, 145.2 or 153.1 and subsection 38 (2) applies with necessary modifications to such a proceeding.²¹³

Children's Lawyer

(2) Where the court determines that legal representation is desirable, the court may, with the consent of the Children's Lawyer, authorize the Children's Lawyer to represent the child. 2006, c. 5, s. 39.

Child Abuse

Child and Family Services Act, RSO 1990, c C.11

PART III: CHILD PROTECTION

Offences, Restraining Orders, Recovery on Child's Behalf

Abuse, failure to provide for reasonable care, etc.

Definition

79. (1) In this section,

"abuse" means a state or condition of being physically harmed, sexually molested or sexually exploited.

Recovery because of abuse

81. (1) In this section ...

"to suffer abuse", when used in reference to a child, means to be in need of protection within the meaning of clause 37 (2) (a), (c), (e), (f), (f.1) or (h). R.S.O. 1990, c. C.11, s. 81 (1); 1999, c. 2, s. 29.

...

Recovery on child's behalf

²¹³ Sections 145.1 and 145.1.2 are provisions for applications for openness orders; s. 145.2 contains provisions for the application to vary or terminate openness orders.

(2) When the Children’s Lawyer is of the opinion that a child has a cause of action or other claim because the child has suffered abuse, the Children’s Lawyer may, if he or she considers it to be in the child’s best interests, institute and conduct proceedings on the child’s behalf for the recovery of damages or other compensation.

Idem: society

(3) Where a child is in a society’s care and custody, subsection (2) also applies to the society with necessary modifications. R.S.O. 1990, c. C.11, s. 81 (3).

Child Protection

Family Law Rules, O Reg 114/99

RULE 4: REPRESENTATION

...

LAWYER FOR CHILD

4(7) In a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise.

CHILD’S RIGHTS SUBJECT TO STATUTE

(8) Subrule (7) is subject to section 38 (legal representation of child, protection hearing) and subsection 114 (6) (legal representation of child, secure treatment hearing) of the Child and Family Services Act.

Child and Family Services Act, RSO 1990, c C.11

PART I: FLEXIBLE SERVICES

CHILDREN’S AID SOCIETIES

...

Children’s Lawyer

20.2(3) If a society or a person, including a child, who is receiving child welfare services proposes that a prescribed method of alternative dispute resolution be undertaken to assist in resolving an issue relating to a child or a plan for the child’s care, the Children’s Lawyer may provide legal representation to the child if in the opinion of the Children’s Lawyer such legal representation is appropriate. 2006, c. 5, s. 5.

...

PART III: CHILD PROTECTION

Legal Representation

Legal representation of child

38. (1)A child may have legal representation at any stage in a proceeding under this Part.

Court to consider issue

(2)Where a child does not have legal representation in a proceeding under this Part, the court,

(a) shall, as soon as practicable after the commencement of the proceeding; and

(b) may, at any later stage in the proceeding, determine whether legal representation is desirable to protect the child's interests.

Direction for legal representation

(3)Where the court determines that legal representation is desirable to protect a child's interests, the court shall direct that legal representation be provided for the child.

Criteria

(4)Where,

(a) the court is of the opinion that there is a difference of views between the child and a parent or a society, and the society proposes that the child be removed from a person's care or be made a society or Crown ward under paragraph 2 or 3 of subsection 57 (1);

(b) the child is in the society's care and,

(i) no parent appears before the court, or

(ii) it is alleged that the child is in need of protection within the meaning of clause 37 (2) (a), (c), (f), (f.1) or (h); or

(c) the child is not permitted to be present at the hearing,

legal representation shall be deemed to be desirable to protect the child's interests, unless the court is satisfied, taking into account the child's views and wishes if they can be reasonably ascertained, that the child's interests are otherwise adequately protected.

Where parent a minor

(5)Where a child's parent is less than eighteen years of age, the Children's Lawyer shall represent the parent in a proceeding under this Part unless the court orders otherwise.

...

Consent order: special requirements

55.Where a child is brought before the court on consent as described in clause 37 (2) (l), the court shall, before

making an order under section 57 or 57.1 that would remove the child from the parent's care and custody,

(a) ask whether,

(i) the society has offered the parent and child services that would enable the child to remain with the parent, and

(ii) the parent **and, where the child is twelve years of age or older, the child has consulted independent legal counsel in connection with the consent; and**

(b) be satisfied that,

(i) the parent and, where the child is twelve years of age or older, the child understands the nature and consequences of the consent,

(ii) every consent is voluntary, and

(iii) the parent and, where the child is twelve years of age or older, the child consents to the order being sought.

...

Mental Health and Secure Treatment

Family Law Rules, O Reg 114/99

RULE 4: REPRESENTATION

...

LAWYER FOR CHILD

(7) In a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise. O. Reg. 114/99, r. 4 (7).

CHILD'S RIGHTS SUBJECT TO STATUTE

(8) Subrule (7) is subject to section 38 (legal representation of child, protection hearing) and subsection 114 (6) (legal representation of child, secure treatment hearing) of the Child and Family Services Act. O. Reg. 114/99, r. 4 (8).

Child and Family Services Act, RSO 1990, c C.11

COMMITMENT TO SECURE TREATMENT

Application for order for child's commitment

114. (1) Any one of the following persons may, with the administrator's written consent, apply to the court for an order for the child's commitment to a secure treatment program:

1. Where the child is less than sixteen years of age,

i. the child's parent,

ii. a person other than an administrator who is caring for the child, if the child's parent consents to the application, or

- iii. a society that has custody of the child under an order made under Part III (Child Protection).
- 2. Where the child is sixteen years of age or more,
 - i. the child,
 - ii. the child's parent, if the child consents to the application,
 - iii. a society that has custody of the child under an order made under Part III (Child Protection), if the child consents to the application, or
 - iv. a physician.

Time for hearing

(2)Where an application is made under subsection (1), the court shall deal with the matter within ten days of the making of an order under subsection (6) (legal representation) or, where no such order is made, within ten days of the making of the application.

Adjournments

(3)The court may adjourn the hearing of an application but shall not adjourn it for more than thirty days unless the applicant and the child consent to the longer adjournment.

Interim order

(4)Where a hearing is adjourned, the court may make a temporary order for the child's commitment to a secure treatment program if the court is satisfied that the child meets the criteria for commitment set out in clauses 117 (1) (a) to (f) and, where the child is less than twelve years old, the Minister consents to the child's admission.

Evidence on adjournments

(5)For the purpose of subsection (4), the court may admit and act on evidence that the court considers credible and trustworthy in the circumstances.

Legal representation of child

(6)Where an application is made under subsection (1) in respect of a child who does not have legal representation, the court shall, as soon as practicable and in any event before the hearing of the application, direct that legal representation be provided for the child.

PART VI: EXTRAORDINARY MEASURES

EMERGENCY ADMISSION

124. ...

Criteria for admission

124(2) The administrator may admit a child to the secure treatment program on an application under subsection (1) for a period not to exceed thirty days where the administrator believes on reasonable grounds that,

- (a) the child has a mental disorder;
- (b) the child has, as a result of the mental disorder, caused, attempted to cause or by words or conduct made a substantial threat to cause serious bodily harm to himself, herself or another person;
- (c) the secure treatment program would be effective to prevent the child from causing or attempting to cause serious bodily harm to himself, herself or another person;
- (d) treatment appropriate for the child's mental disorder is available at the place of secure treatment to which the application relates; and
- (e) no less restrictive method of providing treatment appropriate for the child's mental disorder is appropriate in the circumstances.

Admission on consent

(3) The administrator may admit the child under subsection (2) although the criterion set out in clause (2) (b) is not met, where,

- (a) the other criteria set out in subsection (2) are met;
- (b) the child, after obtaining legal advice, consents to his or her admission; and**
- (c) if the child is less than sixteen years of age, the child's parent or, where the child is in a society's lawful custody, the society consents to the child's admission.

Where child under twelve

(4) Where the child is less than twelve years old, the administrator shall not admit the child under subsection (2) unless the Minister consents to the child's admission.

Additional requirement where applicant is physician

(5) Where the applicant is a physician, the administrator shall not admit the child under subsection (2) unless the administrator is satisfied that the applicant believes the criteria set out in that subsection are met.

Notices required

(6) The administrator shall ensure that within twenty-four hours after a child is admitted to a secure treatment program under subsection (2),

- (a) the child is given written notice of his or her right to a review under subsection (9); and

(b) the Provincial Advocate for Children and Youth and the Children's Lawyer are given notice of the admission.

Mandatory advice

(7) The Provincial Advocate for Children and Youth shall ensure that forthwith after the notice is received a person who is not employed by the secure treatment facility explains to the child his or her right to a review in language suitable for the child's level of understanding. R.S.O. 1990, c. C.11, s. 124 (7); 2007, c. 9, s. 25 (5).

Children's Lawyer to ensure child represented

(8) The Children's Lawyer shall represent the child at the earliest possible opportunity and in any event within five days after receiving a notice under subsection (6) unless the Children's Lawyer is satisfied that another person will provide legal representation for the child within that time.

Application for review

(9) Where a child is admitted to a secure treatment program under this section, any person, including the child, may apply to the Board for an order releasing the child from the secure treatment program. R.S.O. 1990, c. C.11, s. 124 (9).

Child may be kept in program while application pending

(10) Where an application is made under subsection (9), the child may be kept in the secure treatment program until the application is disposed of. R.S.O. 1990, c. C.11, s. 124 (10).

Procedure

(11) Subsections 114 (7), (8) and (9) (hearing) and section 115 (waive oral evidence) apply with necessary modifications to an application made under subsection (9).

Time for review

(12) Where an application is made under subsection (9), the Board shall dispose of the matter within five days of the making of the application. R.S.O. 1990, c. C.11, s. 124 (12).

Order

(13) The Board shall make an order releasing the child from the secure treatment program unless the Board is satisfied that the child meets the criteria for emergency admission set out in clauses 124 (2) (a) to (e).

...

Mental Health Act, RSO 1990, c M.7, s.43

Counsel for patient under 16

43. If a patient who is less than 16 years old is a party to a proceeding before the Board under section 13 or 39 and does not have legal representation,

- (a) the Board may direct the Children's Lawyer to arrange for legal representation to be provided for the patient; and**
- (b) the patient shall be deemed to have capacity to retain and instruct counsel.**

Health Care Consent Act, 1996, SO 1996, c 2, Sch A

PART V: CONSENT AND CAPACITY BOARD

Counsel for incapable person

81. (1) If a person who is or may be incapable with respect to a treatment, managing property, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have legal representation,

- (a) the Board may direct Legal Aid Ontario to arrange for legal representation to be provided for the person; and**
- (b) the person shall be deemed to have capacity to retain and instruct counsel.**

Responsibility for legal fees

(2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the Legal Aid Services Act, 1998 in connection with the proceeding, the person is responsible for the legal fees.

Same

(2.1) Nothing in subsection (2) affects any right of the person to an assessment of a solicitor's bill under the Solicitors Act or other review of the legal fees and, if it is determined that the person is incapable of managing property, the assessment or other review may be sought on behalf of the person by,

- (a) the person's guardian of property appointed under the Substitute Decisions Act, 1992; or**
- (b) the person's attorney under a continuing power of attorney for property given under the Substitute Decisions Act, 1992.**

Child in secure treatment program

(3) If a child who has been admitted to a secure treatment program under section 124 of the Child and Family Services Act is a party to a proceeding before the Board,

the Children's Lawyer shall provide legal representation for the child unless the Children's Lawyer is satisfied that another person will provide legal representation for the child.

