

Children's Legal Rights in Canada under the United Nations Convention on the Rights of the Child

The Honourable Donna J. Martinson Q.C.

Retired Justice of the British Columbia Supreme Court

**National Judicial Institute
Family Law Program: Children
Toronto, Ontario
February 3-5, 2016**

Children's Legal Rights in Canada under the United Nations Convention on the Rights of the Child

OUTLINE

Overview

Part One - The UN Convention on the Rights of the Child - A Primer

I – Nature of Children's Legal rights

- A. The Sources of Children's Legal Rights
- B. A Rights Based Approach: Special Considerations Relating to Children
- C. The Legal Status of the CRC in Canada
 - 1. Canada's Method of Implementing the CRC
 - 2. The Charter and the CRC
 - 3. The Interpretation of Canadian Legislation: the Presumption of Conformity to International Law
- D. Identifying and Remediating Children's Inequality: Mandatory Contextual Analysis

II – General Operation of the CRC

- A. Canada has Legal Obligations under the CRC to Comply With It
- B. The UN Committee on the Rights of the Child
- C. The UN Committee's General Comments Provide Authoritative Direction to Canada
- D. The Four General Principles under the CRC
- E. Other Rights Found in the CRC
- F. Optional Protocols
- G. Reservations

III – The Best Interests of the Child as a Primary Consideration

IV – Children's Participation Rights

V – When Children's Best Interests Must be Considered.

VI – Concluding Observations, Canada

Part Two - A Roadmap for Change for Children

- I. The Need for a Specific Roadmap for Change for Children**
- II. The UN Concluding Observations and A Roadmap for Change: Opportunities to Advance Children's Rights**
 - A. Putting Children First
 - B. Focusing on Just Outcomes for Children
 - C. Making Justice for Children a Central Aspect of Legal Professionalism
 - D. Taking an Expanded View of Access to Justice for Children
 - E. Collaborating and Coordinating
 - F. Researching About Children and Justice
 - G. Significantly Shifting Legal Culture Relating to Children
- III. Final Thoughts – The Importance of Effective Legal Representation for Children**

OVERVIEW

The Canadian Bar Association is developing a Child Rights Toolkit. I, as a member of the CBA National Children's Law Committee, have the privilege of chairing the United Nations Convention on the Rights of the Child (the CRC) sub-committee which is overseeing the development of the Toolkit. I also co-chair, with Caterina Tempesta, counsel with the Ontario Office of the Children's Lawyer, the Toolkit Steering Committee responsible for its actual content. The Committee obtained funding through the CBA Law for the Future Fund to develop the comprehensive, on line toolkit. Victoria child rights lawyer Suzanne Williams has been retained as the toolkit consultant and writer. The toolkit development is well underway.¹

I have prepared this paper for two reasons. The first, found in Part One, is to provide the draft toolkit section I have prepared on the CRC and how it applies in Canada; it is, in essence a primer. It is also a consultation draft and the Toolkit Steering Committee would value any suggestions judges might have about ways in it could be improved. The Steering Committee members would also appreciate more general comments on ways in which the Toolkit might better assist both lawyers and judges in their work. (Please provide any comments you might have to me at donna.martinson1@gmail.com).

The second purpose of the paper, found in Part Two, is to suggest a method by which the consideration of children's rights in Canada might be incorporated into the ongoing access to justice discussions in which the legal profession is engaged. I respectfully suggest that we need a specific Roadmap for Change for Children.

Part One Summary - The CRC: A Primer

The CRC primer addresses children's legal rights by identifying "key points" under a number of topics. In summary it indicates that the CRC operates by:

- imposing specific obligations on Canada, as a country which has ratified the Convention, to make sure that it is implemented;
- creating a Committee on the Rights of the Child which is charged with making sure that countries, such as Canada, who ratify it, comply with its provisions. The Convention gives the Committee on the Rights of the Child the mandate to make sure that Canada actually implements it effectively; these authoritative directions include General Comments and also Concluding Observations specifically for Canada. (Canada's compliance is also reviewed under broader human rights reviews known as Universal Periodic Reviews)

¹For more information about the CBA Child Rights Toolkit, see *The Canadian Bar Association – Child Rights Toolkit*, found in the NJI program materials.

- specifically linking children's best interests to the implementation of **all** of their human rights set out in the Convention.
- requiring that children's best interests are a **primary** consideration in all matter affecting the child meaning that they cannot be considered on the same level as other considerations; when there is a conflict, the child's best interests must be applied to resolve the conflict;
- making children's rights of participation in all matters affecting them an integral part of determining their best interests, and setting out, through General Comments, very specific requirements for their effective participation;
- requiring that children's best interests must be explicitly considered in all decisions (and other actions, such as creating policies and procedures, and developing services affecting them) made by:
 - Courts of law, which includes all relevant procedures concerning children, without restriction, and specifically conciliation, mediation and arbitration processes;
 - administrative authorities at all levels (including education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality among others); and
 - public and private welfare authorities.
- with respect to legislative bodies, requiring that budget decisions and **all** laws, regulations, policies and practices, not just those directly affecting children, must consider children's best interests and involve child rights impact assessments, monitoring and evaluation.

The CRC was signed by Canada on May 28, 1990 and ratified on December 13, 1991. It has not been directly incorporated into domestic legislation, though it is sometimes referred to in legislation, such as the *Youth Criminal Justice Act*. Though not incorporated directly by Parliament or legislators, Canada officially implements the CRC by stating that all laws, policies and practices comply with it. It has done this by: ensuring at the time it was signed and ratified that Canada's laws, policies and practices comply with the Convention; stating that laws, policies and practices developed after ratification continue to comply with the Convention; and declining to directly incorporate the Convention into legislation on the basis that it does already fully comply.

Canada's Charter must be presumed to provide protection at least as great as that afforded by similar protections in the CRC and other International Human Rights Instruments. There is a legal presumption that Canadian statutes conform not only to

the rights and values found in the Charter but also to International Law, including the CRC. The presumption is rebuttable. If a statute is unambiguous, its provisions must be followed. Contextual legal analysis, required by law, connects children's human rights with the reality of the lives of children, measuring that reality against their legal entitlements, and using the reality of their lives to provide substance to human rights laws.

Part One begins with a list of the key points identified. After that, the foundation for each key point is described. This Part covers these topics: I. Nature of Children's Legal Rights; II. General Operation of the CRC; III. The Best Interests of the Child as a Primary Consideration; IV. Children's Participation Rights; V. When Children's Rights Must Be Considered; and VI. Concluding Observations, Canada.

Part Two Summary - A Roadmap for Change for Children

It is well known that recent access to justice reports by the National Action Committee and the Canadian Bar Association have identified significant family and civil justice concerns. While the access to justice concerns raised apply with even greater force to children, the recommendations made are primarily, though not exclusively, focused on access to justice for adults. Children's access to justice issues are, for the most part, considered by looking at the ways in which children benefit from a system which operates more effectively for adults. While the steps being taken are laudable and that benefit is welcome, Canada has legal obligations to recognize the special access to justice considerations that apply to children and act on them.

This part considers several recommendations of the National Action Committee report, ***A Roadmap for Change***, connects those specifically to children, and links them to the UN Committee on the Rights of the Child Concluding Observations, Canada. They are: putting children first; focusing on outcomes for children; making justice for children a central aspect of legal professionalism; taking an expanded view of access to justice for children; collaborating and coordinating within the justice system for the benefit of children; engaging in more research about children and justice; and creating significant shift in our culture of reform for children.

The part concludes with a brief discussion about the importance of legal representation for children. As noted above, the UN Committee on the Rights of the Child includes legal representation for children as part of children's required procedural guarantees. Specifically, the Committee members state that the child will need all appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. They add that In particular the child should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

Yet, children in Canada simply are not represented by their own lawyer most of the time when their best interests are being assessed. Some provinces and territories do better at providing counsel for specific children, but there is no consistency of approach. It is

not good enough to fall back on the outdated thinking that says that adults know what is best for children and can advance their interests for them. Instead, because of the special considerations that apply to children, they are more in need of independent legal representation than most adults.

Part Two discusses these issues under these headings: I. The Need for a Specific Roadmap for Change for Children; II. The UN Concluding Observations and A Roadmap for Change: Opportunities to Advance Children's Rights; and III. Final Thoughts – The Importance of Effective Legal Representation for Children.

PART ONE - THE CRC - A PRIMER

LIST OF KEY POINTS

I – The Nature of Children's Rights

A. THE SOURCE OF CHILDREN'S LEGAL RIGHTS

Key Point 1 – Children are people with legal rights found in Canadian and international law, including the UN Convention on the Rights of the Child (the CRC).

Key Point 2 – The CRC is a core international instrument and the most universally accepted human rights instrument in history.

B. A RIGHTS BASED APPROACH: SPECIAL CONSIDERATIONS RELATING TO CHILDREN

Key Point 1 – A rights based approach for children is required because special considerations apply to them; children, and particularly the most vulnerable children, do not have the same ability as adults to know about their rights, to access remedies, and to have their voices heard.

Key Point 2 – A rights based approach is also needed because of the frequent competition between children's rights and those of adults, making it easy for adults to a paternalistic, needs based approach.

Key Point 3 – The CRC is specifically designed to provide a rights based approach to address these concerns.

C. THE LEGAL STATUS OF THE CRC IN CANADA

1. Canada's Method of Implementing the CRC

Key Point 1 – The CRC is not incorporated directly by into Canadian law by Parliament or Provincial or Territorial Legislatures,

Key Point 2 – Canada states that it complies with its CRC obligations by ensuring that all laws, policies and practices comply with it

2. The Charter and the CRC

Key Point – Canada's Charter must be presumed to provide protection at least as great as that afforded by similar protections in the CRC and other International Human Rights Instruments.

3. Interpretation of Canadian Law Generally – the Presumption of Conformity

Key Point 1 - There is a legal presumption that Canadian statutes conform not only to the rights and values found in the Charter but also to International Law, including the CRC.

Key Point 2 – The presumption is rebuttable.

Key Point 3 – If a statute is unambiguous, its provisions must be followed.

D. IDENTIFYING AND REMEDYING CHILDREN’S INEQUALITY: MANDATORY CONTEXTUAL ANALYSIS

Key Point 1 – Contextual legal analysis, required by law, connects children’s human rights with the reality of the lives of children, measuring that reality against their legal entitlements, and using the reality of their lives to provide substance to human rights laws.

