

## **Legal Hooks and Springboards to Advance Children’s Access to Justice**

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This paper briefly outlines some legal hooks and springboards to help implement the legal fundamentals to advance children’s access to justice. It is not intended to be exhaustive, but is offered in the spirit of providing some starting points for strengthening how legal and other professionals approach their work to respect, implement and be accountable for the legal rights of children and advance children’s wellbeing.

### **I. Background**

The wellbeing of Canadian children compared to other wealthy nations is lagging,<sup>1</sup> and the justice system is in a state of crisis falling far short of the aspirational vision of the Canadian Bar Association whose Access to Justice Committee describes “justice” as:<sup>2</sup>

. . . inviolable. It ensures fairness and equality for all, and respect for all who come before it. Being accorded respect from a justice system means being heard and provided with an effective, meaningful outcome.

According to the United Nations Human Rights Council “access to justice” is:<sup>3</sup>

the ability to obtain, through formal or informal justice processes, a just and timely remedy for violations of rights as put forth in national and international norms and standards including the Convention on the Rights of the Child.

Yet, for children access to justice is not merely about effective remedies but perhaps more importantly about how the remedies actually improve their lives:<sup>4</sup>

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<sup>1</sup> Overall Canada ranks 17 out of 26 rich countries in terms of children’s well-being and lags in the bottom third for material well-being, health and safety, education, behaviors and risks, bullying, housing and environment: Innocenti Report Card 11, *Child Well-Being in Rich Countries: A comparative overview*, UNICEF: April 2013.

<sup>2</sup> Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice: an Invitation to Act*, CBA: November 2013 at p. 60.

<sup>3</sup> UNDP, *Programming for Justice: Access for All. A Practitioner’s Guide to a Human Rights Based Approach to Access to Justice*; 2005 and cited in Concept Note, UN Human Rights Council, Annual Full Day Meeting on the Rights of the Child, Access to Justice for Children, May 13, 2014.

<sup>4</sup> Cherry Kingsley, Letter from Save the Children, *Expanding Horizons: Rethinking Access to Justice in Canada Symposium*, 2000

Young people don't want justice to mean pain, punishment, vengeance, retribution, "making somebody suffer or pay", finger-pointing, shaming or "locking them up and throwing away the key". Most young people that I talk to want food and shelter, protection from violence and abuse, and the support necessary for education, employment, happiness and healing.

Regardless of the definition, justice, and access to it, requires an accessible and respectful process as well as meaningful outcomes that improve people's lives, including children.

In 2014 the UN Human Rights Council during its day of discussion on the rights of the child called on States Parties, including Canada, to improve children's access to justice:<sup>5</sup>

*Noting* the various barriers to children's access to justice, including lack of awareness of the rights of the child, restrictions on the initiation of or participation in proceedings, the diversity and complexity of procedures, lack of trust in the justice system, lack of training of relevant officials, de jure and de facto discrimination, certain cultural and social norms, the stigma on the children associated with certain crimes, and physical barriers,

and highlighted that access to justice occurs in formal justice processes AND informal ones:<sup>6</sup>

*Recognizes* that alternative mechanisms for solving disputes and seeking redress for violations of the rights of the child, such as diversion, restorative justice processes, mediation, conciliation, arbitration, community-based programmes, complaints mechanisms of national human rights institutions, customary and religious justice processes, or company grievance mechanisms, can provide quick, affordable and accessible remedies, and help to reintegrate the child, while stressing that such mechanisms must be based on strict compliance with international human rights standards and procedural safeguards, and be child- and gender-sensitive;

A key challenge for legal professionals and other adults in children's lives is how to best bridge the gaps between justice and children's wellbeing. First, we must take it upon ourselves to know that children have substantive legal rights, including children themselves. Second, we need to find ways of implementing this knowledge so the substantive legal rights of children are integrated into daily practice and outcomes for children. Third where the rights of children are violated or ignored we need to find ways to hold people accountable and seek remedies that are sensitive to the context and wellbeing of children.