Estates

Estates Act, RSO 1990, c E.21

Right of appeal

10. (1) Any party or person taking part in a proceeding under this Act may appeal to the Divisional Court from an order, determination or judgment of the Superior Court of Justice if the value of the property affected by such order, determination or judgment exceeds \$200.

Rights of persons interested to appeal

(2) Where the claimant or personal representative having a right of appeal does not appeal from the order, judgment or determination, the Children's Lawyer or any person beneficially interested in the estate may, by leave of a judge of the Divisional Court, appeal therefrom. R.S.O. 1990, c. E.21, s. 10 (2); 1994, c. 27, s. 43 (2).

Rights of persons interested to be heard at appeal

(3) The Children's Lawyer or any person beneficially interested in the estate, may, by leave of a judge of the Divisional Court, appear and be heard upon any such appeal.

...

Contestation of claims against estate

44. (1) Where a claim or demand is made against the estate of a deceased person or where the personal representative has notice of such claim or demand, they may serve the claimant with a notice in writing that they contest the same in whole or in part, and, if in part, stating what part, and also referring to this section. R.S.O. 1990, c. E.21, s. 44 (1).

Application for order allowing claim

(2) Within thirty days after the receipt of such notice of contestation or within three months thereafter if the judge of the Superior Court of Justice on application so allows, the claimant may, upon filing with the registrar a statement of their claim verified by affidavit and a copy of the notice of contestation, apply to the judge of the Superior Court of Justice for an order allowing the claim and determining the amount of it, and the judge shall hear the parties and their witnesses and shall make such order upon the application as the judge considers just, and if the claimant does not make

such application, the claimant shall be deemed to have abandoned the claim and it is forever barred.

Claim within jurisdiction of Small Claims Court

(3) Where the claim is within the jurisdiction of the Small Claims Court, an application for the extension of time referred to in subsection (2) and the application for the order shall be made to the judge of a Small Claims Court in which an action for the recovery of the claim might be brought, and the application for the order shall be heard by the judge at the sittings of such court, but where the claimant and the personal representative consent, the applications may be made to the judge of the Superior Court of Justice. R

Notice in such cases

(4) Not less than seven days notice of the application shall be given to the personal representative, and where the application is to be made to the judge of the Superior Court of Justice, shall also be given to the Children's Lawyer if minors are concerned, and to such, if any, of the persons beneficially interested in the estate as the judge may direct.

Right of persons interested to be heard

(5) Where the application is made to the judge of the Superior Court of Justice, in addition to the persons to whom notice has been given, any other person who is interested in the estate has the right to be heard and to take part in the proceeding.

...

Notice of contestation of unliquidated claims

45. (1) Where any claim or demand not within the meaning of subsection 44 (1) is made against the estate of a deceased person or where the personal representative has notice or knowledge of the claim or demand, they may serve the claimant with the notice prescribed in the said subsection. R.S.O. 1990, c. E.21, s. 45 (1).

Application by claimant for order for directions

(2) Within the time limits mentioned in subsection 44 (2), the claimant may, upon filing with the registrar a statement of their claim verified by affidavit and a copy of the notice of contestation, apply to the judge of the Superior Court of Justice for an order for directions as to the disposition of the claim or demand, and if the claimant does not make the application, the claimant shall be deemed to have abandoned the claim, and it is forever barred.

Notice in such cases

(3) Not less than seven days notice of the application shall be given to the personal representative and to the Children's Lawyer if minors are concerned and to such, if

any, of the persons beneficially interested in the estate as the judge may direct.

Powers of judge

(4) The judge shall make such order upon the application for directions as he or she considers just and, in particular but without limiting the generality of the foregoing, the judge may,
(a) direct the claimant to bring an action for the recovery or establishment of their claim on such terms and conditions as the judge considers just; and

(b) where the claim or demand is not presently recoverable, prescribe the time after which the claimant shall proceed pursuant to the directions. R.S.O. 1990, c. E.21, s. 45 (4).

Application of parts of s. 44

(5) When an order is made under subsection (4), subsections 44 (9), (10), (11) and (12) apply.

Right of persons interested to appeal

(6) If the personal representative does not appeal from an order made under subsection (2) or (4), the Children's Lawyer or any person beneficially interested in the estate may, by leave of a judge of the Divisional Court, appeal therefrom.

Right of persons interested to be heard on appeal

(7) Where the claimant or the personal representative appeals from an order made under subsection (2) or (4), the Children's Lawyer and any person beneficially interested in the estate may, by leave of the court that hears the appeal, appear and be heard.

Rules of Civil Procedure, RRO 1990, Reg 194

RULE 74 – ESTATES – NON-CONTENTIOUS PROCEEDINGS

APPLICATION TO PASS ACCOUNTS

Material to be Filed

Appointment of Person to Represent Interest

74.18(6) Where a person who has a financial interest in an estate is under a disability or is unknown and the Public Guardian and Trustee or Children's Lawyer is not authorized to represent the interest under any Act and there is no guardian or other person to represent the interest on the passing of the accounts, the court may appoint a person for the purpose.

Land Titles

Land Titles Act, RSO 1990, c L.5

PART VII: SUBSEQUENT REGISTRATIONS

Guardian

73. (1) The guardian of the property of a minor or of a mentally incapable person may make an application, give consent, do an act or be party to a proceeding under this Act if the minor or mentally incapable person could have done so if free from disability. 1992, c. 32, s. 18.

Same

(2) The guardian shall represent the minor or mentally incapable person for the purposes of this Act.

Same

(3) If a minor or a mentally incapable person has no guardian of property, the Children's Lawyer has power to act under subsections (1) and (2), or the land registrar may appoint a person with power to act under those subsections.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is repealed and the following substituted:

If no guardian

(3) If a minor or a mentally incapable person has no guardian of property, the Children's Lawyer or a person appointed by a court has power to act under subsections (1) and (2). 2012, c. 8, Sched. 28, s. 46.

Workplace Safety and Insurance

Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A

PART III: INSURANCE PLAN

..

Election, concurrent entitlements

30. (1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.

Election

(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected. 1997, c. 16, Sched. A, s. 30 (2).

Same

(3) If the worker is or was employed by a Schedule 2 employer, the worker or survivor shall also notify the employer.

Same

(4) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death.

Same

(5) The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so.

Same

(6) If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan. 1

Same, minor

(7) If the worker or survivor is less than 18 years of age, his or her parent or guardian or the Children's Lawyer may make the election on his or her behalf.

2. Intervenor

Courts of Justice Act, R.S.O. 1990, Chap. C. 43

RULE 13 INTERVENTION

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

...

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

3. Amicus Curiae

Courts of Justice Act, R.S.O. 1990, Chap. C. 43

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1.

PRINCE EDWARD ISLAND

1. Legal Representation

Generally

Rules of Civil Procedure (PEI)

PARTIES AND JOINDER

...

RULE 7 PARTIES UNDER DISABILITY

REPRESENTATION

7.01 A proceeding shall be commenced, continued or defended on behalf

of,

(a) a minor, by a litigation guardian;

...

COMMENCEMENT OF PROCEEDINGS

RULE 15 REPRESENTATION BY SOLICITOR

WHERE SOLICITOR IS REQUIRED

15.01 (a) Subject to the provisions of the Legal Profession Act and sub-rule 4 of Rule 74.11 governing proceedings in the small claims section, a party to a proceeding who is under disability or acts in a representative capacity shall be represented by a solicitor.

Family Law

Custody Jurisdiction and Enforcement Act, RSPEI 1988, c C-33

CUSTODY AND ACCESS

4.1(1) Assessment of needs of child

The court before which an application is brought in respect of custody of or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

...

4.1(10) Assessment may be witnessed
Any of the parties, and counsel, if any, representing the child, may require the person appointed under subsection (1) to attend as a witness at the hearing of the application.

Rules of Civil Procedure (PEI)

PARTICULAR PROCEEDINGS

RULE 70 – DIVORCE ACTIONS

CHILDREN AND DIRECTOR OF CHILD PROTECTION'S REPORT

CHILDREN AND DIRECTOR OF CHILD PROTECTION'S REPORT

Application of Rule

70.16 (1) Subrules (2) to (13) apply where there is a child of the marriage within the meaning of s. 2 of the Act.

Children to be Identified

(2) The name and birth date of every child of the marriage shall be set out in the petition or counterpetition.

Service of Documents on Director of Child Protection

(3) Where custody of or access to children is claimed, the petition or counterpetition shall be served on the Director of Child Protection in accordance with Rule 16, and the Director of Child Protection shall forward a letter to the registrar, with a copy to counsel for the petitioner indicating whether or not the Director intends to investigate the matter.

Notice of Intention to Investigate and Report

(4) Where the Director of Child Protection intends to investigate and report to the court concerning custody of or access to a child, he or she shall serve notice of that intention (Form 70M) on the parties and shall file a copy of the notice with proof of service.

(5) Service of the notice on a party who has been noted in default shall be effected by mail addressed to the party at his or her last known address, unless the court orders otherwise.

Service of Documents on Director of Child Protection

(6) Where the Director of Child Protection has served notice, a party who subsequently serves an answer, reply or notice of motion or any other document that relates to custody of or access to the child or relates to the child's support or education shall also serve it on the Director of Child Protection within the time prescribed for service on the parties.

Discovery by Director of Child Protection

(7) Where the Director of Child Protection has served notice, he or she has the right to discovery in respect of any matter that relates to custody of or access to the child or relates to the child's support or education.

Service of Report

(8) The Director of Child Protection shall serve his or her report on the parties interested in custody of or access to the child or in the child's support or education, within sixty days after serving notice under subrule (4), and shall then forthwith file a copy of the report and supporting affidavit, if any, with proof of service.

(9) Subrule (5) applies, with necessary modifications, to service of the report.

Dispute of Report

(10) A party on whom the report is served may dispute a statement in it or in any supporting affidavit by serving a concise statement of the nature of the dispute on every other party interested in custody of or access to the child or in the child's support or education, and on the Director of Child Protection, and filing the statement, with proof of service, within fifteen days after service of the report.

(11) Where the Director of Child Protection has served notice under subrule (4), the action shall not be tried and no motion for judgment shall be heard until,

(a) all disputes have been filed or the time for filing disputes has expired; or

(b) every party interested in custody of or access to the child or in the child's support or education has filed a waiver (Form 70N) of the right to dispute the report.

...

Court Appointment of Child Advocate

70.16 (12) On motion of the Director of Child Protection, a judge shall designate an attorney as a child advocate and direct that such child advocate may intervene for the purpose of protecting the interest of the children concerned.

...

RULE 71 – FAMILY LAW PROCEEDINGS

DIRECTOR OF CHILD PROTECTION'S REPORT

71.06 Subrules 70.16(1) to (8) (Director of Child Protection's Report) apply, with necessary modifications, to proceedings under the Custody Jurisdiction and Enforcement Act.

Child Protection

Child Protection Act, RSPEI 1988, c C-5.1

Court Applications

29(1) Application for order

The Director may apply to the court for an order for

- (a) supervision;
- (b) temporary custody and guardianship followed by supervision;
- (c) temporary custody and guardianship; or
- (d) permanent custody and guardianship, of a child in need of protection.