Key Point 2 – Contextual legal analysis requires “informed” impartiality by all decision makers, based on an understanding of human rights laws and children’s lived reality.

Key Point 3 – Contextual analysis is tied to cultural competency; lawyers must have the knowledge, skills and attitude to relate to a child’s social context/lived reality and advance the child’s rights.

Key Point 4 – Contextual legal analysis applies to the development of laws, policies and practices that impact upon children.

Key Point 5 – Contextual legal analysis applies to all aspects of the work lawyers do in individual cases.

II – GENERAL OPERATION OF THE CRC

A. CANADA HAS LEGAL OBLIGATIONS UNDER THE CRC TO COMPLY WITH IT

Key Point – The CRC imposes numerous obligations on Canada as a signatory to it.

B. THE UN COMMITTEE ON THE RIGHTS OF THE CHILD

Key Point 1 – The CRC creates a UN Committee on the Rights of the Child which examines the progress made by Canada and other state parties in meeting their obligations under the CRC.

Key Point 2– To ensure compliance, the CRC requires Canada and other state parties to submit period reports to the UN Committee

Key Point 3– The UN Committee raises concerns and makes recommendations in reports called Concluding Observations, such as “Concluding Observations, Canada.”

Key Point 4 – Concluding observations can be referred to by courts in legal analysis

C. THE UN COMMITTEE’S GENERAL COMMENTS PROVIDE AUTHORITATIVE DIRECTION TO CANADA

Key Point 1 – The UN Committee provides authoritative directions to state parties in the form of General Comments on the interpretation of the Articles of the Convention.

Key Point 2 – There are 18 General Comments, dealing with: The aims of education; The Role of independent human rights institutions; HIV & AIDS and the rights of the child; Adolescent Health; General measure of implementation for the Convention on the Rights of the Child; Treatment of unaccompanied and separated children outside their country of origin; Implementing child rights in early childhood; The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment; The Right of Children with Disabilities; Children’s Rights in Juvenile Justice; Indigenous Children and their Rights under the Convention; Children’s right to be heard; Freedom from all forms of violence; Best interests of the child; Right to health; State obligations regarding the impact of the business sector on children’s rights; The right of the child to rest, leisure, play, recreational activities, cultural life and the arts; and Harmful practices (a jointly with the Committee on the Elimination of Discrimination against Women).

Key Point 3 – General Comments can be referred to by courts when interpreting the Articles of the CRC.

D. THE FOUR GENERAL PRINCIPLES OF THE CRC

Key Point – There are four general principles under the CRC which inform the interpretation of all Articles: respecting and ensuring the rights to each child without discrimination (Article 2); making the best interests of the child a primary consideration in all actions affecting the child (Article 3(1)); the child’s inherent right to life (Article 6); and the child’s rights to express his or her views freely in all matters affecting the child, those views being given due weight (Article 12).

E. OTHER CHILD RIGHTS FOUND IN THE CONVENTION

Key Point – There are a wide range of fundamental rights of children found in the CRC, included with the goal of achieving their overall well-being.

F. OPTIONAL PROTOCOLS

Key Point 1 – Canada has signed two (children in armed conflict and the sale of children, child prostitution and pornography).

Key Point 2 - Canada has not signed a new Third Optional Protocol providing for a complaints procedure to the UN Committee.

G. RESERVATIONS

Key Point - Canada has made two reservations, one on adoption and one on not detaining children separately from adults.

III – THE BEST INTERESTS OF THE CHILD AS A PARAMOUNT CONSIDERATION

Article 3(1) of the Convention states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Key Point 1 – “A Primary Consideration” means a considerations not on the same level as other considerations.

Key Point 2 – Best Interests requires a rights based approach, covers all rights and involves the holistic development of the child.

Key Point 3 – Adult judgment cannot override children’s rights.

Key Point 4 – Best interests is a three-fold concept: a substantive right, a fundamental interpretive principle and a rule of procedure.

Key Point 5 – As a substantive right it involves the right to have the child’s best interests taken as a primary consideration when different interests are being considered.

Key Point 6 – As a fundamental interpretive legal principle, conflicting interpretations must be resolved by using the interpretation which most effectively serves the child’s best interests.

Key Point 7 – Assessing and determining best interests requires procedural guarantees, including legal representation, timely decisions, and decisions that fully explain how a

decision was reached, how factors were weighed, and how the child's views were considered.

Key Point 8 – Procedural Guarantees also require the use of Child-rights Impact Statements (CRIAs).

Key Point 9 – The best interests of the child concept is complex and must be determined on a case by case basis.

IV – CHILDREN'S PARTICIPATION RIGHTS

Article 12 of the Convention deals with children's participatory rights:

(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.

Key Point 1 – There is an inextricable link between participatory rights and making best interests a primary consideration.

Key Point 2 – The child has two rights: the right to express the child's views, AND to have those views taken seriously.

Key Point 3 – Participation is a process, not a momentary act

Key Point 4 – The child can choose to participate in a proceeding either directly or through a representative.

Key Point 6 – A child has the right to be informed about all aspects of the process.

Key Point 7 – A child should not be interviewed more than necessary.

Key point 8 – A child's capacity must be assessed individually with no age limitation and no starting presumption of incapacity.

Key Point 9 – Age alone cannot determine the significance of a child's views; there must be a case by case assessment of "due weight".

Key Point 10 – The UN Committee recommends a five step implementation process: preparation (including information about the right to be heard and the process to be followed at the hearing); the hearing; assessment of capacity; information about the weight given to the views of the child; and complaints, remedies and redress.

Key Point 11 – The UN Committee recommends 9 basic requirements for the implementation of the right to be heard to avoid tokenism: transparent and informative; voluntary; respectful; relevant to children’s lives; child friendly; inclusive; supported by appropriately trained adults; safe and sensitive to risk; and accountable.

V – WHEN CHILDREN’S BEST INTERESTS MUST BE CONSIDERED

Article 3(1) of the CRC states that:

in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Key Point 1 – “Courts of Law” includes civil and criminal cases and all relevant procedures concerning children, including mediation and arbitration processes.

Key Point 2 – “Administrative Authorities” means those at all levels including education, health care, immigrations and the like.

Key Point 3 – “Legislative Bodies” includes all laws and regulations and related budgets, not just those directly affecting children.

Key Point 4 – “Public or Private Social Welfare Institutions” include all institutions whose work and decisions impact on children and the realization of their rights.

Key Point 5 – The phrase “all actions” is very broad, going beyond just decisions to acts, conduct, proposals, services, procedures, other measures, and inaction.

Key Point 6 – The word “concerning” applies to all decisions and actions that directly or indirectly affect children.

VI – THE COMMITTEE ON THE RIGHTS OF THE CHILD CONCLUDING OBSERVATIONS – CANADA

Follow-up measures undertaken and progress achieved by Canada:

- The Committee welcomes the adoption of the following legislative measures:

- o The law amending the Citizenship Act which came into effect on 17 April 2009; and
- o Bill c-49 in 2005, an Act to amend the Criminal Code (trafficking in persons) 25 November 2005, which creates indictable offences which specifically address trafficking in persons.
- The Committee also welcomes the ratification of the Convention on the Rights of Persons with Disabilities, in March 2010.
- The Committee notes as positive the following institutional and policy measures:
 - o National Action Plan to Combat Human Trafficking in June 2012;
 - o Homelessness Partnering Strategy (HPS) in April 2007;
 - o National Plan of Action for children, A Canada Fit for Children, launched in April 2004; and
 - o National Strategy to Protect Children from Sexual Exploitation on the Internet, launched in May 2004.

The Committee also raised concerns about Canada's implementation of the Convention and made recommendations to address the concerns. It is beyond the scope of this paper to review all of the areas of concern and the recommendations found in the Concluding Observations. Among the recommendations are these:

- Need for National Implementation Legislation;
- Need for a Comprehensive Implementation Strategy;
- Need for a Coordinating Body;
- Need for a National Children's Commissioner;
- Need to Strengthen Efforts to Appropriately Integrate and Apply the Best Interests of the Child Principle across Systems;
- Need to Address the Lack of Respect for the Views of the Child;
- Need to Address the Lack of Education on Children's Human Rights;
- Need for More Effective Allocation of Resources Using a Child-Specific Approach;
- Need for Better Data Collecting and Monitoring of Child Well-being.
- Need to Address Discrimination against Canadian Children:
 - o Taking urgent measures to address the overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out of home care;
 - o Addressing disparities in access to services by all children facing situations of vulnerability, including ethnic minorities, children with disability, immigrants and others;
 - o Ensuring the incorporation of a gender perspective in the development and implementation of any program or stimulus package, especially programs

related to combatting violence, poverty and redressing other vulnerabilities; and

- o Taking immediate steps to ensure that in law and practice, Aboriginal children have full access to all government services and receive resources without discrimination.
- Need to Address Violence against Children:
 - o Corporal Punishment;
 - o Abuse and Neglect;
 - o Sexual Exploitation and Abuse;
 - o Harmful Practices;
 - o Freedom from all forms of Violence
 - Human Rights and the Business Sector.

Similar concerns were raised at Canada' Universal Periodic Review, which reviews the implementation of all human rights instruments in Canada, in 2013.

PART ONE - CRC: A PRIMER

DETAILS - Foundation of Key Points

All children have significant and numerous legal rights to the equal benefit of and protection of the law, without discrimination, under the **Canadian Charter of Rights and Freedoms** (“the **Charter**”), other Canadian laws, and international human rights treaties. These are important fundamental rights focused on their overall well-being and include such rights as the right to education, the highest attainable standard of health; an adequate standard of living; to be protected from all forms of physical or mental harm including sexual abuse and other forms of exploitation; for disabled children (mentally or physically) to special treatment, education and care; and to be protected from economic exploitation. Other rights include the right to privacy, freedom of expression, thought, conscience and religion and the right not to be separated from their parents, or one of them except when doing so is in their best interests. They also have the right to be heard and to be taken seriously.

Yet as children, special considerations apply to them. They do not have the same ability adults have to know about their rights, to access remedies, and to have their voices heard. The opposite is true; their best interests can easily be overlooked. And their best interests may conflict with those of adults generally, or the adults meant to help them. The greatest challenges are faced by the most vulnerable children. Canada’s indigenous children face unique challenges that make them even more vulnerable.