## **II. Substantive Legal Hooks and Springboards to Implement Child Rights**

The *United Nations Convention on the Rights of the Child* ("CRC") ratified by Canada in 1991 with letters of support from all provinces and territories is the cornerstone of children's rights

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<sup>5</sup> Human Rights Council, twenty fifth session, A/HRC/25/L.10, 25 March 2014.

<sup>6</sup> *Ibid.*

worldwide.<sup>7</sup> CRC essentials and other aspects are covered in the complementary papers prepared by the Honourable Donna J. Martinson (retired) and David Dundee and provide foundational knowledge required to begin to apply child rights meaningfully.

The legal rights of children are based in international and domestic law:<sup>8</sup>

... all children in Canada have legal rights to be heard in all matters affecting them, including custody cases. Decisions should not be made without ensuring that those legal rights have been considered. These legal rights are based on the *United Nations Convention on the Rights of the Child*, (“the *Convention*”), and Canadian domestic law.

The following outlines “legal hooks” which expressly contemplate and support the substantive legal rights of children and “legal springboards” which also support children’s substantive legal rights but are implicit. The hooks and springboards may serve as entry points from which legal and other professionals can articulate, advance and ultimately implement children’s rights in formal and informal justice settings. The hooks and springboards are outlined under the following key headings: 1) International Law; 2) Domestic Law; 3) Procedural Law and Guidelines.

## **1. International Law**

### **a) International Law - Legal Hooks**

#### **i. International Instruments**

Numerous international legal instruments outline the human rights of children including the CRC, *Declaration on the Rights of Indigenous Peoples* and *Convention on the Rights of Persons with Disabilities*. Countries or States Parties indicate their commitments to implement their contents through ratification.

Many international instruments are referenced in jurisprudence such as *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, the polygamy reference case in which the Court reviewed the following treaties to defend the constitutionality of s. 293:<sup>9</sup>

- *Convention on the Rights of the Child*;
- *International Covenant on Civil and Political Rights*;
- *International Covenant on Economic, Social and Cultural Rights*;

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<sup>7</sup> *Convention on the Rights of the Child*, R.T. Can. 1992 No. 3; Final Report of Canada’s Standing Senate Committee on Human Rights, “Children: The Silenced Citizens, Effective Implementation of Canada’s International Obligations with respect to the Rights of Children”, 2007: Government of Canada, pp. 7-9. Canada also ratified the Optional Protocol on the Involvement of Children in Armed Conflict in 2000, ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in 2005, but has yet to sign or ratify the Optional Protocol on a Communication Procedure for children open for signature on December 19, 2011.

<sup>8</sup> *B.J.G. v. D.L.G.*, 2010 YKSC 44, at paragraph 2.

<sup>9</sup> *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, see paragraphs 794 – 851 for analysis of international law (treaties, customary and comparative analysis)

- *Convention on the Elimination of All Forms of Discrimination against Women*,

and then concluded:

[839] I am satisfied that the consensus of these international treaty bodies is that the practice of polygamy violates various provisions of the treaties that Canada has ratified. **As a state party, Canada has obligations to take all appropriate measures to eliminate polygamy. This includes an obligation to prevent violations of these treaties by private actors through their practice of polygyny.**

Therefore Canada has obligations as a duty bearer under ratified international treaties, and as such must take all appropriate measures to prevent treaty violations, even those perpetrated by non-state actors. By extension Canada has an obligation to prevent violations of treaties by Provinces/Territories, consistent with their support of Canada's ratification of the CRC, as well as private entities operating at arms-length.

*ii. Baker v. Canada - A contextual approach to statutory interpretation and judicial reviews, attentive to the rights and best interests of children*

It took a decade from the time the CRC was first introduced at the UN before the Supreme Court of Canada considered it in *Baker v. Canada*, an immigration case involving a woman with Canadian-born dependent children which used the CRC to interpret s. 114(2) of the *Immigration Act* in reviewing an immigration officer's decision.<sup>10</sup> Ms. Baker applied for an exemption from the requirement that she apply for permanent residency from outside the country. Her case was based on humanitarian and compassionate grounds due to concerns about unavailable medical treatment in her country of origin and the effect her leaving the country might have on her dependent children. The Supreme Court of Canada held that the immigration officer's decision was unreasonable because, among other things, the officer failed to give serious weight and consideration to the interests of the children:<sup>11</sup>

. . . a reasonable exercise of power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C [humanitarian and compassionate] powers should be exercised may be found, for example, in the purposes of the Act, **in international instruments**, and in the guidelines for making H & C decisions published by the Minister herself.