29(2) Two stage hearing

An application pursuant to subsection (1) shall be conducted in two stages

- (a) a protection hearing pursuant to section 36; and
- (b) a disposition hearing pursuant to section 37.

29(3) Dates for hearings

The date for a protection hearing shall be set in accordance with section 31.

...

34(1) Explanation to child, counsel

Where the Director has made an application pursuant to section 29, and the child who is the subject of the proceedings is at least 12 years old and apparently capable of understanding the circumstances,

- (a) the Director shall explain, to the degree that the child can understand, the nature of the proceedings and their possible implications to the child; and
- (b) the court may order that the child be represented by counsel at the expense of the Director.**

2. Intervenor

Rules of Civil Procedure (PEI)

RULE 13 INTERVENTION

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) Where a person who is not a party to a proceeding claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that he or she may be adversely affected by a judgment in the proceeding; or

(c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,

the person may move for leave to intervene as an added party.

(2) On the motion the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order for pleadings and discovery as is just.

...

LEAVE TO INTERVENE IN COURT OF APPEAL

13.03 Leave to intervene as an added party or as a friend of the court in the

Court of Appeal may be granted by a panel of the court or the Chief Justice of Prince Edward Island.

3. Amicus Curiae

Rules of Civil Procedure (PEI)

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

QUEBEC

1. Legal Representation

Generally

Code of Civil Procedure, CQLR c C-25

BOOK I: GENERAL PROVISIONS

TITLE III RULES APPLICABLE TO ALL ACTIONS

CHAPTER I

ACTIONS, PARTIES TO ACTIONS AND ATTORNEYS

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56. A person must be able to fully exercise his rights to be a party to an action in whatever form it may be, saving contrary provisions of law.

A person who is not able to fully exercise his rights must be represented, assisted or authorized, in the manner provided by the laws which govern his status and capacity or by this Code.

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BOOK II: ORDINARY PROCEDURE IN COURTS OF FIRST INSTANCE

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TITLE V: PROOF AND HEARING

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CHAPTER II.1

REPRESENTATION AND HEARING OF A MINOR OR AN INCAPABLE PERSON OF FULL AGE

394.1. Where, in a proceeding, the court ascertains that the interest of a minor or of a person of full age it considers incapable is at stake and that it is necessary for the safeguard of his interest that the minor or incapable person of full age be represented, it may, even of its own motion, adjourn the hearing of the application until an attorney is appointed to represent him.

The court may also make any order necessary to ensure such representation, in particular, rule on the fees payable to the attorney and determine who will be responsible for their payment.

394.2. To ensure proper representation of a minor or incapable person of full age, the court must, even of its own motion, in all cases where the interest of the minor or incapable person of full age is opposed to the interest of his legal representative, appoint a tutor or curator ad hoc.

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CHAPTER III COSTS

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478.1. The costs of joint actions are shared equally by the parties, unless they have agreed to the contrary or the court, by judgment giving reasons, orders otherwise.

Similarly, costs resulting from the decision of the court to allow a child to be represented by an attorney in family proceedings are shared equally by the parties, unless the court, by judgment giving reasons, orders otherwise.

In any proceedings other than family proceedings, the costs relating to the representation by an attorney of a minor, or a person of full age it considers incapable are awarded by the court according to the circumstances.

Child Protection

Youth Protection Act, CQLR c P-34.1

CHAPTER I INTERPRETATION AND SCOPE

1. In this Act, unless the context indicates a different meaning,

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(c) "child" means a person under 18 years of age;

....

2. This Act applies to any child whose security or development is or may be considered to be in danger.

CHAPTER II GENERAL PRINCIPLES AND CHILDREN'S RIGHTS

...

6. The persons and courts called upon to take decisions respecting a child under this Act must give this child, his parents and every person wishing to intervene in the interest of the child an opportunity to be heard.

...

9. Any child placed in a foster family or by an institution which operates a rehabilitation centre or a hospital centre has the right to communicate in all confidentiality with his advocate, the director who has taken charge of his situations, the Commission and the judges and clerks of the tribunal.

...

CHAPTER V – JUDICIAL INTERVENTION

80. Where the tribunal establishes that the interests of the child are opposed to those of his parents, it must see that an advocate is specifically assigned to counsel and represent the child and that he does not act, at the same time, as counsel or attorney for the parents.

1977, c. 20, s. 80; 1988, c. 21, s. 119; 1989, c. 53, s. 11; 2006, c. 34, s. 48.

81. The tribunal shall hear the persons concerned and the advocates representing them.

The child, the child's parents and the director are parties to the hearing.

The Commission may, ex officio, intervene at the proof and hearing as if it were a party to it. The same applies to the Public Curator if a tutorship is concerned

For the requirements of the proof and hearing, the tribunal may grant any other person the status of party to the hearing if it considers it expedient to do so in the interest of the child. The status of party remains valid until withdrawn by a decision or order of the tribunal.

A person who has information likely to enlighten the tribunal in the interest of the child may, on request, be heard by the tribunal and be assisted by an advocate.

...

84. The tribunal may exclude the child or any other person from the hearing when the information produced could, in the opinion of the tribunal, cause prejudice to the child, if it were produced in the presence of the child or such other person. **The advocate of the child must however remain at the hearing to represent him. If the child has no advocate, the tribunal shall appoint one to him ex officio.**

The advocate of any other person excluded from the hearing may remain present to represent him.

2. Intervenor Status

Code of Civil Procedure, chapter C-25

BOOK II: ORDINARY PROCEDURE IN COURTS OF FIRST INSTANCE

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CHAPTER II: PARTICIPATION OF THIRD PARTIES IN THE ACTION

SECTION I: VOLUNTARY INTERVENTION

An intervening party becomes a party to the proceeding.

1965 (1st sess.), c. 80, a. 210; 2002, c. 7, s. 37.

211. A third party may ask to intervene in order to make representations during the trial. The third party must inform the parties in writing of the purpose of and the grounds for the intervention. After hearing the parties, the court may authorize the intervention if it deems it expedient, having regard to the questions at issue.

3. Amicus Curiae: No statutory provisions

SASKATCHEWAN

1. Legal Representation

Generally

Queen's Bench Rules

...
DIVISION 2 Litigation Representatives

...
Subdivision 1 Persons Under Disability

..
Minor may proceed as adult or by litigation guardian
2-14(1) A minor may commence, continue or defend a proceeding as if of the age of majority if:

(a) the minor is party to a proceeding as a spouse or a co-respondent and the proceeding is a family law proceeding;
(b) the minor has been granted a needy person's certificate; or
(c) before or after commencing the proceeding, the minor obtains the leave of the Court.

(2) A minor may sue for wages as if of the age of majority.

(3) Except where otherwise provided, a minor may commence, continue or defend a proceeding by a litigation guardian.

Rules re appointment of litigation guardian for minor

2-15(1) Unless the Court orders otherwise, any person who is not under disability may act as a litigation guardian for a minor without being appointed by the Court.

(2) No person other than the Public Guardian and Trustee acting pursuant to The Public Guardian and Trustee Act or a litigation guardian appointed by the Court shall act as litigation guardian for a minor until the person has filed an affidavit in Form 2-15.

(3) No person may be appointed as a litigation guardian without that person's consent.

...
Substitution of litigation guardian

2-21(1) If, at any time, it appears to the Court that a litigation guardian is not acting in the best interests of the party under disability or if the litigation guardian wishes to resign, the Court may appoint and substitute another person as litigation guardian on any terms and conditions that the Court considers just.

(2) The Court may give any directions to protect a party under disability that the Court considers proper if, at any time:

(a) no person appears for a party under disability;
(b) the interests of the litigation guardian are, or may be, adverse to the interests of the party under disability; or
(c) the Court is satisfied for any other reason that the interests of the party under disability may require protection.

Family Law

Queens Bench Rules

Part 15: Family Law Proceedings²¹⁴

Parties

15-9(5) A minor may commence, continue or defend a family law proceeding as if of the age of majority.

Child Protection

Queen's Bench Act, 1998, C.Q-1.01

...
PART VI: PROCEDURE

33.1 Appointment of lawyer in protection hearing

33.1(1) In this section, "child" and "protection hearing" have the same meaning as in section 2 of The Child and Family Services Act.

(2) Notwithstanding any of the court's other powers, if an application for a protection hearing is made, the court may direct that the child be represented by a lawyer if the court is satisfied that the interests or views of the child would not otherwise be adequately represented.

(3) If the court directs that a child be represented by a lawyer pursuant to subsection (2), the court shall refer the child to the public guardian and trustee in accordance with section 6.3 of The Public Guardian and Trustee Act,

²¹⁴ What this Part is about: This Part applies to family law proceedings, which include proceedings under The Adoption Act, 1998, The Child and Family Services Act, The Children's Law Act, 1997, The Dependents' Relief Act, 1996, the Divorce Act (Canada), The Enforcement of Maintenance Orders Act, 1997, The Family Maintenance Act, 1997, The Homesteads Act, 1989, The Inter-jurisdictional Support Orders Act, The International Child Abduction Act, 1996, The Marriage Act, 1995, The Family Property Act, The Parents' Maintenance Act, The Victims of Domestic Violence Act, Part XXI of The Queen's Bench Act, 1998, and any other Act that confers jurisdiction on the Family Law Division.

This Part also applies to annulments; the custody or guardianship of, or access to, a child; the determination of parentage or other family relationships; the division of property between spouses, former spouses or persons who have lived together as spouses; judicial separations; the maintenance of a spouse, child or other person; and any other proceeding heard in the Family Law Division.

Unless a different procedure is specified in this Part, the other Parts of the Rules also apply to family law proceedings.

and the public guardian and trustee shall appoint a lawyer to represent the child.

(4) In making a direction pursuant to subsection (2), the court shall consider all relevant factors, including:

(a) any difference between the interests or views of the child and the interests or views of the parties to the protection hearing;

(b) the nature of the protection hearing, including the seriousness and complexity of the issues;

(c) the ability of the child to express his or her interests or views; and (d) the views of the child regarding representation.

(5) Notwithstanding that a child is represented by a lawyer, the child is not a party to the protection hearing

Public Guardian and Trustee Act, SS 1983, c P-36.3

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PUBLIC TRUSTEE ESTABLISHED

...

6.3 Lawyer for child in protection hearing

6.3(1) In this section, "child", "court" and "protection hearing" have the same meaning as in section 2 of The Child and Family Services Act.

6.3(2) Notwithstanding any of the court's other powers, if an application for a protection hearing is made, the court may direct that the child be represented by a lawyer if the court is satisfied that the interests or views of the child would not otherwise be adequately represented.

6.3(3) If the court directs that a child be represented by a lawyer pursuant to subsection (2), the court shall refer the child to the public guardian and trustee and the public guardian and trustee shall appoint a lawyer to represent the child.

6.3(4) On receiving a referral from anyone other than the court, the public guardian and trustee may appoint a lawyer to represent a child with respect to all matters relating to the protection of the child.

6.3(5) If the public guardian and trustee has appointed a lawyer pursuant to subsection (3) or (4), the public guardian and trustee shall file a notice with the court that a lawyer has been appointed.

6.3(6) For the purpose of making appointments pursuant to subsection (3) or (4), the public guardian and trustee may establish and maintain a list of lawyers and may enter into contracts with lawyers and law firms.