There is overwhelming international agreement that because of these special considerations, children's well-being - their best interests - demands a separate and rights based approach facilitated by the support of adults generally, and governments in particular. This led to the development of the **United Nations Convention on the Rights of the Child** (“the CRC”).² Canada played a leadership role in that development and Canada both signed and ratified it. While Canada has chosen not to directly incorporate the Convention into domestic law through action by Parliament and provincial and territorial legislatures, Canada says that this is not necessary as it has ensured, and continues to ensure that its laws, policies and practices do comply with the Convention. Canadian case law says that the **Charter** must be presumed to provide protection at least as great as the Convention and other international treaties. There is a presumption that Canadian statutes conform to the Convention and other international instruments. The same international instruments more generally inform contextual legal analysis, which is the mandatory legal method by which children’s human rights are incorporated into laws, policies, and practices.

² <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>
Citation: Can.T.S. 1992 No 3.

This section of the Toolkit describes these overarching child rights principles and how they can be applied under several headings. Each heading contains key points – the “must know” areas needed to competently address children’s rights:

I – Nature of Children’s Legal Rights

A. THE SOURCE OF CHILDREN’S LEGAL RIGHTS

Key Point 1 – Children are people with legal rights found in Canadian and international law, including the UN Convention on the Rights of the Child (the CRC).

Children are people with legal rights who are entitled to the equal benefit of and protection of the law, without discrimination, under:

- The Canadian Charter of Rights and Freedoms (the *Charter*);
- Other domestic laws; and
- International law, including the United Nations Convention on the Rights of the Child (the CRC) and others, such as:
 - The Universal Declaration of Human Rights;
 - The Declaration on the Rights of the Child;
 - United Nations Convention on the Elimination of all Forms of Racial Discrimination;
 - United Nations Convention on Persons with Disabilities;
 - United Nations Declaration on the Rights of Indigenous Peoples;
 - United Nations Declaration on the Elimination of Violence against Women, and the
 - United Nations Convention on the Elimination of all Forms of Discrimination Against Women

Key Point 2 – The CRC is a core international instrument and the most universally accepted human rights instrument in history.

The CRC is “the most universally accepted human rights instrument in history”: *R. v. Sharpe*, SCC³.

³ 2001 SCC 2 at 177.

It has been ratified by 196 countries.

It applies to all children, of any age, without discrimination: Article 2.

B. A RIGHTS BASED APPROACH: SPECIAL CONSIDERATIONS RELATING TO CHILDREN

Key Point 1 – A rights based approach for children is required because special considerations apply to them; children, and particularly the most vulnerable children, do not have the same ability as adults to know about their rights, to access remedies, and to have their voices heard.

Special considerations apply to children because they are children. A rights based approach is legally required because:

- Children do not have the same ability as adults to:
 - o Know about their rights
 - o To access remedies, and
 - o To have their voices heard.
- The opposite is true; children's best interests:
 - o Can easily be overlooked
 - o May conflict those of adults generally
 - o May conflict with adults meant to help them, such as parents.
- The greatest challenges are faced by the most vulnerable children.

Key Point 2 – A rights based approach is also needed because of the frequent competition between children's rights and those of adults, making it easy for adults to a paternalistic, needs based approach.

There is frequent competition between children's rights and those of adults which make it easy to adopt a more paternalistic and needs-based approach: The Senate Report, *Children – the Silenced Citizens* said:⁴

“The rights-based approach is needed because of children's often intense vulnerability, the frequent competition between children's rights and those of

⁴*Children: the Silenced Citizens*, Report of the Senate Standing Committee on Human Rights, 2007 at p. 27.

adults, and the resulting ease with which a more paternalistic and needs-based approach can be adopted.”

Key Point 3 – The CRC is specifically designed to provide a rights based approach to address these concerns.

The CRC provides strong international acknowledgement that special considerations apply to children so as to ensure the identification of and implementation of their rights.

C. THE LEGAL STATUS OF THE CRC IN CANADA

1. Canada’s Method of Implementing the CRC

Key Point 1 – The CRC is not incorporated directly by into Canadian law by Parliament or Provincial or Territorial Legislatures.

The CRC was signed by Canada on May 28, 1990 and ratified on December 13, 1991. It has not been directly incorporated into domestic legislation, though it is sometimes referred to in legislation, such as the *Youth Criminal Justice Act*.

Key Point 2 – Canada states that it complies with its CRC obligations by ensuring that all laws, policies and practices comply with it.

Though not incorporated directly by Parliament or legislators, Canada officially implements the CRC by stating that all laws, policies and practices comply with it. It has done this by:

- ensuring at the time it was signed and ratified that Canada’s laws, policies and practices comply with the Convention:
- stating that laws, policies and practices developed after ratification continue to comply with the Convention: and declining to directly incorporate the Convention into legislation on the basis that it does already fully comply.

See ***B.J.G v. D.L.G.***:⁵

[33] Canada demonstrated its view that the Convention is a very important international legal instrument by acting as a key player in ensuring that it was enacted in the first place. There are two ways in which countries ratify Conventions. The first is the monist model, where, as in the United States, once a Convention is ratified it becomes part of the domestic law. The second is the dualist model, in which the ratifying country specifically incorporates the Convention into domestic law. Canada uses the dualist model.

⁵ 2010 YKSC 44.

[34] *Canada has not directly incorporated the Convention into domestic law. It takes the position that it is not necessary to do because it has complied with its international obligations under the Convention by determining that existing domestic laws, including provincial and territorial laws, comply with the Convention. The manner in which the Convention was implemented in Canada is described in some detail in the Final Report of the Standing Committee on Human Rights, Children; The Silenced Citizens, Effective Implementation of Canada's Obligations with Respect to the Rights of Children, April 2007.*

[35] *Before this Convention was ratified, the federal government consulted with the provinces and territories to determine whether their laws complied. The government of Canada advised the Senate Committee that it does not ratify a Convention until all jurisdictions indicate they support ratification and are in compliance with the obligations contained in it. In the case of this Convention, though it was signed in May 1990, it was not ratified until December 1991, when all the provinces and territories sent letters of support to the federal government.*

[36] *The federal government and the provinces and territories continue to say that Canadian domestic law complies with the Convention in their periodic reports to the United Nations Committee on the Rights of the Child.*

See also *N.M.K v. R.W.F.*⁶

The Convention and its significance has been referred to numerous times by the SCC and other courts.⁷

⁶ The same approach was adopted by the British Columbia Supreme Court in *N.M.K v. R.W.F.*, 2011 BCSC 1666, a case of alleged parental alienation decided under the Divorce Act, said that children in Canada have a legal right to be heard in all matters affecting them. She concluded that the right is rooted in both the Convention and Canadian domestic law. She adopted the analysis in this respect used in *B.J.G. v. D.L.G.*, 13:

[199] Children in Canada have a legal right to be heard in all matters affecting them, including custody cases. The recent decision of Martinson J. in *B.J.G. v. D.L.G.*, 2010 YKSC 44, is an important and informative decision concerning the rights of children to be heard in custody proceedings. In the decision, Martinson J. reviewed in depth the basis of those rights, which are rooted in both the *United Nations Convention on the Rights of the Child* (the "Convention") and Canadian domestic law.

⁷ See, for example:

A.C. v. Manitoba (Director of Child and Family Services)

[92] ...With our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from that child. The extent to which that input affects the "best interests" assessment is as variable as the child's circumstances, but one thing can be said with certainty is that the input becomes increasingly determinative as the child matures. This is true not only when considering the child's best interests in the placement context but also when deciding whether to accede to a child's wishes in medical treatment situations.

[93] Such a robust conception of the "best interests of the child" standard is also consistent with international instruments to which Canada is a signatory. The *Convention on the Rights of the Child* (citation omitted) describes the "best interest of the child" as a primary consideration in all actions concerning children (Article 3) It then sets out a framework under which the child's own

2. The Charter and the CRC

Key Point – Canada’s Charter must be presumed to provide protection at least as great as that afforded by similar protections in the CRC and other International Human Rights Instruments.

The human rights and values enshrined in Canada’s **Charter** apply to children. Human rights values found in the **Charter** must be considered when laws, policies, practices and procedures are made and interpreted. **Charter** rights and values are, in turn, informed by the CRC:

- 1 Canada’s **Charter** must be presumed to provide protection at least as great as that afforded by similar protections in the Convention and other

input will inform the content of the “best interests” standard with the weight accorded to these views increasing in relation to the child’s developing maturity. Article 4 and 14 of the Convention, for example, require State Parties to respect the responsibilities, rights and duties of parents to provide direction to the child in exercising his or her rights under the Convention, “in a manner consistent with the evolving capacities of the child” Similarly, Article 12 requires State Parties to “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. [Emphasis in original].

In *I. (A.M.R.) v. R. (K.E.)* 2011 ONCA 417 the Ontario Court of Appeal specifically dealt with the Convention.

[82] Finally and importantly, the requirement that a Hague Convention judge consider a risk of persecution on a Hague application involving a refugee child accords with the requirements of the Convention on the Rights of the Child (“CRC”), (citation omitted) to which Canada is a signatory. The jurisprudence of the Supreme Court of Canada consistently holds that the values reflected in international human rights law, and specifically those in the CRC, may help inform the contextual approach to statutory interpretation: see, e.g. *Canadian Foundation for Children, Youth and the Law, v. Canada (Attorney General)* [citation omitted] at para. 31 and 32. [Note: As we have seen, this case endorse the presumption of compliance]

The SCC noted that Canada is a party to the Convention and referred may times in ***Canadian Foundations for Children, Youth and the Law v. Canada (Attorney General)*** 2004 SCC 4. It also referred to the Committee on the Rights of the Child Concluding Observations for Canada. While the court concluded that the best interests of the child is not a principle of fundamental justice, it said it “is a legal principles that carries great power in many contexts.” (at para 12)

In ***Winnipeg Child and Family Services v. K.L.W.***, 2000 SCC 48, the Court, after noting that the domestic legislation in issue did not provide that when a child is in need of protection, the best interests of the child shall be the paramount consideration, said:

[7]...This would seem to run contrary to the Court’s holding in *B. (J)*, *supra*, as well as Art. 3(1) of the UN *Convention on the Rights of the Child* (citation omitted) to which Canada is a signatory.

Baker v. Canada (Minister of Citizenship and Immigration)

[69] Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children’s rights and the best interests of children in other international instruments ratified by Canada...

- international human rights instruments. As a treaty to which Canada is a signatory, it is binding.
- 2 That is, the starting point for analysis of the content of a particular right under the **Charter** is that, at a minimum, it conforms to the comparable right in the Convention or other international treaty which Canada has ratified.
 3. The Convention is, in this respect, not just persuasive in interpreting **Charter** rights; it is binding.