The Court made it clear that values reflected in international human rights law inform the contextual approach to statutory interpretation and judicial review of government decisions, as well as the scope of the *Charter of Rights and Freedoms*.<sup>12</sup> Further, the CRC emphasizes the

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<sup>10</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

<sup>11</sup> *Ibid* at 858-860.

<sup>12</sup> *Ibid.* at 861.

importance of paying attention to the rights and interests of children when decisions are made relating to them.<sup>13</sup>

**The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future.**

Additional case law expressly supports the rights of children but the *Baker* decision was significant as one of the first cases where the Supreme Court of Canada considered the CRC.

#### ***b) International Law - Springboards***

Additional international documents that can serve as springboards include:

- Concluding Observations regarding Canada's implementation of its international commitments such as those contained in the CRC and its Optional Protocols - [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4)
- General Comments which aid in the interpretation of specific provisions of international legal instruments such as the CRC - [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11)
- Jurisprudence from regional mechanisms such as the European Court of Human Rights and Inter-American Court of Human Rights
- An online database of treaty body case law for ideas on crafting or shaping legal arguments based on other jurisdictions - <http://juris.ohchr.org/>

## **2. Domestic Law**

### **a) Domestic Law – Legal Hooks**

#### ***i. The Charter***

Many, if not most, cases involving the CRC and child rights before the Supreme Court of Canada have involved the *Charter*. While several earlier *Charter* decisions rendered by the Supreme Court majority do not necessarily bolster children's *Charter* rights in the result such as *Sharpe* and *Auton*, it is helpful to consider them to understand potential barriers that may have to be overcome in a future *Charter* challenge.

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<sup>13</sup> *Ibid.*

In 2001 the Supreme Court of Canada considered the CRC in the context of a constitutional challenge to s.163 of the *Criminal Code of Canada* that criminalized possession of child pornography *R v. Sharpe*.<sup>14</sup> The Court framed the competing principles in the case as follows:<sup>15</sup>

On the one hand stands the right of free expression — a right fundamental to the liberty of each Canadian and our democratic society. On the other stands the conviction that the possession of child pornography must be forbidden to prevent harm to children.

Mr. Sharpe did not argue that preventing harm to children could never curb freedom of expression, but rather that the provision in question was overbroad because it caught material that posed no harm to children.<sup>16</sup> In a six to three decision the majority of the Supreme Court of Canada found the section constitutional provided it was read to include two exceptions pertaining to self-created and legal material held for personal use that in the Court's view raised little or no risk of harm to children. The majority's reasons were grounded in a contextual approach to statutory interpretation that did not consider the rights of children as protected in international instruments such as the CRC. On the contrary, in concluding that s. 163 was constitutional without exception the dissenting judgment quoted the CRC and international instruments extensively noting that:<sup>17</sup>

. . . international law is rife with instruments that emphasize the protection of children.

The narrow contextual approach underlying the Court's majority decision in *Sharpe* compared to the broader view to child protection taken by the Court's minority seems to emphasize the value and importance of considering the CRC and other international instruments to guarantee the rights and protection of children in jurisprudence.