6.3(7) The public guardian and trustee and a lawyer appointed pursuant to this section are entitled to do the following:

- (a) have reasonable access to the child;
- (b) obtain disclosure from parties to the protection hearing;
- (c) participate in all matters relating to the protection hearing;
- (d) address the court in a protection hearing;
- (e) file written submissions in a protection hearing;
- (f) call, examine, cross-examine and re-examine witnesses in a protection hearing.

6.3(8) If any person fails to provide access or disclosure in accordance with clause (7)(a) or (b), the public guardian and trustee, or any person designated by the public guardian and trustee on an application ex parte, may request that the court grant an order requiring that person to immediately provide access or disclosure, as the case may be, and the court may make any other order that it considers necessary to enforce the provisions in subsection (7).

6.3(9) Before making an appointment pursuant to subsection (4), the public guardian and trustee shall consider all relevant factors, including:

- (a) any difference between the interests or views of the child and the interests or views of the parties to the protection hearing;
- (b) the nature of the protection hearing, including the seriousness and complexity of the issues;
- (c) the ability of the child to express his or her interests or views; and
- (d) the views of the child regarding representation.

Provincial Court Act, 1988, SS 1998, c. P-30.11

Appointment of lawyer in protection hearing

64.1(1) In this section, “child” and “protection hearing” have the same meaning as in section 2 of The Child and Family Services Act.

(2) If an application for a protection hearing is made, the court may direct that the child be represented by a lawyer if the court is satisfied that the interests or views of the child would not otherwise be adequately represented.

(3) If the court directs that a child be represented by a lawyer pursuant to subsection (2), the court shall refer the child to the public guardian and trustee in accordance with section 6.3 of The Public Guardian and Trustee Act, and the public guardian and trustee shall appoint a lawyer to represent the child.

(4) In making a direction pursuant to subsection (2), the court shall consider all relevant factors, including:

- (a) any difference between the interests or views of the child and the interests or views of the parties to the protection hearing;

- (b) the nature of the protection hearing, including the seriousness and complexity of the issues;
 - (c) the ability of the child to express his or her interests or views; and
 - (d) the views of the child regarding representation.
- (5) Notwithstanding that a child is represented by a lawyer, the child is not a party to the protection hearing.

2. Intervenor

Queen's Bench Act, 1998, C.Q-1.01

PART XII: PARTICULAR FAMILY LAW PROCEEDINGS

...

Allowing intervention on terms

108 A judge may allow a person to intervene in an action, on any terms that the judge considers appropriate, where:

- (a) the person is charged with adultery with any party to the action; or
- (b) the judge considers, in the interest of any person not already a party to the action, that the person should be made a party to the action.

Queen's Bench Rules, Sask. Q.B. Rules

Subdivision 4 Intervenors

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Intervenor status

2-12 On application, the Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

The Court of Appeal Rules

PART VII INTERVENTION

Intervention

17(1) Any person interested in any proceeding before the court may, by leave of the court, intervene in the proceeding on the terms and conditions the court may direct.

(2) Any intervenor before the court appealed from shall be served with a notice of appeal and notice of cross-appeal, if any, but shall not have the status of an intervenor on appeal unless leave to intervene is first granted by the court.

(3) An application to intervene shall be made to the court on notice to all parties and other intervenors in the proceeding.

3. Amicus Curiae

Queen's Bench Rules, Sask. Q.B. Rules

Subdivision 4 Intervenors

...

Leave to intervene as a friend of the Court

2-13(1) The Court may order that a person may, without becoming a party to the proceeding, intervene in the proceeding as a friend of the Court for the purpose of assisting the Court by way of argument or by presentation of evidence.

(2) The Court may make an order pursuant to subrule (1) on any terms as to costs or otherwise that the Court may impose.

R.2-13.

YUKON

4. Legal Representation

Divorce and Family Law

Rules of Court, Y.O.I.C. 2009/65

RULE 63: DIVORCE AND FAMILY LAW

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Minors

Party who is a minor

(22) A minor who has attained the age of 16 years and who is a party to a family law proceeding may act without a litigation guardian and the provisions of Rule 6 do not apply to that party.

Appointment of litigation guardian

(23) Notwithstanding subrule (22), if the court considers that it is in the interest of a minor referred to in subrule (22) or of any child of the minor, it may, on application or on its own motion, appoint a litigation guardian for the minor or for the child of the minor.

Custody, Access and Guardianship

Children's Law Act, RSY 2002, c 31

4. Interpretation

PREAMBLE

In this Act,

"parent" means the father or mother of a child by birth, or because of an adoption order made or recognized under Part 5 of the Child and Family Services Act or any predecessor to that Part; ("père ou mère")

"official guardian" means the Public Guardian and Trustee.

PART 5: PROCEDURAL AND GENERAL MATTERS

...

168. Separate representation of children

168(1) In this section a reference to a child is a reference to a child while still a minor.

168(2) In proceedings under this Act, the official guardian shall have the exclusive right to determine whether any

child requires separate representation by a lawyer or any other person that will be paid for at public expense chargeable to the Yukon Consolidated Revenue Fund.

168(3) In proceedings under this Act a child requiring separate representation may include

- (a) a child for whom there is no guardian other than the official guardian;
- (b) a child in the care of the director of family and children's services; or
- (c) a child alleged to be in need of protection.

168(4) The official guardian may act as guardian for the proceeding or appoint a guardian for the proceeding for a child needing separate representation.

168(5) When determining whether separate representation or the appointment of a guardian for the proceeding for the child at public expense is required, the official guardian

(a) shall consider advice or recommendations from the judge before whom or court in which the proceedings are taking place and any party to the proceeding; and

(b) shall 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.

168(6) If the official guardian is of the opinion that separate representation of a child is required and is best achieved by the appointment of a person other than a lawyer the official guardian may appoint that other person.

168(7) An official guardian who acts as or appoints a guardian for the proceeding pursuant to this section shall as soon as practicable inform the concerned parents or other person entitled to care and custody and cause the child to be informed if the child is of sufficient age and understanding to comprehend the appointment.

Child Protection

Child and Family Services Act, S.Y. 2008, c. 1

Part 1 – Introductory Provisions

1. Definitions

In this Act

...

"child" means a person who is under 19 years of age. ("enfant")

...

"official guardian" means the Public Guardian and Trustee. ("tuteur public")

...

"youth" means a person who is 16 years of age or over but is under 19 years of age. ("adolescent")

...

Part 3 — Protection of Children

Division 5 — Procedure and Evidence

76. Separate representation of children

76(1) For the purposes of an application made or proposed by any person to a judge under this Part, **the official guardian has the exclusive right to determine whether a child requires the appointment of a guardian, or separate representation by a lawyer or any other person, that will be paid for at public expense chargeable to the Government of Yukon's consolidated revenue fund.**

76(2) The official guardian may act as guardian for the proceeding or appoint a guardian for the proceeding for a child needing separate representation.

76(3) When determining whether separate representation or the appointment of a guardian for the proceeding for the child at public expense is required, the official guardian

(a) shall consider advice or recommendations from the judge or from any party to the application; and

(b) shall consider

(i) the ability of the child to comprehend the application,

(ii) whether there exists a conflict between the interests of the child and the interests of any party to the application and, if so, the nature of the conflict, and

(iii) whether the parties to the application will put or are putting before the judge the relevant evidence in respect of the interests of the child that can reasonably be adduced.

76(4) If the official guardian believes that separate representation of a child is required and is best achieved by the appointment of a person other than a

lawyer, the official guardian may appoint that other person.

76(5) An official guardian who acts as or appoints a guardian for the proceeding shall as soon as practicable inform the parents and the child, if the child is of sufficient age and understanding to comprehend

5. Intervenor

Child and Family Services Act, SY 2008, c 1

Parties

48 (2) A judge may grant party or intervenor status to any person on such terms as the judge considers appropriate. S.Y. 2008, c.1, s.48

Court of Appeal Rules, 2005, 2005

PART 6: APPLICATIONS

Applications for intervenor status

36(1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.

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6. Amicus Curiae: No statutory provisions