See: **Divito v. Canada (Public Safety and Emergency Preparedness)**⁸ in which the Supreme Court of Canada, when discussing another international instrument, stated:

[23] Most recently, in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* [citation omitted] McLachlin C.J and LeBel J. confirmed that “**the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified**” (para. 70)

[24] *The international law inspiration for s. 6(1) of the Charter is generally considered to be art. 12 of the International Covenant on Civil and Political Rights*

⁸ 2013 SCC 47, See also:

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 p. 1056 (Chief Justice Dickson, citing his dissenting comments in the earlier remarks in *Reference Re Public Service Employee Relations Act (Alta)*):

The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of the “full benefit of the Charter’s protection”. I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia v. B.C. 2007 SCC 27:

[70] ...as Dickson C.J. observed in the *Alberta Reference*, at p. 349, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents Canada has ratified

R. v. Hape, 2007 SCC 26:

[55] This Court has also looked to international law to assist in interpreting the *Charter*. Whenever possible, it has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other. [Citing the remarks of Dickson C.J. in ***Slaight Communications.***]

{“ICCPR”} (citation omitted) which has been ratified by 167 state, including Canada...

[25] As a treaty to which Canada is a signatory, the ICCPR is binding. As a result, the rights protected by the ICCPR provide a minimum level of protection in interpreting the mobility rights under the Charter... (Emphasis added)

3. Interpretation of Canadian Law Generally – the Presumption of Conformity

Key Point 1 - There is a legal presumption that Canadian statutes conform not only to the rights and values found in the Charter but also to International Law, including the CRC.

- Supreme Court of Canada cases support, in relation to statutory interpretation, a presumption of conformity to international law.
- They do so on the basis that courts must interpret statutes in a way that would not leave Canada in violation of its international obligations.
- Such a presumption is consistent with Canada’s approach of indirectly implementing and complying with the Convention by ensuring that its laws, policies and practices comply with it.
- Having such a presumption in this context is consistent with the conclusion that the **Charter** should be presumed to provide protection at least as great as that afforded by the Convention.

Key Point 2 – The presumption is rebuttable.

- The presumption is rebuttable.
- Because Canada takes the position that it complies with the CRC by ensuring that its laws do conform to the CRC, it would be difficult in most instances to for Canada to try to rebut the presumption.

Key Point 3 – If a statute is unambiguous, its provisions must be followed.

- If a statute is unambiguous, its provisions must be followed even if they are contrary to international law.
 - Their constitutional validity could of course be challenged.

See **R. v. Hape**:⁹

(4) Conformity with International Law as an Interpretive Principle of Domestic Law

[53] ...It is a well-established principle of statutory interpretation that legislation will be **presumed to conform to international law**. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid construction of domestic law pursuant to which the state would be in violation of its international obligations, unless the working of the statute clearly compels that result. R. Sullivan [citing Driedger] explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted and courts will therefore prefer a construction that reflects them. **The presumptions is rebuttable.**

[54] The presumption of conformity has been accepted and applied by this Court on numerous occasions. In *Daniels v. White*, [1968] S.C.R. 517, at p. 541, Pigeon J. stated:

[T]his is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law... [I]f a statute is unambiguous, its provisions must be followed even if they are contrary to international law.... [Underlining in original].

(Emphasis added)

See also **Canadian Foundations for Children, Youth and the Law v. Canada (Attorney General)** and **Ordon Estate v. Grail**.¹⁰

⁹ 2007 SCC 26:

¹⁰ **Canadian Foundations for Children, Youth and the Law v. Canada (Attorney General)** 2004 SCC 4:

[31]...Statutes should be construed to comply with Canada's international obligations: [citing *Ordon Estate v. Grail* at para. 137 – see below]

[32] [Note: This paragraph deals with specific article of the CRC].

Ordon Estate v. Grail, [1998] 3 S.C.R. 437:

[137] ...Although international law is not binding upon Parliament or the provincial legislatures, a **court must presume that legislation is intended to comply**

D. IDENTIFYING AND REMEDYING CHILDREN'S INEQUALITY: MANDATORY CONTEXTUAL ANALYSIS

Key Point 1 – Contextual legal analysis, required by law, connects children's human rights with the reality of the lives of children, measuring that reality against their legal entitlements, and using the reality of their lives to provide substance to human rights laws.

Contextual legal analysis – the way in which we ensure that there is “equal justice for all” – is required by Canada's constitutional framework.¹¹ It is the legal method by which fundamental human rights are incorporated into our laws, policies, practices and procedures. This mandatory legal analysis connects children's human rights with the reality of the lives of children, measuring that reality against their legal entitlements, and using the reality of their lives to provide substance to human rights laws. The Convention, together with the **Charter**, plays a central role in that analysis.¹²

Canada's Chief Justice, Beverley McLachlin, when speaking about judging in a diverse society,¹³ explained the importance of contextual analysis, stating that, “...the judge understands not just the legal problem, but the social reality out of which the dispute or issue before the court arose”.¹⁴

She expanded upon the words social reality this way:¹⁵

...

“Judges apply rules and norms to human beings embedded in complex, social situations. To judge justly, they must appreciate the human beings and situations

with Canada's obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations: [citing Driedger].

¹¹See the discussion about contextual legal analysis in The Hon. D. Martinson and Dr. N. Bell, *Legal Professionalism and Access to Justice: Lawyers as Champions for Children*. <https://ethicsincanada.files.wordpress.com/2014/02/d-martinson-and-n-bell-legal-professionalism-and-access-to-justice-lawyers-as-champions-for-children.pdf>

¹² See for example, *Winnipeg Child and Family Services v. K.L.W.* 2000 SCC 48 at para. 71.

¹³ **Judging: the Challenges of Diversity**, Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, Judicial Studies Committee Inaugural Annual Lecture, June 7, 2012, Edinburgh, Scotland:

<http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf>

¹⁴ Previous note, at p. 13.

¹⁵ Above, note 13, at p. 14.

before them, and appreciate the **lived reality** of the men, women and **children** who will be affected by their decisions.” (Emphasis added)

Former Supreme Court of Canada Justice Frank Iacobucci has described the importance of understanding social context in a way that is directly relevant to children’s lived reality:¹⁶

...understanding the Canadian social context and incorporating this into the process of adjudication requires that we always bear in mind the moral underpinnings of our Constitution and in particular the fundamental principles of equality.

What the Chief Justice McLachlin and Justice Iacobucci said about the need for contextual legal analysis applies to all legal analysis, including that engaged in by lawyers and all other professionals in the justice system who make decisions that have an impact on children. For example, it applies to those professionals who mediate or arbitrate and those who, in the family law context, conduct parenting assessments; they must make decision/recommendations or facilitate agreements that comply with the law.

Key Point 2 – Contextual legal analysis requires “informed” impartiality by all decision makers, based on an understanding of human rights laws and children’s lived reality.

The law also requires that people making decisions about children should be impartial. Contextual analysis, using human rights legal principles is directly linked to impartiality. Being impartial does not mean knowing nothing. Chief Justice McLachlin has spoken about what she calls “informed impartiality”. An impartial decision maker must have an understanding of human rights law, and the lived reality of the child or children whose rights are at issue.

The decision maker must also understand that there are subjective elements to judging. She made the point that judges can have biases: ¹⁷

“Like everyone else, judges possess preferences, convictions and – yes – prejudices.”

She noted that informed impartiality requires that decision makers have the ability to identify their own preferences, convictions and prejudices and to address them by being introspective, open and empathetic.¹⁸ Children deserve no less.

¹⁶Hon. Justice Frank Iacobucci, “The Broader Context of Social Context”, Remarks, Social Contest Education Faculty and Curriculum Design Program I, Part II, Victoria, June 2001.

¹⁷ Above, note 13 at p. 7.

¹⁸ Above, note 13 at p. 11.

Key Point 3 – Contextual analysis is tied to cultural competency; lawyers must have the knowledge, skills and attitude to relate to a child’s social context/lived reality and advance the child’s rights.

Competency is of course a key aspect of legal professionalism. Cultural incompetence has been described as having a direct connection to the lack of understanding of a client’s social context. The analysis applies with even greater force to children:¹⁹

..a situation where a lawyer lacks the knowledge, skills and attitudes to relate to the social context of his or her client, and is thereby incapable of appropriately advancing the children’s rights and legitimate interests at trial.

Key Point 4 – Contextual legal analysis applies to the development of laws, policies and practices that impact upon children.

At the broader policy level, these same human rights laws provides the standard by which to measure whether:

- proposed laws, policies and practices by comply with the legal rights of children;
- governments have effectively engaged in, in all decisions, including budgetary decisions, meaningful child rights impact assessments.
- children have effectively participated in the processes leading to the creation of the proposed laws, and policies; and
- proposed policies and practices by the business sector comply with the rights of children.

Key Point 5 – Contextual Legal Analysis applies to all aspects of the work lawyers do in individual cases.

Here are some ways in which the Convention, the **Charter** and other human rights legislation applying to children provide a standard by which to measure whether a particular child is in fact accessing justice in individual cases:

- informs the nature of the questions lawyers ask of and about the child to determine the child’s lived reality;
- allows the lawyers to use the answers to those questions to compare the
- child’s lived reality to what a just result would require;

¹⁹Professor Richard Devlin and David Layton, *Culturally Incompetent Counsel and the Trial Level Judge: A legal and Ethical Analysis*, [2014] Vol. 60, Criminal Law Quarterly, 360.

- can help determine how violations of those rights can be remedied generally;
- informs the way in which the child(ren) should participate fully in the process; and
- provides a framework for examining laws that apply to the individual case, including the common law and rules of evidence, policies and procedures, to assess whether they conform to the fundamental rights found in human rights laws.

II – General Operation of the CRC

A. CANADA HAS LEGAL OBLIGATIONS UNDER THE CONVENTION TO COMPLY WITH IT

Key Point – the CRC imposes numerous obligations on Canada as a signatory to it.