In 2004 the Supreme Court of Canada rendered its decision in *Auton* where the petitioners named were infants with autism who, with the assistance of their parents as litigation guardians, claimed the provincial government's failure to fund applied behavioral therapy violated their equality rights under the *Charter*.<sup>18</sup> The unequal treatment rested in the fact that non-disabled children or adults received mental health services funded by the Province while autistic children were denied the applied behavioral therapy even though the Province acknowledged the importance of early intervention, diagnosis and treatment for autism. The trial judge and British Columbia Court of Appeal both found the Province violated the children's equality rights, but the Supreme Court of Canada disagreed holding that there was no violation because the Province was only required under the applicable legislation to fund core services provided by medical practitioners and this did not include the services in issue.<sup>19</sup> The Court referenced the importance of looking at equality issues substantively and contextually in its reasons but it did not draw on the CRC to assist. Its equality analysis hinged on whether the service was a benefit provided by law, and whether an appropriate comparator group received unequal treatment to their benefit. It is

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<sup>14</sup> *R v. Sharpe* [2001] 1 S.C.R. 45; *Criminal Code*, R.S.C. 1985, c. C-46, s. 163.1(4).

<sup>15</sup> *Ibid.* paragraph 29.

<sup>16</sup> *Ibid.* paragraph 30.

<sup>17</sup> *Ibid.* paragraph 178.

<sup>18</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78

<sup>19</sup> *Ibid.*; *Canada Health Act*, R.S.C. 1985, c. C-6; *Medical Protection Act*, R.S.B.C. 1996, c. 286.

noteworthy that a similar argument raised by Canada that Aboriginal children on reserve should not be compared to children living off reserve was rejected by the Canadian Human Rights Tribunal with respect to a First Nations Child Welfare Complaint (Docket: T1340/7708).<sup>20</sup>

In 2009 the Supreme Court of Canada considered *A.C. v. Manitoba (Director of Child and Family Services)*, a case involving apprehension of an almost 15 year old girl who suffered gastrointestinal bleeding caused by Crohn's disease when she refused a blood transfusion as a Jehovah's Witness.<sup>21</sup> Section 25(8) of the Manitoba *Child and Family Services Act* enabled the Court to authorize treatment that it considered to be in the child's best interests and s. 25(9) presumed that the best interests of a child 16 or over was most effectively promoted by allowing the child's views to be determinative, unless it could be shown that the child did not understand the decision or appreciate its consequences. The following provisions of the *Charter* were raised: s. 2(a) (conscience and religion), s. 7 (life, liberty and security of the person and no deprivation of these unless in accordance with the principles of fundamental justice), and s. 15(1) (equality). The Court reviewed the common law for adults, the common law for minors, other jurisdictions, and the academic literature in concluding that the legislation led to:<sup>22</sup>

... an interpretive approach to "best interests" that is consistent with international standards, developments in the common law, and the reality of childhood and child protection.

The Court found the legislative provisions constitutional and took the view that while the evolving and contextual nature of maturity makes it difficult to define:<sup>23</sup>

the right of mature adolescents not to be unfairly deprived of their medical decision-making autonomy means the assessment must be undertaken with respect and rigour.

To this end, the Court offered several questions not as a formula but as examples to assist others in assessing the extent to which a child's wishes reflect true, stable and independent choices. The Court concluded:<sup>24</sup>

... I agree with A.C. that it is inherently arbitrary to deprive an adolescent under the age of 16 of the opportunity to demonstrate sufficient maturity when he or she is under the care of the state. It is my view, however, that the "best interests" test referred to in s. 25(8) of the Act, properly interpreted, provides that a young person is entitled to a degree of decisional autonomy commensurate with his or her maturity.

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<sup>20</sup> *First Nations Child and Family Caring Society of Canada et al v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development)*, Canadian Human Rights Tribunal, File No. T 1340/7008. Canada raised this argument in an attempt to dispense with the case on a technicality prior to the full hearing. The complaint was referred by the Commission to the Canadian Human Rights Tribunal in 2008 and the Tribunal's decision is expected in 2015.

<sup>21</sup> *A. C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181

<sup>22</sup> *Ibid.* paragraph 80.

<sup>23</sup> *Ibid.* paragraph 96

<sup>24</sup> *Ibid.* paragraph 114.