Appendix B: Appointment of Legal Counsel to the Child in a Child Protection Case

Alberta	Manitoba	New Brunswick	Northwest Territories	Nova Scotia	Nunavut	Ontario	Prince Edward Island	Quebec	Saskatchewan	Yukon
<p>Child, Youth and Family Enhancement Act, RSA 2000, c C-12</p> <p>Legal representative</p> <p>112(1) If an application is made for a supervision order, a private guardianship order or a temporary or permanent guardianship order, or a child is the subject of a supervision order or a temporary or permanent guardianship order or a permanent guardianship agreement, and the child is not represented by a lawyer in a proceeding under Part 1, Division 3, 4 or 5, the Court may direct that the child be represented by a lawyer if (a) the child, the guardian of the child or a director requests the Court to do so, and (b) the Court is satisfied that the interests or views of the child would not be otherwise adequately represented.</p> <p>(2) If the Court directs that a child be represented by a lawyer pursuant to subsection (1), (a) it shall refer the child to the Child and Youth Advocate. (b) repealed 2008 c31 s50.</p> <p>(3) If a referral is made under subsection (2), the Child and Youth Advocate shall appoint or cause to be appointed a lawyer to represent the child.</p> <p>(4) If a referral is made under subsection (2), the Court may make an order directing that the costs of the lawyer be paid by the child, the guardian of the child or a director or</p>	<p>The Child and Family Services Act, CCSM c C80</p> <p>Part III: Child Protection</p> <p>Legal counsel for parent who is a child 34(1.1) Where a parent of a child who is the subject of a hearing under section 27 is a child and is 12 years of age or older, the parent has the right to retain and instruct legal counsel in respect of the hearing without having a litigation appointed for the parent.</p> <p>Counsel for child 34(2) In the case of the child who is the subject of the hearing, a judge or master may order that legal counsel be appointed to represent the interests of the child and, if the child is 12 years of age or older, may order that the child have the right to</p>	<p>Family Services Act, SNB 1980, c F-2.2</p> <p>6(4) In any matter or proceeding under this Act affecting a child, whether before a court or any person having authority to make a decision that affects a child, the child has the right to be heard either on his own behalf or through his parent or another responsible spokesman.</p> <p>6(5) In any proceeding under this Act the court may waive any requirement that the child appear before the court where it is of the opinion that it would be in the best interests of the child to do so and the court is satisfied that the interests and concerns of the child with respect to the matter before the court will not be thereby prejudiced.</p> <p>7 In any proceeding with respect to the custody of a child, whether under this or any other Act, the court shall, (a) if the Minister is not a party to the proceeding, advise the Minister of the proceeding, in which case the Minister may intervene in the proceeding and may take whatever steps he considers necessary to ensure that the interests and concerns of the child are properly</p>	<p>Child and Family Services Act, SNWT 1997, c 13</p> <p>Principles [3.1 not yet in force] 3.1(1) Notice of right to legal counsel The following persons are entitled to be informed of the right to be represented by legal counsel throughout the child protection process: (a) a parent or person having lawful custody or actual care of a child; (b) a child who is able to express his or her views and preferences respecting decisions affecting him or her.</p> <p>3.1(2) Facilitating access to legal counsel After advising a person of the right to be represented by legal counsel, the Director or a Child Protection Worker shall endeavour, to the extent that it is practicable, to facilitate that person's access to legal counsel and, where appropriate, the</p>	<p>Children and Family Services Act, SNS 1990, c 5</p> <p>Child as party and appointment of guardian</p> <p>37 (1) A child who is sixteen years of age or more is a party to a proceeding unless the court otherwise orders and, if a party, is, upon the request of the child, entitled to counsel for the purposes of a proceeding.</p> <p>(2) A child who is twelve years of age or more shall receive notice of a proceeding and, upon request by the child at any stage of the proceeding, the court may order that the child be made a party to the proceeding and be represented by counsel, where the court determines that such status and representation is desirable to protect the child's interests.</p>	<p>Child and Family Services Act, SNWT (NU) 1997, c 13</p> <p>PART IV: GENERAL</p> <p>Procedure 86(1) Counsel for child The court shall ensure that a child who is the subject of a hearing before the court is represented by counsel independent of his or her parents where it appears to the court that (a) the interests of the child and the child's parents are in conflict; or (b) it would be in the best interests of the child to be represented by his or her own counsel.</p>	<p>Child and Family Services Act, RSO 1990, c C.11</p> <p>PART III: CHILD PROTECTION ... Legal Representation Legal representation of child 38. (1) A child may have legal representation at any stage in a proceeding under this Part. Court to consider issue (2) Where a child does not have legal representation in a proceeding under this Part, the court, (a) shall, as soon as practicable after the commencement of the proceeding; and (b) may, at any later stage in the proceeding, determine whether legal representation is desirable to protect the child's interests. Direction for legal representation (3) Where the court determines that legal representation is desirable to protect a child's interests, the court shall direct that legal representation be provided for the child.</p>	<p>Child Protection Act, RSPEI 1988, c C-5.1</p> <p>Court Applications</p> <p>29(1) Application for order The Director may apply to the court for an order for (a) supervision; (b) temporary custody and guardianship followed by supervision; (c) temporary custody and guardianship; or (d) permanent custody and guardianship, of a child in need of protection. 29(2) Two stage hearing An application pursuant to subsection (1) shall be conducted in two stages (a) a protection hearing pursuant to section 36; and (b) a disposition hearing pursuant to section 37. 29(3) Dates for hearings The date for a protection hearing shall be set in accordance with section 31. ... 34(1) Explanation to</p>	<p>Youth Protection Act, CQLR c P-34.1</p> <p>CHAPTER II</p> <p>GENERAL PRINCIPLES AND CHILDREN'S RIGHTS ...</p> <p>6. The persons and courts called upon to take decisions respecting a child under this Act must give this child, his parents and every person wishing to intervene in the interest of the child an opportunity to be heard. ...</p> <p>9. Any child placed in a foster family or by an institution which operates a rehabilitation centre or a hospital centre has the right to communicate in all confidentiality with his advocate, the director who has taken charge of his situations, the Commission and the judges and clerks of the tribunal. ... CHAPTER V – JUDICIAL INTERVENTION</p>	<p>Queen's Bench Act, 1998, C.Q-1.01</p> <p>... PART VI: PROCEDURE</p> <p>33.1 Appointment of lawyer in protection hearing 33.1(1) In this section, "child" and "protection hearing" have the same meaning as in section 2 of The Child and Family Services Act. (2) Notwithstanding any of the court's other powers, if an application for a protection hearing is made, the court may direct that the child be represented by a lawyer if the court is satisfied that the interests or views of the child would not otherwise be adequately represented. (3) If the court directs that a child be represented by a lawyer pursuant to subsection (2), the court shall refer the child to the public guardian and trustee in accordance with section 6.3 of The Public Guardian and Trustee Act, and the public guardian and trustee shall appoint a lawyer to represent the child. (4) In making a direction pursuant to subsection (2), the court shall consider all relevant factors, including: (a) any difference between the interests or views of the child and the interests or views of the parties to the protection hearing; (b) the nature of the protection hearing, including the seriousness and complexity of the issues; (c) the ability of the child to express his or her interests or views; and (d) the views of the child regarding representation. (5) Notwithstanding that a child is represented by a lawyer, the child is not a party to the protection hearing.</p> <p>Public Guardian and Trustee Act, SS 1983, c P-36.3</p> <p>... PUBLIC TRUSTEE ESTABLISHED ...</p> <p>6.3 Lawyer for child in protection hearing</p> <p>6.3(1) In this section, "child", "court" and "protection hearing" have the same meaning as in section 2 of The Child and Family Services Act. 6.3(2) Notwithstanding any of the court's other powers, if an application for a protection hearing is made, the court may direct that the child be represented by a lawyer if the court is</p>	<p>Child and Family Services Act, S.Y. 2008, c. 1</p> <p>Part 3 — Protection of Children</p> <p>Division 5 — Procedure and Evidence</p> <p>76. Separate representation of children 76(1) For the purposes of an application made or proposed by any person to a judge under this Part, the official guardian has the exclusive right to determine whether a child requires the appointment of a guardian, or separate representation by a lawyer or any other person, that will be paid for at public expense chargeable to the Government of Yukon's consolidated revenue fund. 76(2) The official guardian may act as guardian for the proceeding or appoint a guardian for the proceeding for a child needing separate representation. 76(3) When determining whether separate representation or the appointment of a guardian for the proceeding for the</p>

Alberta	Manitoba	New Brunswick	Northwest Territories	Nova Scotia	Nunavut	Ontario	Prince Edward Island	Quebec	Saskatchewan	Yukon
<p>apportioned among all or any of them, having regard to the means of the child and the guardian.</p> <p>Child and Youth Advocate Act, SA 2011, c C-11.5</p> <p>Part 2 Advocate's Role, Functions and General Powers</p> <p>... Role and functions of Advocate</p> <p>9(1) The role of the Advocate is to represent the rights, interests and viewpoints of children.</p> <p>... (c) appoint, or cause to be appointed, lawyers to represent children with respect to any matter or proceeding under the Child, Youth and Family Enhancement Act or the Protection of Sexually Exploited Children Act or any matter or proceeding prescribed by regulation;</p> <p>Child and Youth Advocate Regulation, Alta Reg 53/2012</p> <p>Appointment of lawyer to represent child</p> <p>1(1) If a child is the subject of a permanent guardianship order or a permanent guardianship agreement under the Child, Youth and Family Enhancement Act, the Child and Youth Advocate may appoint or cause to be appointed a lawyer to represent the child where</p> <p>(a) the child is the subject of a guardianship application under the Family Law Act,</p> <p>(b) the child is the subject of a guardianship</p>	<p>instruct the legal counsel.</p> <p>Factors affecting need for counsel for child</p> <p>34(3) In making an order under subsection (2), the judge or master shall consider all relevant matters including,</p> <p>(a) any difference in the view of the child and the views of the other parties to the hearing;</p> <p>(b) any difference in the interests of the child and the interests of the other parties to the hearing;</p> <p>(c) 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;</p> <p>(d) the capacity of the child to express his or her views to the court;</p> <p>(e) the views of the child regarding separate representation , where such</p>	<p>represented separate from those of any other person, including the appointment of counsel or a responsible spokesman to assist in the representation of the interests and concerns of the child, and</p> <p>(b) where the Minister is a party to the proceeding and the court is of the opinion that the interests and concerns of the child should be represented by counsel or by a responsible spokesman, advise the Attorney-General that in his opinion counsel or a responsible spokesman should be made available to assist in the representation of the child's interests and concerns.</p> <p>7.1(1)The court shall consider the following in order to determine whether counsel should be made available under paragraph 7(b):</p> <p>(a) whether the child is 12 years of age or older;</p> <p>(b) whether the child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him or her, have been given consideration in determining his or her interests and concerns;</p> <p>(c) whether the</p>	<p>services of an interpreter.</p> <p>PART IV: GENERAL</p> <p>Procedure</p> <p>....</p> <p>86(1) Counsel for child</p> <p>The court shall ensure that a child who is the subject of a hearing before the court is represented by counsel independent of his or her parents where it appears to the court that</p> <p>(a) the interests of the child and the child's parents are in conflict; or</p> <p>(b) it would be in the best interests of the child to be represented by his or her own counsel.</p>	<p>(3) Upon the application of a party or on its own motion, the court may, at any stage of a proceeding, order that a guardian ad litem be appointed for a child who is the subject of the proceeding and, where the child is not a party to the proceeding, that the child be made a party to the proceeding, if the court determines that such a guardian is desirable to protect the child's interests and, where the child is twelve years of age or more, that the child is not capable of instructing counsel.</p> <p>(4) Where a child is represented by counsel or a guardian ad litem pursuant to this Section, the Minister shall in accordance with the regulations, pay the reasonable fees and disbursements of the counsel or guardian as the case may</p>		<p>Criteria</p> <p>(4)Where,</p> <p>(a) the court is of the opinion that there is a difference of views between the child and a parent or a society, and the society proposes that the child be removed from a person's care or be made a society or Crown ward under paragraph 2 or 3 of subsection 57 (1);</p> <p>(b) the child is in the society's care and,</p> <p>(i) no parent appears before the court, or</p> <p>(ii) it is alleged that the child is in need of protection within the meaning of clause 37 (2) (a), (c), (f), (f.1) or (h);</p> <p>or</p> <p>(c) the child is not permitted to be present at the hearing, legal representation shall be deemed to be desirable to protect the child's interests, unless the court is satisfied, taking into account the child's views and wishes if they can be reasonably ascertained, that the child's interests are otherwise adequately protected.</p> <p>... Where parent a minor</p> <p>(5)Where a child's</p>	<p>child, counsel</p> <p>Where the Director has made an application pursuant to section 29, and the child who is the subject of the proceedings is at least 12 years old and apparently capable of understanding the circumstances,</p> <p>(a) the Director shall explain, to the degree that the child can understand, the nature of the proceedings and their possible implications to the child; and</p> <p>(b) the court may order that the child be represented by counsel at the expense of the Director.</p>	<p>80. Where the tribunal establishes that the interests of the child are opposed to those of his parents, it must see that an advocate is specifically assigned to counsel and represent the child and that he does not act, at the same time, as counsel or attorney for the parents.</p> <p>Civil Code of Québec, CQLR c C-1991</p> <p>... CHAPTER V JUDICIAL INTERVENTION</p> <p>DIVISION I JURISDICTION</p> <p>§ 1. — Declaration and hearing</p> <p>... 78. The tribunal must inform the parents and the child of their right to be represented by an advocate.</p> <p>... 80. Where the tribunal establishes that the interests of the child are opposed to those of his parents, it must see that an advocate is</p>	<p>satisfied that the interests or views of the child would not otherwise be adequately represented.</p> <p>6.3(3) If the court directs that a child be represented by a lawyer pursuant to subsection (2), the court shall refer the child to the public guardian and trustee and the public guardian and trustee shall appoint a lawyer to represent the child.</p> <p>6.3(4) On receiving a referral from anyone other than the court, the public guardian and trustee may appoint a lawyer to represent a child with respect to all matters relating to the protection of the child.</p> <p>6.3(5) If the public guardian and trustee has appointed a lawyer pursuant to subsection (3) or (4), the public guardian and trustee shall file a notice with the court that a lawyer has been appointed.</p> <p>6.3(6) For the purpose of making appointments pursuant to subsection (3) or (4), the public guardian and trustee may establish and maintain a list of lawyers and may enter into contracts with lawyers and law firms.</p> <p>6.3(7) The public guardian and trustee and a lawyer appointed pursuant to this section are entitled to do the following:</p> <p>(a) have reasonable access to the child;</p> <p>(b) obtain disclosure from parties to the protection hearing;</p> <p>(c) participate in all matters relating to the protection hearing;</p> <p>(d) address the court in a protection hearing;</p> <p>(e) file written submissions in a protection hearing;</p> <p>(f) call, examine, cross-examine and re-examine witnesses in a protection hearing.</p> <p>6.3(8) If any person fails to provide access or disclosure in accordance with clause (7)(a) or (b), the public guardian and trustee, or any person designated by the public guardian and trustee on an application ex parte, may request that the court grant an order requiring that person to immediately provide access or disclosure, as the case may be, and the court may make any other order that it considers necessary to enforce the provisions in subsection (7).</p> <p>6.3(9) Before making an appointment pursuant to subsection (4), the public guardian and trustee shall consider all relevant factors, including:</p> <p>(a) any difference between the interests or views of the child and the interests or views of the parties to the protection hearing;</p> <p>(b) the nature of the protection hearing, including the seriousness and complexity of</p>	<p>child at public expense is required, the official guardian (a) shall consider advice or recommendations from the judge or from any party to the application; and</p> <p>(b) shall consider (i) the ability of the child to comprehend the application, (ii) whether there exists a conflict between the interests of the child and the interests of any party to the application and, if so, the nature of the conflict, and (iii) whether the parties to the application will put or are putting before the judge the relevant evidence in respect of the interests of the child that can reasonably be adduced.</p> <p>76(4) If the official guardian believes that separate representation of a child is required and is best achieved by the appointment of a person other than a lawyer, the official guardian may appoint that other person.</p> <p>76(5) An official guardian who acts as or appoints a guardian for the proceeding shall as soon as</p>