Canada:

- Must respect and ensure the rights set forth in the present *Convention* to each child within its jurisdiction without discrimination of any kind... Article 2;
- shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the *Convention*: Article 4;
- Shall, with respect to economic, social and cultural rights, States Parties undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation: Article 4; and
- Shall undertake to make the principles and provisions of the *Convention* widely known, by appropriate and active means, to adults and children alike: Article 42;
 - Shall ensure that the child has access to information and material aimed at promoting the child's social, spiritual and moral well-being and physical and mental health: Article 17

Other obligations Canada has include the obligation:

- To respect the responsibilities, rights and duties of parents (and appropriate others) to provide appropriate direction and guidance: Article 5;
- To use their best efforts to ensure recognition that both parents have common responsibilities for the child and that parents (or guardians) shall have the primary responsibility for the upbringing and development of the child, with the best interests of the child their basic concern: Article 18(1);
- To respect the right of the child separated from one or both parents to maintain personal relations and direct contact with both on a regular basis, except if it is contrary to the child's best interests: Article 9(3);

- To ensure that no child is wrongfully deprived of liberty (Article 37); if a child is deprived of liberty to ensure that the child shall be separated from adults unless it is considered in the child's best interest not to do so...: Article 37(c):
- Recognize the right of a child placed in care to a periodic review: Article 25:
- To protect children from the illegal use of drugs and involvement in drug production or trafficking: Article 33:
- To provide parents with appropriate assistance and develop child-care policies: 18(2);
- Take measure to combat the illicit transfer and non-return of children abroad: Article 11;
- To take all appropriate measure to prevent the abduction of, the sale of or traffic in children for any purpose or in any form: Article 35;
- To protect children from exploitation: Article 36;
- Ensure that no child is subject to torture or other cruel, inhuman and degrading treatment or punishment: Article 37;
- To ensure rights to children accused of infringing penal law (Article 40)
- To ensure protection to children re armed conflict and in particular not to involve any child under 15 in hostilities: Article 38;
- To provide appropriate treatment or training for recovery and rehabilitation of children who has suffered mistreatment, neglect or exploitation: Article 39;
- If a system of adoption is recognized or permitted it shall ensure that the best interests of the child shall be the paramount consideration: Article 21: and
- To take appropriate measures to ensure that a child who seeks refugee status or is considered a refugee shall receive appropriate protection and humanitarian assistance in the enjoyment of rights in the Convention or other international human rights or humanitarian instrument: Article 22.

B. THE UN COMMITTEE ON THE RIGHTS OF THE CHILD

Key Point 1 – The CRC creates a UN Committee on the Rights of the Child which examines the progress made by Canada and other state parties in meeting their obligations under the CRC.

The Committee on the Rights of the Child (the UN Committee) is created by Article 43 of the Convention to examine “the progress made by State Parties in achieving the realization of the obligations undertaken in the present Convention”. It is made up of a group of experts; it initially had 10 members and now has 18 members, all elected by states parties.

Key Point 2– To ensure compliance, the CRC requires Canada and other state parties to submit period reports to the UN Committee.

Article 44 requires countries which have ratified the Convention to submit initial and periodic reports on the national situation of children's rights to the Committee for examination.

Key Point 3– The UN Committee raises concerns and makes recommendations in reports called Concluding Observations, such as “Concluding Observations, Canada.”

The Committee examines each report and raises concerns or makes recommendations to the State party. For a discussion of Canada’s most recent concluding observations see Part VI, below.

Key Point 4 – Concluding observations can be referred to by courts in legal analysis.

Concluding Observations have been referred to in legal analysis. For example, the Supreme Court of Canada referred to the Concluding Observations of the Committee on the Rights of the Child in *Canadian Foundations for Children, Youth and the Law v. Canada (Attorney General)*.²⁰

C. THE UN COMMITTEE’S GENERAL COMMENTS PROVIDE AUTHORITATIVE DIRECTION TO CANADA

Key Point 1 – The UN Committee provides authoritative directions to state parties in the form of General Comments on the interpretation of the Articles of the Convention.

The Committee periodically provides General Comments on the interpretation of the Articles of the Convention. It does this as part of its role under Article 43 of achieving the realization of the obligations undertaken by States Parties when they ratify the Convention. As such General Comments give authoritative direction to States Parties on their obligations under the Convention.

Key Point 2 – There are 18 General Comments.

The 18 General Comments are:

1. (2001) – The aims of education;
2. (2002 – The Role of independent human rights institutions;

²⁰ 2004 SCC 4 at paras. 186-187.

3. (2003) - HIV & AIDS and the rights of the child;
4. (2003) –Adolescent Health;
5. (2003) –General measure of implementation for the Convention on the Rights of the Child;
6. (2005) – Treatment of unaccompanied and separated children outside their country of origin;
7. (2005) – Implementing child rights in early childhood;
8. (2006) – The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment;
- 9 (2006) – The Right of Children with Disabilities;
10. (2007) - Children’s Rights in Juvenile Justice;
11. (2009) - Indigenous Children and their Rights under the Convention;
12. (2009) – Children’s right to be heard;
13. (2011) – Freedom from all forms of violence;
14. (2013) – Best interests of the child;
15. (2013) – Right to health;
- 16, (2013) – State obligations regarding the impact of the business sector on children’s rights;
17. (2013) – The right of the child to rest, leisure, play, recreational activities, cultural life and the arts; and
18. (2014) – Harmful practices (a jointly with the Committee on the Elimination of Discrimination against Women (No. 31).

Key Point 3 – General Comments can be referred to by courts when interpreting the Articles of the CRC,

General Comments can be referred to by Courts to provide guidance in interpreting the articles found in international instruments such as the Convention. For example, in *Devito v. Canada*²¹ the Supreme Court of Canada referred to a General Comment of the UN Human Rights Committee to interpret a provision of the *International Covenant on Civil and Political Rights*.²²

²¹ 2013 SCC 47,

²² *Devito* at paras 26 -27.

D. THE FOUR GENERAL PRINCIPLES OF THE CRC

Key Point – There are four general principles under the CRC which inform the interpretation of all Articles: respecting and ensuring the rights to each child without discrimination (Article 2); making the best interests of the child a primary consideration in all actions affecting the child (Article 3(1)); the child’s inherent right to life (Article 6); and the child’s rights to express his or her views freely in all matters affecting the child, those views being given due weight (Article 12),

There are four general principles found in the Convention for interpreting and implementing all the rights of the child. They are:²³

Article 2: The obligation of States to respect and ensure the rights set forth in the Convention to **each child without discrimination**

Article 3(1): the **best interests of the child as a primary consideration** in all actions concerning children

Article 6: the child’s **inherent right to life** and States parties’ obligation to ensure to the maximum extent possible the **survival and development of the child.**

Article 12: the child’s right to express his or her views freely in “all matters affecting the child”, those views being given due weight.

E. OTHER CHILD RIGHTS FOUND IN THE CONVENTION

Specific rights found in the Convention include the right to:²⁴

- The highest attainable standard of health; (Article 24)
- Protection from physical or mental harm including sexual abuse and other forms of exploitation; (Article 19 and 34)
- Protection from economic exploitation. (Article 32)
- For disabled children (mentally or physically) special treatment, education and care (Article 23)
- Education; (Articles 28 and 29)
- Social security; (Article 26)

²³General Comment No. 5 (2003) at para. 12 and General Comment No. 12 (2009) at para. 2.

²⁴As summarized in *Children: the Silenced Citizens*, above, note 4 at pp. 32 – 33.

- An adequate standard of living; (Article 27)
- A name and nationality from birth; (Articles 7 and 8)
- Not to be separated from their parents, except by competent authorities when in their best interests; (Article 9)
- Special protection and assistance provided by the state if temporarily or permanently deprived of the child's family environment; (Article 20)
- Family reunification; (Article 10)
- Freedom of expression; (Article 13)
- Freedom of thought, conscience and religion; (Article 14)
- Freedom of association and freedom of peaceful assembly (Article 15)
- Protection of privacy; (Article 16)
- Play; and (Article 31)
- For children belonging to an ethnic, religious or linguistic minority or children of indigenous origins, enjoy his or her culture, to profess and practice his or her own religion, or to use his or her own language.

F. OPTIONAL PROTOCOLS

Key Point 1 – Canada has signed two (children in armed conflict and the sale of children, child prostitution and pornography).

There are three optional protocols to the Convention and Canada has signed two of them. . The first is on the Involvement of Children in Armed Conflict, which Canada ratified July 7, 2000. The second is on the Sale of Children, Child Prostitution and Child Pornography, Canada ratified September 14, 2005.

Key Point 2 - Canada has not signed a new Third Optional Protocol providing for a complaints procedure to the UN Committee.

Canada has declined to sign a new Third Optional Protocol, which had as its date of entry into force, April 14, 2014. This is an important protocol which provides that an individual or group of individuals can submit a “communication” to the Committee on the Rights of the Child:

...claiming to be the victims of a violation by the state party of any of the rights set forth in the Convention of the two Optional Protocols. (Article 5)

G. RESERVATIONS

Key Point - Canada has made two reservations, one on adoption and one on not detaining children separately from adults

The Convention allows countries to make some reservations when they ratify the Convention. There are two Canadian reservations. The first reservation is Article 21 which provides that the best interests of children is the paramount consideration in adoptions. The reservation is this:

With a view to ensuring full respect for the purposes and intent of article 20 (3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada.

The second is Article 37(c) which provides that children deprived of liberty should be separated from adults. The reservation states:

The Government of Canada accepts the general principles of article 37 (c) of the Convention, but reserves the right not to detain children separately from adults where this is not appropriate or feasible.

III –The Best Interests of the Child as a Primary Consideration

Article 3(1) of the Convention states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Key Point 1 – “A Primary Consideration” means a considerations not on the same level as other considerations.

Considering children’s rights requires that their best interests are a **primary** consideration in all actions affecting the child. That is, their best interests **may not be considered on the same level as all other considerations.** (General Comment 14, para. 37). It does NOT mean that it is just one of many considerations.

This strong position is justified by the special considerations of the child: dependency, maturity, legal status and often, voicelessness. (General Comment 14, para. 37)

- a. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests (General Comment 14, para. 37)
- b. If the interests of children are not highlighted, they tend to be overlooked (General Comment 14, para. 37)

Key Point 2 – Best Interests requires a rights based approach, covers all rights and involves the holistic development of the child,

The concept of the child’s best interest is aimed at ensuring both: (General Comment 14, para. 4)

- the full and effective enjoyment of all the rights recognized in the Convention; and
- the holistic development of the child.

The full application of the concept of a child’s best interests “requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity: (General Comment 14, para. 5)

Key Point 3 – Adult judgment cannot override children’s rights.

“An adult’s judgment of a child’s best interests cannot override the obligation to respect all of the child’s rights under the Convention.” (General Comment 14, para. 4)

Key Point 4 – Best interests is a three-fold concept: a substantive right, a fundamental interpretive principle and a rule of procedure.