Section 35 of the *Charter* has yet to be considered by the Supreme Court of Canada in the context of children, and in particular how aboriginal rights may protect or otherwise benefit aboriginal children today given a practice, custom or tradition integral to a particular aboriginal group that protected children at the time of contact with the Europeans.<sup>25</sup>

*ii. Legislation with express provisions*

The CRC, or some of its contents, is expressly referenced in certain laws at provincial/territorial and federal levels. However, no comprehensive legal framework exists to ensure the CRC is applied automatically or consistently to all cases involving Canadian children, or to all jurisdictions across Canada.<sup>26</sup> Nevertheless, there are examples of express provisions in domestic statutes that recognize the legal rights of children and can be used as a hook for implementation such as:

- British Columbia - *Child Family Community Services Act*

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

- (a) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the placement;
- (b) to be informed about their plans of care;
- (c) to be consulted and to express their views, according to their abilities, about significant decisions affecting them;
- (d) to reasonable privacy and to possession of their personal belongings;
- (e) to be free from corporal punishment;
- (f) to be informed of the standard of behaviour expected by their caregivers or prospective adoptive parents and of the consequences of not meeting the expectations of their caregivers or prospective adoptive parents, as applicable;
- (g) to receive medical and dental care when required;
- (h) to participate in social and recreational activities if available and appropriate and according to their abilities and interests;
- (i) to receive the religious instruction and to participate in the religious activities of their choice;
- (j) to receive guidance and encouragement to maintain their cultural heritage;
- (k) to be provided with an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care;
- (l) to privacy during discussions with members of their families, subject to subsection (2);
- (m) to privacy during discussions with a lawyer, the representative or a person employed or retained by the representative under the [Representative for Children](#)

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<sup>25</sup> *R. v. Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 (SCC).

<sup>26</sup> CRC/C/CAN/CO/3-4, 6 December 2012; In addition to no comprehensive legal framework, no office such as a national children's commissioner exists to encourage coordination or consistency in applying children's rights across the country;

and Youth Act, the Ombudsperson, a member of the Legislative Assembly or a member of Parliament;

(n) to be informed about and to be assisted in contacting the representative under the Representative for Children and Youth Act, or the Ombudsperson;

(o) to be informed of their rights, and the procedures available for enforcing their rights, under

(i) this Act, or

(ii) the Freedom of Information and Protection of Privacy Act.

(2) A child who is removed under Part 3 is entitled to exercise the rights in subsection (1) (l), subject to any court order made after the court has had an opportunity to consider the question of access to the child.

(3) This section, except with respect to the Representative for Children and Youth as set out in subsection (1) (m) and (n), does not apply to a child who is in a place of confinement.

- Alberta - *Protection of Children Abusing Drugs Act, SA 2005, c P-27.5*

#### Confinement in protective safe house

**4** If a child is confined in a protective safe house pursuant to a protection order, the director of the protective safe house must at the beginning of the period of confinement

(a) give the child a request for review form provided for in the regulations,

(b) give the child a copy of the order,

(c) provide the child with a written explanation of

(i) the child's right to ask the Court to review the order, and

(ii) the child's right to contact a lawyer, ,

(d) explain the Court order and the information referred to in clause (c) to the child orally in a way that the director believes the child is likely to understand, and

(e) give the child the telephone number of the Legal Aid Society of Alberta in writing.

#### Review of protection order

4.1 (1) An application to the Court for a review of a protection order may be made by

(a) the child who is the subject of the order,

(d) any other person, with the permission of the Court.

(3) The applicant must give notice of the application for review to the following:

(a) the child who is the subject of the protection order,

- *Youth Criminal Justice Act* preamble:

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in

the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms;

This express CRC reference in the preamble has been used by the Supreme Court of Canada to inform the YCJA's application to young people:<sup>27</sup>

Turning first to the preamble, there are two parts that demonstrate that the Act is aimed at restricting the use of custody for young persons. First, there is the part of the preamble that states that "Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms". This reference to the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, is important because art. 37(b) of the Convention provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

## b) Domestic Law – Springboards

### i. *Legislative Interpretation that presumes respect for children's rights*

While legal instruments such as the CRC are neither incorporated directly into Canada's constitution or laws, nor automatically enforceable,<sup>28</sup> there is a presumption that the legislation enacted by Canada's federal parliament and provincial and territorial legislatures respect the rights and values set out in the CRC.<sup>29</sup>