Alberta	Manitoba	New Brunswick	Northwest Territories	Nova Scotia	Nunavut	Ontario	Prince Edward Island	Quebec	Saskatchewan	Yukon
<p>application, a trusteeship application, or both, under the Adult Guardianship and Trusteeship Act, or</p> <p>(c) the child is the subject of an application, proceeding or other matter under the Citizenship Act (Canada).</p> <p>(2) If a child is receiving any intervention services under the Child, Youth and Family Enhancement Act or any services under the Protection of Sexually Exploited Children Act, the Child and Youth Advocate may appoint or cause to be appointed a lawyer to represent the child</p> <p>(a) where the child wishes to apply for an order under the Protection Against Family Violence Act, or</p> <p>(b) for matters, other than those under the Youth Criminal Justice Act (Canada) or the Youth Justice Act, where the Child and Youth Advocate is of the opinion that the child requires independent representation.</p>	<p>views can reasonably be ascertained; and</p> <p>(f) the presence of parents or guardians at the hearing.</p>	<p>Minister has been able to identify the child's interests and concerns;</p> <p>(d) whether the interests and concerns of the child and those of the Minister differ;</p> <p>(e) whether counsel is better able to identify the child's interests and concerns; and</p> <p>(f) any other factors the court considers relevant.</p> <p>7.1(2) Upon advising the Attorney General that counsel should be made available under paragraph 7(b), the court shall provide the reasons justifying the decision.</p>		<p>be, including the reasonable fees and disbursements of counsel for the guardian.</p>		<p>parent is less than eighteen years of age, the Children's Lawyer shall represent the parent in a proceeding under this Part unless the court orders otherwise.</p>		<p>specifically assigned to counsel and represent the child and that he does not act, at the same time, as counsel or attorney for the parents.</p>	<p>the issues;</p> <p>(c) the ability of the child to express his or her interests or views; and</p> <p>(d) the views of the child regarding representation.</p> <p>Provincial Court Act, 1988, SS 1998, c. P-30.11</p> <p>Appointment of lawyer in protection hearing</p> <p>64.1(1) In this section, "child" and "protection hearing" have the same meaning as in section 2 of The Child and Family Services Act.</p> <p>(2) If an application for a protection hearing is made, the court may direct that the child be represented by a lawyer if the court is satisfied that the interests or views of the child would not otherwise be adequately represented.</p> <p>(3) If the court directs that a child be represented by a lawyer pursuant to subsection (2), the court shall refer the child to the public guardian and trustee in accordance with section 6.3 of The Public Guardian and Trustee Act, and the public guardian and trustee shall appoint a lawyer to represent the child.</p> <p>(4) In making a direction pursuant to subsection (2), the court shall consider all relevant factors, including:</p> <p>(a) any difference between the interests or views of the child and the interests or views of the parties to the protection hearing;</p> <p>(b) the nature of the protection hearing, including the seriousness and complexity of the issues;</p> <p>(c) the ability of the child to express his or her interests or views; and</p> <p>(d) the views of the child regarding representation.</p> <p>(5) Notwithstanding that a child is represented by a lawyer, the child is not a party to the protection hearing.</p>	<p>practicable inform the parents and the child, if the child is of sufficient age and understanding to comprehend the appointment.</p>

Appendix C: Appointment of Legal Counsel to the Child in the area of Secure Treatment

Prov.	Provisions advising child of right to be represented of a lawyer	Mandatory Provision of legal services	Mandatory requirement that Court appoint legal services for child	Court has discretion to refer child for legal services	Court has discretion to order costs of lawyer to be paid by child in whole or in part
AB	Y ¹	N	N	Y ²	Y ³
ON	N ⁴	Y ⁵	Y ⁶	N ⁷	NA
NS	Y ⁸	N	N	N	NA

¹ *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s. 44(9)(b)(v), s. 44(9)(c)-(d):

s. 44(9) If the Court makes a secure services order, it shall...

(b) provide the child, the child's guardian and the child's lawyer, if any, with a copy of the order and a written statement showing

...

(v) that the child may be represented by a lawyer at any application to the Court

...

(c) provide the child with a written statement showing the address and telephone number of the Child and Youth Advocate, and

(d) provide the child's guardian with a written statement showing the address and telephone number of the nearest office of the Legal Aid Society.

² *Ibid.*, s. 112(1)-(3) (note: Part 1, Division 4 is with respect to a secure services order):

Legal representative

112(1) If an application is made for a supervision order, a private guardianship order or a temporary or permanent guardianship order, or a child is the subject of a supervision order or a temporary or permanent guardianship order or a permanent guardianship agreement, and the child is not represented by a lawyer in a proceeding under Part 1, Division 3, 4 or 5, the Court may direct that the child be represented by a lawyer if

(a) the child, the guardian of the child or a director requests the Court to do so, and

(b) the Court is satisfied that the interests or views of the child would not be otherwise adequately represented.

(2) If the Court directs that a child be represented by a lawyer pursuant to subsection (1),

(a) it shall refer the child to the Child and Youth Advocate.

(b) repealed 2008 c31 s50.

(3) If a referral is made under subsection (2), the Child and Youth Advocate shall appoint or cause to be appointed a lawyer to represent the child.

³ *Ibid.*, s. 112(4): If a referral is made under subsection (2), the Court may make an order directing that the costs of the lawyer be paid by the child, the guardian of the child or a director or apportioned among all or any of them, having regard to the means of the child and the guardian.

⁴ No but see FN 5 and 6 regarding the mandatory representation of a child by a lawyer.

⁵ *Child and Family Services Act*, RSO 1990, c C.11, s. 124(6):

Emergency Admission

...

Notices required

124 (6) The administrator shall ensure that within twenty-four hours after a child is admitted to a secure treatment program under subsection (2),

(a) the child is given written notice of his or her right to a review under subsection (9); and

(b) the Provincial Advocate for Children and Youth and the Children's Lawyer are given notice of the admission.

Mandatory advice

(7) The Provincial Advocate for Children and Youth shall ensure that forthwith after the notice is received a person who is not employed by the secure treatment facility explains to the child his or her right to a review in language suitable for the child's level of understanding.

Children's Lawyer to ensure child represented

(8) The Children's Lawyer shall represent the child at the earliest possible opportunity and in any event within five days after receiving a notice under subsection (6) unless the Children's Lawyer is satisfied that another person will provide legal representation for the child within that time.

⁶ *Ibid.*, s. 114(6):

Part VI: Extraordinary Measures

...

Commitment to Secure Treatment

...

114. (1) Any one of the following persons may, with the administrator's written consent, apply to the court for an order for the child's commitment to a secure treatment program:

...

Legal representation of child

(6) Where an application is made under subsection (1) in respect of a child who does not have legal representation, the court shall, as soon as practicable and in any event before the hearing of the application, direct that legal representation be provided for the child.

⁷ Legal representation is mandatory. See FN 5-6.

⁸ *Children and Family Services Act*, SNS 1990, c 5, s. 55(2)(d):

Secure-treatment certificate

55(2) A secure-treatment certificate shall be in the form prescribed by the regulations and shall include

...

(d) a statement that the child may be represented by counsel at any hearing, including the address and telephone number of the nearest legal-aid office.

Appendix D: Appointment of Legal Counsel to the Child under Mental Health Legislation

Prov.	Provisions re: appointment of legal rep. for children	Provisions re: appointment of representative for patient	Provisions for children re: obligation to advise child of right to retain counsel	Provisions for all patients re: obligation to advise of right to retain counsel	Provisions to allow for representation of patient by individual (legal counsel not specified)	Right of rep. to Notice of hearing	Right of rep. to request adjournment of hearing	Right of rep. to attend hearing	Right of rep to make submissions at hearing	Right of rep to submit evidence at hearing	Right of rep. to cross examine at hearing
AB	N	N	N	N ¹	Y	Y ²	Y ³	Y ⁴	NA ⁵	Y ⁶	Y ⁷
BC	N	N	Y ⁸	Y ⁹	Y	NA	NA	Y(Q) ¹⁰	Y(Q) ¹¹	Y(Q) ¹²	NA
MB	N	N	N	Y ¹³	Y	Y ¹⁴	N/A	Y ¹⁵	NA ¹⁶	Y ¹⁷	Y ¹⁸
NB	N	Y ¹⁹	N	Y ²⁰	Y	Y ²¹	Y ²²	Y ²³	Y ²⁴	Y ²⁵	Y ²⁶
NL	N	Y ²⁷	N	Y ²⁸	Y	Y ²⁹	NA	Y ³⁰	Y ³¹	Y ³²	Y ³³
NT	N	N	N	Y ³⁴	Y	NA	NA	NA ³⁵	NA ³⁶	NA ³⁷	NA ³⁸
NS	N	Y ³⁹	N	Y ⁴⁰	Y	Y ⁴¹	NA	Y ⁴²	NA ⁴³	Y ⁴⁴	Y ⁴⁵
NU ⁴⁶	N	N	N	Y	Y	NA	NA	NA	NA	NA	NA
ON	Y ⁴⁷	Y ⁴⁸	N	Y ⁴⁹	Y	Y ⁵⁰	Y ⁵¹	Y ⁵²	Y ⁵³	Y ⁵⁴	Y ⁵⁵
PE	N	N	N	Y ⁵⁶	Y	Y ⁵⁷	NA	Y ⁵⁸	Y ⁵⁹	Y ⁶⁰	Y ⁶¹
QC	N	N	N	Y ⁶²	Y	Y ⁶³	NA	Y ⁶⁴	Y ⁶⁵	Y ⁶⁶	Y ⁶⁷
SK	N	Y ⁶⁸	N	Y ⁶⁹	Y	Y ⁷⁰	NA	Y ⁷¹	Y	Y ⁷²	Y ⁷³
YU	Y ⁷⁴	Y ⁷⁵	N	Y ⁷⁶	Y	Y ⁷⁷	NA	Y ⁷⁸	Y ⁷⁹	Y ⁸⁰	Y ⁸¹

¹ There are no provisions under the Alberta *Mental Health Act*, RSA 2000, c M-13 requiring patients to be advised of their right to legal counsel; however, upon receipt of a complaint, the Patient Advocate, under the *Mental Health Patient Advocate Regulation*, Alta Reg 148/2004, shall provide to the patient, as far as it is reasonable, information including how the patient may obtain legal counsel.