The child’s best interests is a threefold concept: (General Comment 14, para. 6)

Key Point 5 – As a substantive right it involves the right to have the child’s best interests taken as a primary consideration when different interests are being considered.

A substantive right: The “right to have the child’s best interests taken as a primary consideration when different interests are being considered in order to reach a decision on the issues and stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children, or children in general...” (General Comment 14, para 6(a))

Key Point 6 – As a fundamental interpretive legal principle, conflicting interpretations must be resolved by using the interpretation which most effectively serves the child’s best interests.

A fundamental interpretative legal principle, means that “if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen. The rights enshrined in the Convention and its

Optional Protocols provide the framework for interpretation.” (General Comment 14, para. 6(b))

Key Point 7 – Assessing and determining best interests requires procedural guarantees, including legal representation, timely decisions, and decisions that fully explain how a decision was reached, how factors were weighed, and how the child’s views were considered.

A rule of procedure: assessing and determining the best interests of the child requires procedural guarantees. (General Comment 14, para. 6(c)). These are among them:

- Legal representation (General Comment 14, para. 96)
 - o The child will “need all appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies.”
 - o In particular the child “should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.”
- Timely decisions – delays in or prolonged decision making can have particularly adverse effects on children as they evolve so must be timely (General Comment 14, para. 93)
- Legal reasoning – Any decision concerning a child or children must be “motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child’s best interests. If the decision differs from the child’s views, the reasons for that should be clearly stated, showing how the child’s best interests were a primary consideration and why other considerations outweighed the views of the child. (General Comment 14, para. 97)

Key Point 8 – Procedural Guarantees also require the use of Child-rights Impact Statements (CRIAs).

Child-rights impact assessments (CRIAs) and Good Governance: General Comment 14, para 99)

- CRIAs must be used to “predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affects children and the enjoyment of their rights.”
- Must be Complemented by ongoing monitoring and evaluation of the impact of the measures on children’s rights
- Need to be built into Government processes at all levels and as early as possible in the development of policy and other general measure in order to ensure good governance for children’s rights.

Key Point 9 – The best interests of the child concept is complex and must be determined on a case by case basis.

“The best interests of the child”:

- The concept is complex, and its content must be determined on a case-by case basis.(General Comment 14, para. 32)
 - o It is through the interpretation and implementation of Article 3(1), in line with the other provisions of the Convention, that the legislator, judge, administrative social or educational authority will be able to clarify the concept and make concrete use of it.
 - o The concept of the child’s best interests is therefore flexible and adaptable.
 - o It should be adjusted and defined on an individual basis according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.
 - o For collective decisions, - such as those made by legislators, the best interests of children must be assessed and determined in light of the circumstances of the particular group and/or children in general. In both cases, this must be one with full respect for the rights contained in the Convention and its Optional Protocols.

- When there is a conflict among the rights found in the Convention or other human rights treaties, the child's best interests shall be applied to resolve any conflict among those rights. (General Comment 14, para. 33)
- Care must be taken to ensure that the flexibility of the concept does not lead to manipulation. (General Comment 14, para. 34)
- With respect to implementation of the children's best interests, making sure that the best interests of the child are a primary consideration in legislation and policy making at all levels of Government "demands" a continuous process of child rights impact assessment (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluations to evaluate the actual impact of implementation. (General Comment 14, para 35)

IV – Children's Participatory Rights

Article 12 of the Convention deals with children's participatory rights:

(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.

Key Point 1 – There is an inextricable link between participatory rights and making best interests a primary consideration,

- Article 12, which is a general principle, is **inextricably linked to another general principle, Article 3(1)**, which, as we have seen, is the article making a child's best interests a primary consideration: (General Comment 14. at para 43)

"Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matter affecting the child. This is clearly set out in the Committee's general comment 12 which also highlights the inextricable links between articles 3, paragraph 1, and 12. The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and

their inclusion in all matters affecting the child, including the assessment of his or her best interests. Article 3 paragraph 1 cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12 by facilitating the essential role of children in all decision affecting their lives²⁵”.

- Article 12 is also linked to two other general principles: (General Comment 12, para. 68)
 - Article 2 – the right to non-discrimination, making the right available to **all** children, and
 - Article 6 (the right to life, survival and development)
- Article 12 is in fact connected to all other articles of the Convention (General Comment 12, para. 68)
- The right of all children to be heard **and** taken seriously constitutes one of the fundamental values of the Convention.

Key Point 2 – The child has two rights: the right to express the child’s views, AND to have those views taken seriously,

- Article 12(1) establishes that every child capable of forming his her own views has two rights:
 - to express her or his views freely, in all matters affecting her or him, and
 - the additional right to have those views to be given due weight in accordance with the child’s age and maturity.
- Article 12(2) makes it clear that the child shall in particular be given the chance to “be heard” in any judicial and administrative proceedings affecting the child, either directly, or through a representative (or an appropriate body).

Key Point 3 – Participation is a process, not a momentary act,

- Participation is a not a momentary act but a process of participation. (General Comment 12, para. 13)

Key Point 4 – The child can choose to participate in a proceeding either directly or through a representative.

“Either directly or through a representative...”

²⁵ The quote refers to General Comment No. 12, at paras. 70-74

- This is a choice the child has the right to make. “Whenever possible the child must be given the opportunity to be directly heard in any proceedings.” (General Comment 12, para. 35)

Key Point 6 – A child has the right to be informed about all aspects of the process.

“The right to express those views freely”

- Information: Involves a right to be informed about all aspects of the process (General Comment 12, para. 25)

Key Point 7 – A child should not be interviewed more than necessary.

- Only when necessary: A child should not be interviewed more often than necessary, especially when harmful events are being explored, as the “hearing” of a child is a difficult process that can have a traumatic impact on the child. (General Comment 12, para. 24)

Key Point 8 – A child’s capacity must be assessed individually with no age limitation and no starting presumption of incapacity.

- “Capable of forming his or her own views” should not be seen as a limitation, but rather an obligation to assess the capacity of the child to form an autonomous opinion (General Comment 12, para. 20).
 - a. There is no age limit on the right of the child to express his or her own views and one should not be imposed (For more details see para 21)
 - b. There cannot be a starting assumption that a child is incapable of expressing her or his own views. (para. 20)
 - c. On the contrary, Canada should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express the; it is not up to the child to first prove her or his capacity. (para. 20)
- Capacity refers to cognitive capacity to form views and communicate them: ***B.J.G. v. D.L.G.***²⁶

²⁶ 2010 YKSC 44. I expressed this view about capacity on behalf of the Yukon Supreme Court:

[26] First, children have a legal right to express their views. There is not a legal requirement to do so. They can choose not to participate:

[27] Second, there must be a determination of whether a child is *capable* of forming his or her *own* views before the child has the legal right to express his or her views. The thrust of this provision is to ensure that children are capable in the sense that they have the cognitive capacity to form their own

Key Point 9 – Age alone cannot determine the significance of a child’s views; there must be a case by case assessment of “due weight”.

- “Being given due weight in accordance with the age and maturity of the child”
- Age alone cannot determine the significance of a child’s views. “Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child’s capacity to form a view. For this reason, the views of the child have to be assessed on a case by case basis.” (General Comment 12, para. 29.)

Key Point 10 – The UN Committee recommends a five step implementation process: preparation (including information about the right to be heard and the process to be followed at the hearing); the hearing; assessment of capacity; information about the weight given to the views of the child; and complaints, remedies and redress.

- The UN Committee recommends a **five step implementation process** for the right to participate: (General Comment 12, paras. 40 – 47)

Step one: Preparation (para. 41):

- the child must be informed about
 - the right to express the opinion in all matters affecting the child, and, in particular in any judicial and administrative decision-making processes, and
 - about the impact his or her expressed views will have on the outcome
- the child must be informed about the option of either communicating directly or through a representative and the consequences of this choice
- the decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take

views and to communicate them. In alienation cases, for example, the issue of parental conduct that may amount to alienation should generally not be considered at this stage, but rather at the stage dealing with the second legal right, the right to have a child’s views given due weight in accordance with the child’s age and maturity. However in some cases the alienating conduct of a parent may be such that the child is not really capable of forming his or her *own* views.

[28] Third, decision makers can deal with all of the circumstances of the case when deciding what weight should be given to a child’s views. This second legal right of children is based on the best interests of children principle. It gives children a voice, not the choice, as others have put it; they are *not* required to make the decision.

place, who the participants will be, and has to take account the views of the child in this respect.

Step two: The hearing: (para. 42)

- o The context must be enabling and encouraging
- o “Experience dictates that the situation should have the format of a talk rather than a one-sided examination. Preferably, a child should not be heard in open court, but under conditions of confidentiality.

Step three: Assessment of capacity of the child (General Comment 12, para. 44)

Step four: Information about the weight given to the views of the child (the feedback (General Comment 12, para. 45)

- o Since the child has the rights to have his or her views given due weight, the decision maker has to:
 - inform the child of the outcome of the process and
 - explain how the views were considered.

Step five: Complaints remedies and redress. (General Comment 12, para. 46-47)

Key Point 11 – The UN Committee recommends 9 basic requirements for the implementation of the right to be heard to avoid tokenism: transparent and informative; voluntary; respectful; relevant to children’s lives; child friendly; inclusive; supported by appropriately trained adults; safe and sensitive to risk; and accountable.

- To avoid “tokenistic approaches” to children’s participation, the Committee sets out some basic requirements for the implementation of the right of the child to be heard. All processes in which a child or children are heard and participate, must be: (General Comment 12, para. 134)
 - a) Transparent and informative – providing full, accessible, diversity sensitive and age-appropriate information about their participation rights;
 - b) Voluntary;
 - c) Respectful, giving respect to children’s views;
 - d) Relevant to children’s lives;
 - e) Child friendly;
 - f) Inclusive, recognizing that children are not a homogenous group;

- g) Supported by appropriately trained adults;
- h) Safe and sensitive to risk; and
- i) Accountable.

V – When Children’s Best Interests Must Be Considered

As we have seen, Article 3(1) of the CRC states that:

in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Key Point 1 – “Courts of Law” includes civil and criminal cases and all relevant procedures concerning children, including mediation and arbitration processes.

- Courts of law includes all relevant procedures concerning children, without restriction. “This includes conciliation, mediation and arbitration processes” (General Comment 14, para 27)
 - i. Criminal cases (General Comment 14, para. 28)
 - ii. Civil cases (General Comment 14, para 29)

Key Point 2 – “Administrative Authorities” means those at all levels including education, health care, immigrations and the like.