Canada has chosen not to incorporate the provisions of the *Convention* directly into domestic law because it takes the position that Canadian domestic law complies with the *Convention*. That is because **Canadian jurisprudence provides that in interpreting domestic statutes, Parliament and provincial legislatures are presumed to respect the rights and values set out in the *Convention*.**

This approach has been taken in administrative decision making as well as cases before the courts. For example, a July 14, 2010 Report by a Nova Scotia Review Officer (FI-08-107) which reviewed whether the Department of Community Services properly withheld portions of the Record in accordance with the *Freedom of Information and Protection of Privacy Act* from

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<sup>27</sup> R. v. C.D.; R. v. C.D.K., [2005] 3 SCR 668, 2005 SCC 78 at para 35; Also, R. v. D.B., [2008] 2 S.C.R. 3, 2008 SCC 25.

<sup>28</sup> Note that Canada uses a dualist model of ratification, and its ratification included reservations to CRC Articles 21 and 37(c); Final Report of Canada's Standing Senate Committee on Human Rights, "Children: The Silenced Citizens, Effective Implementation of Canada's International Obligations with respect to the Rights of Children", 2007: Government of Canada, pp. 7-9.

<sup>29</sup> B.J.G. v. D.L.G., 2010 YKSC 44, at paragraph 5; for further authority on the presumption see *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982.

an adult who had previously been in care, and determined that the information should be fully disclosed, expressly refers to the rights and best interests of the child in her findings:

The best interests of the child is the paramount consideration in matters involving child protection, which test is reflected in the *United Nations Convention on the Rights of the Child*, and the *Nova Scotia Community and Family Services Act*. Every child has the right to information about family, both foster and biological. The key principle under protection legislation is best interests. I find that in most instances, the best interests of children are served by access to information about their complete family history.

**ii. *Contextual Approach to Legislative Interpretation that requires a consideration of children’s rights and well-being within the broader political, social and historical context***

As noted in the international law section above, *Baker* upheld the contextual approach to legislative interpretation and judicial review of government decisions where child rights are at stake. This approach to statutory interpretation, which permits an examination of the broader political, social and historical context, has been applied by the Supreme Court of Canada to support the rights of children in other cases as well. For example, in *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419 where the constitutionality of s. 715.1 of the *Criminal Code* permitting videotaped evidence of a child victim of sexual abuse was in issue, the Court upheld the provision on the basis that it responded to the dominance and power which adults, by virtue of their age, have over children, that it makes participation in the criminal justice system less stressful and traumatic for young people, and also aids in the preservation of evidence and the discovery of truth.

**iii. *Principles of fundamental justice – presumptions flowing from children’s heightened vulnerability***

In 2004 the Supreme Court of Canada rendered its decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (“*Children’s Foundation*”), also known as Canada’s “spanking case”, which included consideration of whether best interests of the child is a principle of fundamental justice.<sup>30</sup> The case involved a constitutional challenge of s. 43 of the *Criminal Code* which justified a reasonable use of force by a parent or teacher against a child for corrective or educational purposes. Decisions were rendered by a majority of the Court as well as by three additional dissenting judges, perhaps reflecting the diverse and evolving perspectives of Canadians on the subject matter of children’s place within the family.

The majority of the Court ruled that while the best interests of the child is a legal principle in domestic and international law, it is not a principle of fundamental justice because it is not fundamental to society’s notion of justice. The majority relied in part on the wording of Article 3 of the CRC noting that the best interests of the child are “a” primary consideration, not “the” primary consideration and thus may be subordinated to other concerns in appropriate contexts.<sup>31</sup> The majority also referenced Articles 5, 19(1) and 37(a) of the CRC and other international

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<sup>30</sup> *Canadian Foundation for Children and the Law v. Canada (Attorney General)* [2004] 1 S.C.R. 76.

<sup>31</sup> *Ibid*, paragraphs 9-12.

human rights instruments but took an extremely narrow interpretation of these in deciding that they did not explicitly ban the use of corporal punishment.<sup>32</sup> Further, the majority went on to describe when the use of force was justified, for example for a child between the ages of 2 and 12 and only when the force was applied by a parent, and underscored the primacy of keeping the family in tact over protecting the dignity of the child.<sup>33</sup>

The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families — a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.