² *Mental Health Act*, RSA 2000, c M-13 s. 40(1)-(3).

³ *Ibid.*, s. 40(5).

⁴ *Ibid.*, s. 37(3).

⁵ For the purposes of this chart NA means there are no provisions addressing same.

⁶ *Mental Health Act*, RSA 2000, c. M-13, s.37(3).

⁷ *Idem.*

⁸ The director must give notice to patients under sixteen years of age to “the right set out in section 10 of the Canadian Charter of Rights and Freedoms”, *Mental Health Act*, RSBC 1996, c 288, s. 34.1(2)(b); also see *Child, Family and Community Service Act*, RSBC 1996, c 46, s. 8.

⁹ *Mental Health Act*, RSBC 1996, c288, s.34(2)(b).

¹⁰ There is no provision regarding the right to attend the hearing; however see FN 12 and 13.

¹¹ For the purposes of this chart Y(Q) means yes with a qualification. See *Mental Health Act*, RSBC 1996, c288, s.25(2.4) right to make submissions only once the person “satisfies the review panel that he or she has a material interest in or knowledge of matters relevant to the hearing”.

¹² *Mental Health Act*, RSBC 1996, c288, s.24.3(1) and 25(2.6) by way of order of the review panel.

¹³ *Mental Health Act*, CCSM c M110, s. 14(c), 32(1)(d), 32(2), 33(1).

¹⁴ *Ibid.*, s. 53(2), s. 58.

¹⁵ *Ibid.*, s. 52(4).

¹⁶ No specific provisions regarding submissions but see s. 54(2) “Each party may present any evidence that the review board considers relevant and may question witnesses”.

¹⁷ *Ibid.*, s. 52(1), 54(2).

¹⁸ *Ibid.*, s. 52(1), 54(2).

¹⁹ See provisions regarding psychiatric patient advocate services and psychiatric patient advocates in *General Regulation*, NB Reg 94-33, ss. 21-22.1(2):

Psychiatric Patient Advocate Services and Psychiatric Patient Advocates

21. The administrator of a psychiatric facility shall provide access to office space and secretarial services in the facility to assist a psychiatric patient advocate service in carrying out its responsibilities under the Act and this Regulation.

22(1)A psychiatric patient advocate, upon learning of an application under section 8 or 12 of the Act, shall ascertain whether the person who is the subject of the application has a representative and the name and address of the representative and shall advise the chairman of the tribunal of the name and address of the representative.

22(2)A psychiatric patient advocate shall act as the representative of a person who is detained in a psychiatric facility under an examination certificate issued under section 7.1 of the Act, who is the subject of an application under section 8 or 12 of the Act or who is an involuntary patient if the person is unable to represent himself and the person is not otherwise represented and it would be detrimental, in the opinion of the psychiatric patient advocate, to the best interests of the person if the person was not represented.

22.1(1)Notwithstanding that a person who is the subject of an application under section 8 or 12 of the Act has a representative, a psychiatric patient advocate has full party status to act before a tribunal dealing with the application and may call witnesses, cross-examine witnesses, make submissions and do such other things that he or she considers to be in the best interests of the person who is the subject of the application.

22.1(2)Nothing in subsection (1) requires a psychiatric patient advocate to act in any proceeding before a tribunal if the person referred to in subsection (1) has a representative.

Also see *Mental Health Act*, RSNB 1973, c M-10, s. 7.6(2) regarding the duties of the psychiatric patient advocate:

7.6(2) It is the duty of a psychiatric patient advocate service to offer advice and assistance to persons who are detained in a psychiatric facility under examination certificates issued under section 7.1, to persons who are the subjects of applications under section 8 or 12 and to involuntary patients in psychiatric facilities, and to provide psychiatric patient advocates to meet, confer with, advise and assist persons who are detained in a psychiatric facility under examination certificates issued under section 7.1, who are the subjects of applications under section 8 or 12 or who are involuntary patients.

²⁰ *Mental Health Act*, RSNB 1973, c M-10, s. 7.1(5)(a), s. 7.3(b), s. 10.1(a), s. 12(2), and s. 12(3).

²¹ General Regulation, NB Reg 94-33, s. 10(1)(b)-(c); *Mental Health Act*, RSNB 1973, c M-10, s. 21.

²² General Regulation, NB Reg 94-33, s. 12, s. 19; *Mental Health Act*, RSNB 1973, c M-10, s. 7.6(5).

²³ General Regulation, NB Reg 94-33, s. 10(3), s. 10(3)(c)-(d).

²⁴ *Ibid.*, s. 10(4).

²⁵ *Idem.*

²⁶ *Idem.*

²⁷ *Mental Health Care and Treatment Act*, SNL 2006, c M-9.1, Part II: Rights and Rights Advisors:

Rights advisor

13. (1) The minister may appoint one or more rights advisors in accordance with the regulations.
- (2) A rights advisor shall not be a person who is
- (a) involved in the direct clinical care of the person to whom the rights advice is to be given; or
- (b) providing treatment or care and supervision under a community treatment plan.

Functions of rights advisor

14. (1) The rights advisor may offer advice and assistance in accordance with this Act to
- (a) a person who is an involuntary patient;
- (b) a person who is residing in the community under a community treatment order or its renewal; and
- (c) the representative of a person referred to in paragraph (a) or (b).
- (2) The rights advisor shall
- (a) meet in person or by other means as soon as possible with a person referred to in paragraph (1)(a) or (b) and in any event within 24 hours of the person becoming an involuntary patient or the issuance of a community treatment order and meet after that at the request of the person referred to in paragraph (1)(a) or (b) or as required by this Act or the regulations;
- (a.1) contact a person referred to in paragraph (1)(a) or (b) and his or her representative within 10 days of the meeting referred to in paragraph (a) unless the person or the representative contacts the rights advisor first;
- (b) explain the significance of a certificate of involuntary admission or a community treatment order or the renewal of a certificate of involuntary admission or a community treatment order to the person who is subject to the certificate or order;
- (c) communicate information in a neutral, non-judgmental manner;
- (d) meet as soon as is practicable in person or by other means with the representative of a person referred to in paragraph (1)(a) or (b) and after that at the request of the representative or as required by this Act or the regulations;
- (e) at the request of the person or his or her representative, assist the person in making application to the board in accordance with this Act and the regulations;

-
- (f) at the request of the person or his or her representative, assist the person in obtaining legal counsel;
 - (g) at the request of the person or his or her representative, accompany the person to board hearings;
 - (h) maintain confidentiality; and
 - (i) perform other functions prescribed by the regulations.

Notice to rights advisor

- 15. (1) The administrator shall ensure that the rights advisor is given notice of
 - (a) a decision to admit or detain a person in a psychiatric unit;
 - (b) the filing of each certificate in respect of an involuntary patient;
 - (c) the cancellation or expiration of a certificate of involuntary admission and the release of an involuntary patient from a psychiatric unit;
 - (d) the change in status of a voluntary patient to an involuntary patient; and
 - (e) an application to the board under section 33.
- (2) The administrator or attending psychiatrist, as appropriate, shall ensure that the rights advisor is given notice of
 - (a) the issuance, renewal, expiry, termination or revocation of a community treatment order; and
 - (b) an application to the board under subsection 53(3).

²⁸ *Ibid.*, s. 10(c), s. 11(1)(a)(iii), s.11(2)(a)(ii), s.12(3), s.12(4)(c)(i), s.41(3)(a).

²⁹ *Ibid.*, s. 12(8), s.67(2).

³⁰ *Ibid.*, s. 14(1)(g).

³¹ *Ibid.*, s. 67(3)(b).

³² *Ibid.*, s. 67(3)(b), s.70(1)(d).

³³ *Ibid.*, s.70(1)(e).

³⁴ *Mental Health Act*, RSNWT 1988, c M-10, s. 35(2) regarding the obligation to advise of right to consult with a lawyer; under s. 19.5(3) a medical practitioner shall also advise patient of the right to appoint a representative.

³⁵ Although further to FN 34, the patient shall be advised of the right to consult with a lawyer and to appoint a representative, the scope of the lawyer or representatives involvement is not clear from the Act. Further to sections s. 9(50(a)(i)), 23.4(1), 28(1) various hearing shall be held that impact the patient's rights and the adjudicator is to consider evidence and the testimony of the patient "where practicable". The right to notice and the participatory rights in the hearings is not clear on the face of the Act.

³⁶ *Idem.*

³⁷ *Idem.*

³⁸ *Idem.*

³⁹ See "Functions and duties of Patient Advisor Service" under *Involuntary Psychiatric Treatment Act*, SNS 2005, c 42, s. 61; Note that under s.71(2) "Where the patient is unable or unwilling to attend a hearing before the Review Board and the patient has not appointed someone to act on the patient's behalf, the Review Board shall appoint a representative to attend the hearing and act on behalf of the patient."

⁴⁰ *Involuntary Psychiatric Treatment Act*, SNS 2005, c 42, s.26(c), *Involuntary Psychiatric Treatment Regulations*, NS Reg 235/2007, s.4(1)(c), s. 4(3).

⁴¹ *Involuntary Psychiatric Treatment Act*, SNS 2005, c 42, s. 70(2).

⁴² *Ibid.*, s. 71(1), s. 72.

⁴³ There are no direct provisions regarding the right to make submissions however see s. 72: "Every party is entitled to be represented by counsel or an agent in a hearing before the Review Board"; and s.73(1): "Every party is entitled to present such evidence as the Review Board considers relevant and to question witnesses."

⁴⁴ *Ibid.*, s. 73(1).

⁴⁵ *Idem.*

⁴⁶ *Mental Health Act*, RSNWT (Nu) 1988, c M-10, see all FN for Northwest Territories as statutory provisions are exactly the same.

⁴⁷ *Mental Health Act*, RSO 1990, c M.7, s.43, in particular:

Counsel for patient under 16

43. If a patient who is less than 16 years old is a party to a proceeding before the Board under section 13 or 39 and does not have legal representation,

- (a) the Board may direct the Children's Lawyer to arrange for legal representation to be provided for the patient; and
- (b) the patient shall be deemed to have capacity to retain and instruct counsel. 1996, c. 2, s. 72 (27).

⁴⁸ *Mental Health Act*, RSO 1990, c M.7:

Definition

1.1

"rights adviser" means a person, or a member of a category of persons, qualified to perform the functions of a rights adviser under this Act and designated by a psychiatric facility, the Minister or by the regulations to perform those functions, but does not include,

- (a) a person involved in the direct clinical care of the person to whom the rights advice is to be given, or
- (b) a person providing treatment or care and supervision under a community treatment plan; ("conseiller en matière de droits")

Notice of certificate

Part II Hospitalization

Notice of Certificate

38. (1) An attending physician who completes a certificate of involuntary admission or a certificate of renewal shall promptly give the patient a written notice that complies with subsection (2) and shall also promptly notify a rights adviser. 1992, c. 32, s. 20 (24).