- Administrative authorities at all levels including education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality among others (General Comment 14 para 30)

Key Point 3 – “Legislative Bodies” includes all laws and regulations and related budgets, not just those directly affecting children.

- Legislative Bodies includes: (General Comment 14, para. 31)
 - o All relevant laws and regulations, not just those directly relating to children, and
 - o Extends to the approval of budgets

Key Point 4 – “Public or Private Social Welfare Institutions” include all institutions whose work and decisions impact on children and the realization of their rights.

- Public or private social welfare institutions (Comment 14, para. 26)
 - o Should not be narrowly interpreted.

- o These terms include all institutions whose work and decisions impact on children and the realization of their rights. Therefore they include:
 - Not only those relating to economic, social and cultural rights (e.g. Care, health, environment, education, business, leisure and play, etc.)
 - But also institutions dealing with civil rights and freedoms (e.g. birth registration, protection against violence in all settings, etc.)
- Private social welfare institutions include private sector organizations – either for-profit or non-profit – which play a role in the provision of services that are critical to children’s enjoyment of their rights, and which act on behalf of or alongside Government services as an alternative.

Key Point 5 – The phrase “all actions” is very broad, going beyond just decisions.

- “All actions” means not just decisions, but also: (General Comment 14 para. 18)
 - a. acts;
 - b. conduct;
 - c. proposals;
 - d. services;
 - e. procedure;
 - f. other measures; and
 - g. Inaction.

Key Point 6 – The word “concerning” applies to all decisions and actions that directly or indirectly affect children.

- “Concerning” must be understood in a very broad sense, applying to all decisions and actions that directly or indirectly affect children (General Comment 14 para. 19).

VI. The Committee on the Rights of the Child Concluding Observations - Canada

As noted in Part II, Article 44 of the Convention requires States Parties to submit “reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights.” The Committee then prepares “Concluding Observations”. The Committee also receives submissions from non-governmental organizations.

Canada's third and fourth reports to the Committee were submitted as required.²⁷

Canada's last Concluding Observations Report was prepared by the Committee on the Rights of the Child in 2012.²⁸ The Concluding Observations comment favourably on aspects of Canada's reports:

- II. Follow-up measures undertaken and progress achieved by the State Party
4. The Committee welcomes the adoption of the following legislative measures:
 - a. The law amending the Citizenship Act which came into effect on 17 April 2009, and
 - b. Bill c-49 in 2005, an Act to amend the Criminal Code (trafficking in persons) 25 November 2005, which creates indictable offences which specifically address trafficking in persons.
5. The Committee also welcomes the ratification of the Convention on the Rights of Persons with Disabilities, in March 2010.
6. The Committee notes as positive the following institutional and policy measures:
 - a. National Action Plan to Combat Human Trafficking in June 2012;
 - b. Homelessness Partnering Strategy (HPS) in April 2007.
 - c. National Plan of Action for children, A Canada Fit for Children, launched in April 2004, and
 - d. National Strategy to Protect Children from Sexual Exploitation on the Internet, launched in May 2004.

The Committee also raised concerns about Canada's implementation of the Convention and made recommendations to address the concerns. It is beyond the scope of this paper to review all of the areas of concern and the recommendations found in the Concluding Observations. Here are some of them.

Need for National Implementation Legislation

- There is a lack of national implementation legislation for the Convention which must be remedied: paras. 10 and 11.

²⁷ <http://www.pch.gc.ca/eng/1356643877151/1356644060906>

²⁸ http://rightsofchildren.ca/wp-content/uploads/Canada_CRC-Concluding-Observations_61.2012.pdf

Need for a Comprehensive Implementation Strategy

- Canada's National Action Plan for Children lacks clear division of responsibilities, clear priorities, targets and timetables, resource allocation and systematic monitoring: para. 12.
- Canada therefore needs to adopt a national strategy which address these concerns which allocates adequate human, technical and financial resources for the implementation, monitoring and evaluation of the comprehensive strategy: para. 13.

Need for a Coordinating Body

- While some positive coordinating steps have been taken, including the establishment of the Interdepartmental Working Group on Children's Rights (2007), the Committee is concerned that the overall coordination has not been effective in practice, leading to disparities in the implementation of the Convention: para. 14.
- The Committee recommends a coordinating body for the implementation of the convention and the national strategy and the strengthening of the Interdepartmental Working Group: para. 15.

Need for a National Children's Commissioner

- While noting that most provinces have an Ombudsman for Children, there is a concern about the absence of an independent Ombudsman for Children at the federal level: para. 23.
- The Committee recommends that Canada takes the steps necessary to establish a fully independent federal Children's Ombudsman to ensure comprehensive and systematic monitoring of all children's rights at the federal level: para. 23.

Need to Strengthen Efforts to Appropriately Integrate and Apply the Best Interests of the Child Principle across Systems

- The principle of the best interests of the child is not widely known, appropriately integrated and consistently applied to all legislative, administrative and judicial proceedings and in policies, programs and projects relevant to and with an impact upon children: paras. 34 and 35.
- There is particular concern that the best interest of the child is not appropriately applied in asylum-seeking, refugee and/or immigration detention situations: para. 34.

Need to Address the Lack of Respect for the Views of the Child

- The Committee specifically commented on the question of respect for the views of the child, stating that it is concerned that there are inadequate mechanisms for facilitating meaningful and empowered child participation in legal, policy, and environmental issues, and administrative processes that impact children: para. 36.
- The Committee therefore recommends that Canada: (para. 37)

Promote the meaningful and empowered participation of all children, within the family, community, and schools, and develop and share good practices. Specifically the committee recommends that the views of the child be a requirement for all official decision making processes that relate to children, including custody cases, child welfare decisions, criminal justice, immigration, and the environment. The committee also urges Canada to ensure that children have the possibility to voice their complaints if their right to be heard is violated with regard to judicial and administrative proceedings and that children have access to an appeals procedure.

Need to Address the Lack of Education on Children's Human Rights

- The Committee concluded that there is no systematic training on children's rights and the Convention for all professional groups working for or with children: para. 26.
- The Committee therefore recommends an Integrated strategy for training on children's rights for all professionals, including government officials and judicial authorities, is needed which focuses on the use of the Convention in legislation and public policy, program development, advocacy, and decision making processes and accountability: para. 27.

Need for More Effective Allocation of Resources Using a Child-Specific Approach

- The Committee notes that, bearing in mind that Canada is one of the most affluent economies in the world and that it invests sizeable amounts of resources in child-related programs, it does not use a child-specific approach for budget planning and allocation, making it practically impossible to identify, monitor and report and evaluate the impact of investment in children and the overall application of the Convention in budgetary terms: para. 16.

Need for Better Data Collecting and Monitoring of Child Well-being.

- There is a concern about the limited progress Canada has made in establishing a national, comprehensive data collection system covering all areas of the Convention. In particular Canada's report lacks data on the number of children aged 14 to 18 placed into alternative care facilities: para. 20.
- Canada should set up a national and comprehensive data collection system: para. 21.

Need to Address Discrimination against Canadian Children

- The Committee recommends that Canada address discrimination Canadian children continue to face by: (paras. 32 and 33)
 - a. Taking urgent measures to address the overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out of home care;
 - b. Addressing disparities in access to services by all children facing situations of vulnerability, including ethnic minorities, children with disability, immigrants and others;
 - c. Ensuring the incorporation of a gender perspective in the development and implementation of any program or stimulus package, especially programs related to combatting violence, poverty and redressing other vulnerabilities; and
 - d. Taking immediate steps to ensure that in law and practice, Aboriginal children have full access to all government services and receive resources without discrimination.

Need to Address Violence against Children

Corporal Punishment

- The Committee is "gravely concerned" that s. 43 of the Criminal Code continues to condone corporal punishment of children. The Committee recommends that s. 43 should be repealed, that there is awareness raising on alternative forms of punishment and the adverse consequences of corporal punishment, and training of professionals to promptly identify, address and report all cases of violence against children: paras. 44 and 45.

Abuse and Neglect

- While noting programs such as *The Family Violence Prevention Program*, the Committee is concerned about the high levels of violence and maltreatment

against children evidence by the *Canadian Incidence Study of Reported Child Abuse and Neglect 2008*.

- The Committee recommends that Canada take into account its General Comment 13 (Freedom from all forms of violence) and:
 - a. Develop and implement a national strategy for the prevention of all forms of violence against all children and allocate the necessary resources to this strategy and ensure that there is a monitoring mechanism;
 - b. Ensure that the factors contributing to the high levels of violence among Aboriginal women and girls are well understood and addressed in national and province/territory plans;
 - c. Ensure that all child victims of violence have immediate means of redress and protection, including protection or restraining orders; and
 - d. Establish mechanisms for ensuring effective follow-up support for all child victims of domestic violence upon their family reintegration.

Sexual Exploitation and Abuse

- While the Committee is encouraged by work that has been done by Canada relating to child sexual exploitation on the internet, more needs to be done to address other forms of sexual exploitation such as child prostitution and child sexual abuse: paras. 48 and 49.

Harmful Practices

- The Committee recommends that Canada take all necessary measures, including legislative measures and targeted improvement of investigation and law enforcement to protect all children from unde4rage forced marriages and to enforce the legal prohibition against polygamy.

Freedom from all forms of Violence

- The Committee recommends that Canada prioritize the elimination of all forms of violence against child, and in particular:
 - a. Develop a comprehensive national strategy to prevent and address all forms of violence against children.
 - b. Adopt a national coordinating framework to address all forms of violence against children.
 - c. Pay particular attention to the gender dimension of violence. And
 - d. Cooperate with the Special Representative of the Secretary-general on violence against child and relevant United Nations Institutions.

Human Rights and the Business Sector

The Committee referred to child rights and the business sector (paras. 28 and 29), suggesting that Canada:

- establish and implement regulations to ensure that the business sector complies with international and national human rights, labour, environment and other standards, particularly with regard to child rights and particularly in light of Human Rights Council resolutions:
 - Clear regulatory framework among other, the gas, mining and oil companies operating in territories outside Canada
 - Monitoring of implementation of companies at home and abroad
 - Assessment, consultations with and disclosure to the public by companies on plan to address environmental and health position and the human right impact of their decisions.

Similar concerns were raised at Canada' Universal Periodic Review, which reviews the implementation of all human rights instruments in Canada, in 2013.