Arbour J. in her dissenting opinion which found s. 43 unconstitutional, suggested the majority judgment was tantamount to rewriting the provision:<sup>34</sup>

. . . it is useful to note how much work must go into making the provision constitutionally sound and sufficiently precise: (1) the word “child” must be construed as including children only over age 2 and younger than teenage years; (2) parts of the body must be excluded; (3) implements must be prohibited; (4) the nature of the offence calling for correction is deemed not a relevant contextual consideration; (5) teachers are prohibited from utilizing corporal punishment; and (6) the use of force that causes injury that is neither transient nor trifling (assault causing bodily harm) is prohibited (it seems even if the force is used by way of restraint). At some point, in an effort to give sufficient precision to provide notice and constrain discretion in enforcement, mere interpretation ends and an entirely new provision is drafted.

Four years later in **R. v. D.B., [2008] 2 S.C.R. 3, 2008 SCC 25** the Court considered whether deprivation of a young person’s liberty was in accordance with the principles of fundamental justice within the meaning of s. 7 of the *Charter*, and in particular recognized that young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment. The Court held that this presumption is a legal principle given the legislative history leading to the YCJA, and finds expression in Canada’s international commitments, in particular the UN Convention on the Rights of the Child. Among other things the Court noted that the principle is fundamental to the operation of a fair legal system, and can be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. It has been administered and applied to proceedings against young people for decades in this country.

It is possible that the *Children’s Foundation* case would be decided differently today as Canadians’ views of children and their rights evolve, and newer law such as the *Family Law Act*

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<sup>32</sup> *Ibid.*, paragraphs 32-34.

<sup>33</sup> *Ibid.* paragraph 62.

<sup>34</sup> *Ibid.* paragraph 190.

in British Columbia that has the best interests of the child as the only consideration in making determinations about guardianship, parenting arrangements or contact with a child is in effect.<sup>35</sup>

See also David Dundee's CLEBC paper for points on principles of natural justice.

***iv. Minority Decisions***

As time passes and public discourse evolves to include more references to the rights of children the reasoning contained in minority decisions, such as in *Sharpe* and *The Children's Foundation Case* referenced above, may prove to be of great value as the Courts have been known to revisit prior case law decisions.

***v. Contracts and other legal instruments***

A wide range of contracts and other legal instruments are entered daily and affect or involve children. For example, agreements for entering into informal justice decision making such as mediation, and agreements entered into to benefit communities such as Impact Benefit Agreements in the context of resource development affecting aboriginal communities provide opportunities to include and uphold the rights and wellbeing of children, both in their drafting of content and outcomes as well as with respect to processes used in their implementation.

***vi. Policy and public documents and statements***

Depending on context there may be policies of governments or organizations, codes of conduct for professionals and others working with children, achievement contracts in the case of education etc to consider in furthering the rights and well-being of children. The Senate Standing Committee on Human Rights has produced several reports taking a child rights-based approach, including its work on Canada's obligations under the CRC.

**III. Procedure and Practice Guidelines**

In October 2012 the United Nations Committee on the Rights of the Child reviewed Canada's performance on respecting children's views and stated:<sup>36</sup>

36. The Committee welcomes the State party's Yukon Supreme Court decision in 2010 which ruled that all children have the right to be heard in custody cases. Nevertheless, the Committee is concerned that there are inadequate mechanisms for facilitating meaningful and empowered child participation in legal, policy, environmental issues, and administrative processes that impact children.

Mechanisms to facilitate children's meaningful and empowered access to Canadian courts and other justice decision-making mechanisms remain inadequate, leaving Canadian children with a

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<sup>35</sup> Senate Report, *Supra* note 7; s. 37, *BC Family Law Act*.