Contents of notice to patient

(2) The written notice given to the patient shall inform the patient,

(a) of the reasons for the detention;

(b) that the patient is entitled to a hearing before the Board;

(c) that the patient has the right to retain and instruct counsel without delay; and

(d) that the patient has the right to apply to the Board for a transfer to another psychiatric facility as described in section 39.2. 2010, c. 1, Sched. 17, s. 3.

Rights adviser

(3) The rights adviser shall promptly meet with the patient and explain to him or her the significance of the certificate, the right to have it reviewed by the Board and, where applicable, the right to apply to the Board for a transfer. 2010, c. 1, Sched. 17, s. 3.

(4), (5) Repealed: 2004, c. 3, Sched. A, s. 90 (16).

Notice of child's right

(6) Whenever a child has a right to apply to the Board under section 13, the officer in charge shall promptly give the child a written notice of the fact that indicates the child is entitled to a hearing before the Board, and shall also promptly notify a rights adviser. 1992, c. 32, s. 20 (24).

Rights adviser

(7) The rights adviser shall promptly meet with the child and explain to him or her the right to apply to the Board under section 13. 1992, c. 32, s. 20 (24).

Exception

(8) Subsections (3) and (7) do not apply if the person himself or herself refuses to meet with the rights adviser. 1992, c. 32, s. 20 (24); 2004, c. 3, Sched. A, s. 90 (17).

Assistance

(9) At the person's request, the rights adviser shall assist him or her in making an application to the Board and in obtaining legal services. 1992, c. 32, s. 20 (24).

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Part III Estates

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Advice to patient, notice to rights adviser

59.(1)A physician who issues a certificate of incapacity or a certificate of continuance shall promptly advise the patient of the fact and shall also promptly notify a rights adviser.

Meeting with rights adviser

(2)The rights adviser shall promptly meet with the patient and explain to him or her the significance of the certificate and the right to have the issue of the patient's capacity to manage property reviewed by the Board.

Exception

(3)Subsection (2) does not apply if the patient himself or herself refuses to meet with the rights adviser.

Assistance

(4)At the patient's request, the rights adviser shall assist him or her in making an application to the Board and in obtaining legal services. 1992, c. 32, s. 20 (43).

⁴⁹ S. 33.1(4)(e), s.33.1 (8), s. 38(2)(c), s. 38.1(2).

⁵⁰ *Consent and Capacity Board Rules of Practice*, s. 11.1-11.4 [Preamble: "These Rules have been adopted by the Consent and Capacity Board (the "Board") pursuant to section 25.1 of the Statutory Powers Procedure Act. Except where their application is statutorily excluded, these Rules apply to hearings held under the Health Care Consent Act, 1996, Long-Term Care Act, 1994, Mental Health Act and Substitute Decisions Act, 1992."], online: <http://www.ccboard.on.ca/english/legal/documents/rulesofpractice.pdf> [the "CCB Rules"].

⁵¹ *CCB Rules*, Rule 22.1-22.2.

⁵² *CCB Rules*, Rule 2.1.

⁵³ *CCB Rules*, Rule 29.1.

⁵⁴ *CCB Rules*, Rules 23.1, 25.1.

⁵⁵ *CCB Rules*, Rule. 24.1.

⁵⁶ *Mental Health Act*, RSPEI 1988, c M-6.1, s. 10(c), s. 11(c), s. 17(1)(c), s. 17(2), s. 32(1)(b)(ii), s. 32(2)-(3).

⁵⁷ *Ibid.*, s. 29(2).

⁵⁸ *Ibid.*, s.29(3).

⁵⁹ *Ibid.*, no specific provisions regarding right to make submissions, however this is presumed as patient has right to counsel and rights at hearing include questioning witnesses and presenting evidence.

⁶⁰ *Ibid.*, s. 29(5).

⁶¹ *Idem.*

⁶² *An Act Respecting the Protection of Persons Whose Mental State Presents a Danger to Themselves or to Others*, CQLR c P-38.001, s. 14, s. 15, Schedule 5(e); *An Act Respecting Administrative Justice*, CQLR c J-3, s. 103.

⁶³ *An Act Respecting Administrative Justice*, CQLR c J-3, s. 112, s. 129.

⁶⁴ *Ibid.*, s. 10, s. 12, s. 128.

⁶⁵ *Ibid.*, s. 142.

⁶⁶ *Ibid.*, s. 137.

⁶⁷ *Ibid.*, s. 132, s.142.

⁶⁸ *Mental Health Services Act*, SS 1984-85-86, c M-13.1, s.10(1)-(4):

Official representatives

10(1) In this section, "person" includes a partnership.

(2) The minister shall appoint one or more persons to be official representatives for each region to assist patients in understanding their rights and obligations pursuant to this Act.

(3) The director may, if he or she considers it necessary or advisable for the purposes of this Act, assign an official representative to assist patients in a region that is in addition to the region for which the official representative was appointed.

Mental Health Services Regulations, RRS c M-13.1 Reg 1, s. 13:

Official representative

13(1) An official representative for a region:

Official representative

13(1) An official representative for a region:

(a) on receipt of notice that a person has been apprehended or detained in the region pursuant to section 18, 19, 21, 22, 23.1 or 24.6 of the Act, shall make any contact with the person that he or she considers necessary to advise that person concerning his or her rights and obligations in relation to the apprehension or detention;

(b) on receipt of notice that a patient has been detained in a mental health centre in the region pursuant to section 23 of the Act, shall visit the patient as soon as is practicable after his or her detention and advise that patient concerning his or her rights and obligations in relation to detention pursuant to the applicable clause of section 23 of the Act;

(c) on receipt of notice that a patient has been detained in a mental health centre in the region pursuant to section 24 of the Act, shall visit the patient within 24 hours after the commencement of the patient's detention to introduce himself or herself as an official representative for the purposes of the Act, to provide information concerning the rights and obligations of the patient in relation to the detention, and to offer assistance to enable the patient to exercise his or her rights;

(d) on receipt of an application for a long-term detention order pursuant to section 24.1 of the Act, shall visit the person who is the subject of the application as soon as is practicable, provide the person with information concerning his or her rights and obligations with respect to the application, and as far as is reasonably practicable, provide any assistance that is requested, including the following:

(i) assisting the person to obtain legal counsel;

(ii) accompanying the person to the court hearing;

(iii) representing the person at the court hearing;

(e) on receipt of a notice that a person is subject to a community treatment order, shall speak with that person as soon as is practicable after the community treatment order comes into effect in order to provide information concerning the rights and obligations of the person in relation to the community treatment order and to offer assistance to enable the person to exercise his or her rights;

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- (f) on receipt of notice that a patient has been ordered to be transferred from a mental health centre in the region pursuant to section 28 of the Act, shall visit the patient as soon as is practicable, and in any event before the transfer of the patient, to provide information concerning the rights and obligations of the patient in relation to the order for transfer and to offer assistance to enable the patient to exercise his or her rights;
- (g) on receipt of notice that a person has been ordered to be returned to another jurisdiction pursuant to section 28.2 of the Act, shall:
- (i) visit the person as soon as is practicable, and in any event before the transfer of the person out of Saskatchewan, to provide information concerning the rights and obligations of the person with respect to the order and to offer assistance to enable the person to exercise his or her rights; and
- (ii) if requested to do so by the person, assist him or her to submit an appeal to the Court of Queen's Bench;
- (h) on receipt of notice that a decision has been made to administer to a patient in the region a treatment that is designated as a special treatment pursuant to clause 43(g) of the Act, shall visit the patient as soon as is practicable, and in any event, except in case of emergency, before the commencement of the special treatment, and advise the patient concerning his or her rights and obligations in relation to the special treatment that has been directed;
- (i) may visit any patient in a mental health centre, with the consent of that patient, for the purpose of advising the patient concerning his or her rights and obligations, after:
- (i) notifying the officer in charge of his or her intention to visit the patient; and
- (ii) giving consideration to any information provided by the officer in charge relating to the timing of the visit;
- (j) may visit any out-patient, at the request of that patient, to advise the patient concerning his or her rights;
- (k) subject to subsection (2.1), if a person who is entitled pursuant to subsection 33(2) of the Act to appeal to a review panel decides to appeal and requests the assistance of the official representative to initiate or to pursue an appeal, shall provide as far as is reasonably practicable any assistance that is requested, including:
- (i) submitting an appeal;
- (ii) assisting the patient to obtain legal counsel;
- (iii) accompanying the patient to the review panel hearing;
- (iv) representing the patient at the review panel hearing;
- (v) if a person is dissatisfied with the decision of the review panel, assisting the patient to submit an appeal to the Court of Queen's Bench; and
- (vi) generally assisting the patient to remain informed during the review process;
- (l) if a patient who is entitled to appeal to a review panel concerning detention pursuant to section 24 of the Act or an order for transfer pursuant to section 28 of the Act does not submit an appeal and if the official representative considers it advisable that an appeal should be submitted, shall submit an appeal on behalf of that patient;
- (m) shall create and maintain a file on each patient about whom he or she receives information, including copies of any certificates, warrants or orders, and a description of services provided by the official representative in relation to that patient pursuant to the Act or these regulations;
- (n) unless he or she is required to do so by law, shall not disclose information obtained in the course of serving as an official representative for any purpose other than performing the duties and responsibilities, including providing instructions to a lawyer, of an official representative prescribed in the Act or these regulations.
- (2) Clause (1)(n) does not apply to the provision of information to the director if

the name and other means of identifying the patient are removed.

(3) For the purposes of clause 33(2)(c) of the Act, the official representative shall take into consideration the wishes of the patient in providing any assistance requested by the patient's nearest relative, proxy or personal guardian regarding initiating an appeal of a decision mentioned in subsection 33(1) of the Act, if an appeal is not consistent with the patient's wishes.

(4) An official representative acting pursuant to subsection (1) shall be given access to any information that he or she requires in order to provide advice or assistance to a patient.

⁶⁹ *Mental Health Services Act*, SS 1984-85-86, c M-13.1, s. 34(7).

⁷⁰ *Mental Health Services Regulations*, RRS c M-13.1 Reg 1, s. 21(1)(a)(i),(ii).

⁷¹ *Mental Health Services Act*, SS 1984-85-86, c M-13.1, s. 34(7)(c),(e); *Mental Health Services Regulations*, RRS c M-13.1 Reg 1, s. 13(1)(iii), 12(1)(k)(iii)-(iv).

⁷² *Mental Health Services Act*, SS 1984-85-86, c M-13.1, s. 34(7)(c),(e); *Mental Health Services Regulations*, RRS c M-13.1 Reg 1, s. 23.

⁷³ *Mental Health Services Act*, SS 1984-85-86, c M-13.1, s. 34(7)(d),(e).

⁷⁴ *Mental Health Act*, RSY 2002, c 150, s. 45: "The Minister may make available legal services or patient advisor services for persons who are detained as involuntary patients."

⁷⁵ *Mental Health Act*, RSY 2002, c 150, s. 45: "The Minister may make available legal services or patient advisor services for persons who are detained as involuntary patients."

⁷⁶ *Ibid.*, s. 9(1)(c), s. 9(2)(c), s. 39(1)-(2).

⁷⁷ *Ibid.*, s. 5(a).

⁷⁸ *Ibid.*, s. 33(5)(e).

⁷⁹ *Ibid.*, s.33(5)(e).

⁸⁰ *Ibid.*, s. 33(5)(c).

⁸¹ *Ibid.*, s.33(5)(g).