It is worth noting that The Canadian Bar Association (CBA) has responded to these Concluding Observations. On March 10, 2014, the then President wrote on behalf of the CBA, and at the instigation of the CBA Children's Law Committee, to the Prime Minister and other Government Officials:²⁹

to enjoin the Government of Canada to make a detailed action plan to effectively implement the UN Convention of the Rights of the Child (UN CRC). The Concluding Observations of the UN Committee on the Rights of the Child (UN Committee) constitute a road map that could prove transformational in improving the lives of Canadian children. We urge you to follow this in tabling a detailed Government Action Plan.

²⁹<http://www.repeal43.org/wp-content/uploads/2013/05/CBA-Letter-to-PM-re-CRC-Implementation.pdf>

PART TWO - A ROADMAP FOR CHANGE FOR CHILDREN³⁰

I. Need for a Specific Roadmap for Change for Children

Access to justice reports such as the Canadian Bar Association's *Reaching Equal Justice, Roadmap for Change*, and *Meaningful Change for Family Justice - Beyond Wise Words*,³¹ point out that the justice system often is not able to provide just, timely cost effective outcomes in civil and family law cases at a time when legal problems are pervasive in people's daily lives. They say that many people have lost confidence in the justice system. The reports make far-reaching recommendations about ways in which the justice system, broadly defined, and access to it, can be achieved. Important work is being done across the country to try to make this happen.

While the access to justice concerns raised apply with even greater force to children, the recommendations made are primarily, though not exclusively, focused on access to justice for adults. Children's access to justice issues are, for the most part, considered by looking at the ways in which children benefit from a system which operates more effectively for adults. While the steps being taken are laudable and that benefit is welcome, Canada has legal obligations to recognize the special access to justice considerations that apply to children and act on them.

I have explained why special considerations apply when considering justice for children that require more than merely making them an add-on to general access to justice plans. As is often said in this context, they are people, but they are not little adults. I respectfully suggest that now is the time to integrate into our national access to justice discussions a specific roadmap which recognizes the special considerations that apply in order to achieve justice for children. Justice for children must be, as the Convention emphasizes, a **primary** consideration.

Much important, admirable work has been done over many years, and continues to be done, by advocates for children and their rights across the country; this is so both within and beyond the legal profession. The fact remains that there are many children in Canada who experience human rights violations on a daily basis but they don't have adequate information about their rights, and don't have the ability to remedy those violations. Too many children are living in poverty, without adequate education or

³⁰Based on a paper by the author called *Justice, Not Just Access – Effective Outcomes for Children (Children's Legal Rights – the Fundamentals)*, prepared for **Access to Justice for Children**, a Continuing Legal Education Society of British Columbia education conference, May 14-15, 2015, Vancouver, British Columbia.

³¹**Access to Civil and Family Justice, A Roadmap for Change**, Final Report of the National Action Committee on Civil and Family Justice, October 2013; **Meaningful Change for Family Justice – Beyond Wise Words**; **Reaching Equal Justice**, the Canadian Bar Association, August 2013; **Reaching Equal Justice: An Invitation to Envision and Act**, Canadian Bar Association, December 2013; **Foundation for Change**, Report of the Public Commission on Legal Aid in British Columbia, March 2011.

healthcare, and experiencing violence of all kinds, while at the same time having their best interests undervalued or completely ignored. Children rarely have the chance to participate in the making of decisions that impact significantly upon their lives, and they almost never have separate legal representation. Urgent attention is required both generally, and with respect to the particular concerns of Indigenous children.

Legal and other professionals have limited educational opportunities to learn about children’s legal rights. Many law schools do not have such courses, and if they do, they can be narrowly focused. In *Meaningful Change for Family Justice - Beyond Wise Words*, the National Action Committee Report from which many of the *A Roadmap for Change* recommendations came, family law is referred to as the “poor cousin” in the justice system.³² The report states that, “Family law has been de-emphasized by law schools, in favour of subjects more attractive to large law firms and global practice.”³³ The situation is even worse for courses concerning children and the law.

II. The UN Concluding Observations and A Roadmap for Change: Opportunities to Advance Children’s Rights

The Concluding Observations of the UN Committee on the Rights of the Child, dealt with in Part VII, provide helpful direction. The access to justice reports themselves also provide useful guidance. For example, many recommendations in *A Roadmap for Change* either apply directly to processes that would work effectively for children, or can be adapted to do so. This section contains examples from the report and discusses their relevance. The quotes provided have been adapted to show how they apply to children. (The parts added are bolded. If words are replaced, they follow the bolded words in brackets, in italics.)

A. PUTTING CHILDREN FIRST

A Roadmap for Change states there must be a focus on children as users of the justice system, and they must be involved in reform:³⁴

The focus must be on **children** (*people*) who need to use the system...
Children who are before the courts (*Litigants and especially self-represented litigants*) are not, as they are too often seen, an inconvenience; they are why the system exists.

...

³² Above, note 31 at p. 13.

³³ Above, note 31 at pp. 28-29

³⁴ Above, note 31 at p. 07.

Until we involve those who use the system, **including children**, in the reform process, the system will not really work for those who use it...

Putting children first is consistent with making their best interests a primary consideration, as required by the Convention. Including children in the reform process emphasizes the importance of children's participation - hearing from them how the justice system would operate most effectively for them - which is highlighted in the Convention, and referred to as a concern in the Concluding Observations.

B. FOCUSING ON JUST OUTCOMES FOR CHILDREN

The entire thrust of the Convention is to achieve just outcomes for all children in all aspects of their lives. That approach is consistent with that taken in ***A Roadmap for Change***:³⁵

...We should not be preoccupied with fair processes for their own sake, but with achieving fair and just results for **children** (*those who use the system*)...

...

Providing justice – not just in the form of fair and just process but also in the form of fair and just outcomes – must be our primary concern.

C. MAKING JUSTICE FOR CHILDREN A CENTRAL ASPECT OF LEGAL PROFESSIONALISM

A Roadmap for Change emphasizes making legal professionalism an important part of the concept of legal professionalism. The recommendation, as it relates to children, is that:³⁶

Access to justice **for children** must become more than a vague and aspirational principle. Law societies and lawyers must see it as part of a modern — “sustainable”— notion of legal professionalism. Access to justice **for children, including specific courses on children's legal rights** should feature prominently in law school curricula, bar admission and continuing education programs, codes of conduct, etc....

³⁵ Above, note 31 at p. 09.

³⁶ Above, note 31 at p. 15.

Making education on children’s legal rights a foundational aspect of legal professionalism in this manner would go a long way in addressing the concerns about the lack of human rights education raised in the Concluding Observations.

D. TAKING AN EXPANDED VIEW OF ACCESS TO JUSTICE FOR CHILDREN

The National Action Committee has emphasized the importance of looking at everyday legal problems. The report says that:³⁷

When thinking about access to justice **for children**, the starting point and consistent focus of the Action Committee is on the broad range of legal problems experienced by **children** — not just those that are adjudicated by courts. Key to this understanding of the justice system is that it looks at everyday legal problems from the point of view of the **children** experiencing them...

As we have seen, children’s legal rights must, under the Convention, be considered in almost all aspects of children’s lives. They are more likely to experience injustices in such places as schools, rather than experiencing it in ways that would lead them to court.

E. COLLABORATING AND COORDINATING

The Concluding Observations point to the need for more effective coordination and the need for a National Children’s Commissioner who could facilitate that coordination. **A Roadmap for Change** emphasizes the importance of both coordination and collaborations:³⁸

We also need to focus on collaboration and coordination. The administration of justice in Canada is fragmented. In fact, it is hard to say that there is a system – as opposed to many systems and parts of systems...

...

We can and must improve collaboration and coordination across and within jurisdictions, and across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts tribunals, the Bar, the Bench, court administration, the academy, the public, etc.)...”

We can and must improve collaboration, coordination and service integration with other social service sectors and providers as well.

³⁷ Above, note 31 at p. 02.

³⁸ Above, note 31 at p. 07.

F. RESEARCHING ABOUT CHILDREN AND JUSTICE

There is very little research in Canada about children and their ability to access justice. *A Roadmap for Change* suggests that we need more:³⁹

more research **about children and the way they experience justice** to promote evidence based policy making **about them**.

This approach is consistent with the recommendation in the Concluding Observations that Canada needs better data collecting and monitoring of child well-being. It would, as required by the Convention, involve the participation of children in all aspects of the research. It is also critical in determining what really needs to be done to provide children with meaningful access.

G. SIGNIFICANTLY SHIFTING LEGAL CULTURE RELATING TO CHILDREN

An important recommendation coming out of the work of the National Action Committee is the need to change the legal culture:⁴⁰

We need a fresh approach and a new way of thinking. In short, we need a significant shift in culture to achieve meaningful improvement to access to justice **for children** in Canada – a new culture of reform **for them**.

It is easy to look to how things have been traditionally done as an excuse not to make changes. Shifting our thinking to help children access justice involves looking for opportunities for change, not obstacles to change.

III. Final Thoughts – The Importance of Effective Legal Representation for Children

While laws alone cannot solve all of the issues that children face, applying “the law”, using a child rights based approach, is a very important method of effectively advancing their overall interests and well-being and of including their meaningful participation. We can no longer afford to view justice for children as a “wouldn’t it be nice if we could fix it but we can’t” kind of issue. Children both deserve and are legally entitled to much

³⁹ Above, note 31 at p. 10.

⁴⁰ Above, note 31 at p. 06.

more. As legal and other professionals we have legal obligations to advance justice for them and with them, individually, as groups and collectively.

A very good start would be to take seriously children's rights to independent legal representation. Children in Canada simply are not represented by their own lawyer most of the time when their best interests are being assessed. Some provinces and territories do better at providing counsel for specific children, but there is no consistency of approach. Yet, as we have seen, the UN Committee on the Rights of the Child states that all children need all appropriate legal representation when their best interests are to be formally assessed and determined by courts and equivalent bodies. It is not good enough to fall back on the outdated thinking that says that adults know what is best for children and can advance their interests for them. Instead, because of the special considerations that apply to children, they are more in need of independent legal representation than most adults.

The goal of an effective legal system is justice, not just access. While providing lawyers for children is necessary, it is not good enough to provide children with access to just any lawyer or other professional. That lawyer or other professional has to be a person who is well-equipped to assist children in identifying human rights violations in all aspects of their lives, and in achieving redress for them. Doing this requires an in-depth understanding of children's human rights and the ability to integrate rights based contextual analysis into all aspects of their work. Only then will just outcomes for children be achieved.