<sup>36</sup> Committee on the Rights of the Child, *CRC/C/CAN/CO/3-4*, Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012), paragraphs 36-37.

patchwork of laws and services.<sup>37</sup> Indeed, whether a mechanism is available to a child is dependent on factors such as: subject matter; and the child's place of residence. These factors help determine the applicable law, rules of procedure or practice within a formal or informal justice process, and the nature and extent of resources available to the child to access the system. Where a child is able to use a mechanism to gain access to a proceeding, then the knowledge, expertise and resources available to both the child and those facilitating the child's participation in the proceedings determine the quality of the child's participation and respect for the child's rights.

In other parts of the world such as the European Union, children's access to justice is a priority. Indeed in 2011 the Council of Europe Guidelines on Child Friendly Justice came into effect to help create child-friendly justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level. They focus on actions taken before, during and after justice proceedings and require actions to be contextualized. A summary of the guidelines are contained in the CLEBC materials. Guidelines have also been produced with respect to children as witnesses and victims of crime which are also available in the conference materials.

With the patchwork of mechanisms and services to support children, their rights and their access to justice in Canada, it is left to those working directly with, or whose work directly impacts, children to strengthen their practices with children. To this end, in both formal and informal justice process:<sup>38</sup>

- 1) Acknowledge the impact of the justice process and subject matter on children
- 2) Support children and their rights
- 3) Recognize the evolving capacity of children
- 4) Give children information they can understand
- 5) Create supportive environments where children can participate
- 6) Listen to children in decisions that affect them
- 7) Consider children's views and perspectives
- 8) Assure children that they are not making the decisions that are the responsibility of the adults
- 9) Tell children what happens (in a way that they understand)
- 10) Repeat- meaningful child participation is not static but a continuous process

The patchwork in Canadian children's access to justice is further compounded by the presence, or lack thereof, of third party mechanisms to assist children.<sup>39</sup> Some of these positive supports include a publicly funded Office of the Children's Lawyer in Ontario, non-governmental organizations such as Justice for Children and Youth in Toronto that provide legal assistance to

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<sup>37</sup> Grover, Sonja, *The Legal Standing of Children in Canada*, (Butterworths: 2008) Canada.

<sup>38</sup> Adapted from Williams and Heykoop, *Ten Tips for Legal Professionals: Meaningful Child Participation in Family Justice Processes*, International Institute for Child Rights and Development: 2008.

<sup>39</sup> For example Justice for Children and Youth provides select legal representation to low-income children and youth in Toronto, Ontario and vicinity and periodically intervenes in cases originating outside Ontario where children's rights are at stake. Similar organizations are not in operation in every Canadian jurisdiction or community.

low income children, non-profit children's advocacy centres such as the Zebra Centre in Edmonton whose multi-disciplinary teams of law enforcement, justice and child protection professionals assist children who have been victims or witnesses of crime through their criminal proceedings, and non-profit organizations such as the Hear the Child Society that maintains a roster of neutral qualified child interviewers for family proceedings in British Columbia.<sup>40</sup> Alberta's Office of the Child and Youth Advocate also has the Legal Representation for Children and Youth (LRCY) program that provides representation for children and young people involved with the child protection system.<sup>41</sup> In addition, several non-profit or academic organizations in Canada either commence legal proceedings on behalf of children or intervene in cases involving children, frequently with *pro bono* legal assistance from the private bar.<sup>42</sup>

There are various hooks and springboards to support and advance children's access to justice which can be used before, during or after formal and informal justice processes. Each of us has the ability to strengthen our knowledge and implement practices that can better respect, implement and account for the rights and wellbeing of children.

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<sup>40</sup> Learn more about these practices at: Office of the Children's Lawyer: <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/>; Justice for Children and Youth: <http://www.jfcy.org/>; Zebra Centre: <http://zebracentre.ca/>; Hear the Child Society: <http://hearthechild.ca/>.

<sup>41</sup> Bertrand, Bala, Birnbaum, Paetsch, "Hearing the Voices of Children in Alberta Family Proceedings: The Role of Children's Lawyers and Judicial Interviews, August 2012, p. 3.

<sup>42</sup> Examples include the Canadian Coalition on the Rights of the Child, the BC Civil Liberties Association and the David Asper Centre for Constitutional Rights based at the Faculty of Law, University of Toronto.