



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

## **Alternative Report to the UN Committee on the Rights of the Child**

**CANADIAN BAR ASSOCIATION  
CHILD AND YOUTH LAW SECTION**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Child and Youth Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Child and Youth Law Section.

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# Alternative Report to the UN Committee on the Rights of the Child

## I. EXECUTIVE SUMMARY

The Canadian Bar Association Child and Youth Law Section comments on Canada's compliance with the United Nations Convention on the Rights of the Child (UNCRC) and recommends changes to advance children's rights in Canada:

- **Incorporation of the UNCRC and Ratification of the Third Optional Protocol:** Canada and the provincial and territorial governments should incorporate the UNCRC into domestic law, and meaningfully review existing laws for conformity with the UNCRC. Canada should ratify the Third Optional Protocol to promote better monitoring and resolution of violations of children's rights and take subsequent steps to facilitate children's access to and awareness of the communications procedure.
- **National Commissioner for Children and Youth:** Canada should establish an independent national human rights institution with a mandate to protect and promote the rights of children and youth at the federal level.
- **Child Rights Impact Assessments:** Canada and the provincial and territorial governments should mandate Child Rights Impact Assessments for all new bills, regulations, policies and budgets that impact the rights and best interests of children.
- **Education for Judges and Lawyers:** The government and legal organizations in Canada should facilitate mandatory, comprehensive, in-depth and on-going child rights education, with a focus on the UNCRC. Governments and organizations should promote access to justice for children by creating and implementing a roadmap for access to justice focused on children and their rights.
- **Best Interests of the Child:** Canada and the provinces and territories should include the best interests of the child in all legislation, court decisions, and policy decisions affecting children. In immigration, refugee determination and immigration detention decisions, Canada should minimize the separation of children from their family members except if it is necessary for the best interests of the child. Canada should comply with Jordan's Principle to ensure Indigenous children's access to necessary services is not delayed due to jurisdictional disputes. Canada should address children's rights concerns relating to forthcoming amendments to the *Divorce Act*.
- **Child Participation and Representation:** Canada and the provinces and territories should increase the participation of children in advisory bodies that give input on legislative and policy decisions. Children should be offered a range of ways to participate in proceedings, and their choices on whether and how to participate should be respected. Courts and administrative decision-makers that assess children's best interests should meaningfully inform children about their participation rights including their right to independent legal representation. Governments should ensure dedicated and adequate funding to meet children's essential legal needs.

## II. INTRODUCTION

The Canadian Bar Association Child and Youth Law Section (CBA Section) appreciates the opportunity to make submissions to the United Nations Committee on the Rights of the Child (CRC Committee) on Canada's compliance with the United Nations Convention on the Rights of the Child (UNCRC) and promotion of children's rights. The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice.<sup>1</sup> The CBA Section coordinates activities, provides advice and responds to law, policy and legal research developments on matters affecting children in Canada.<sup>2</sup> This report highlights Canada's performance in promoting children's rights federally and nationally since the CRC Committee issued its last Concluding Observations in December 2012. Each section includes recommendations for promoting compliance with Canada's obligations under the UNCRC and the rights of children across the country.

## III. METHODOLOGY

This report gathers information from reported legal decisions, policy positions of the CBA Section and positions presented by government to comment on issues within the expertise of the CBA Section. Many of its recommendations reflect CBA policy set in resolutions passed at annual meetings. Others reflect written submissions presented to the federal government by the CBA Child and Youth Law Section and CBA Sections including Family Law, Immigration Law, Constitutional and Human Rights, and Aboriginal Law.

## IV. INCORPORATION OF THE UNCRC AND ITS OPTIONAL PROTOCOLS INTO DOMESTIC LAW

While Canada ratified the UNCRC in 1991, it has not yet incorporated the UNCRC and its First and Second Optional Protocols into domestic law.<sup>3</sup> Canadian courts periodically interpret Canadian law to accord with provisions of the UNCRC.<sup>4</sup> In *Baker v Canada* and *Kanthasamy v Canada*, for example, the Supreme Court of Canada stressed the importance of the best interests of the child, consistent with Article 3 of the UNCRC, in humanitarian and

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<sup>1</sup> The Canadian Bar Association, "About us" (2019), [online](#). The Children's Law Committee, now the CBA Child and Youth Law Section, published an online Child Rights Toolkit to assist professionals working in legal and administrative decision-making with information and resources to better understand and implement a child rights-based approach, using the UNCRC, in practice and to strengthen their advocacy for children. See CBA Child and Youth Law Section, CBA Child Rights Toolkit, [online](#). [*CBA Child Rights Toolkit*]

<sup>2</sup> The Canadian Bar Association, Child and Youth Law Section, [online](#).

<sup>3</sup> Canada, "Rights of children" (14 November 2017), [online](#).

<sup>4</sup> Senate of Canada, Standing Senate Committee on Human Rights, *Children: The Silenced Citizens*, (April 2007) (Chair: The Honourable Raynell Andreychuk) at pages 42-43, [online](#) [*Silenced Citizens*]; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at para. 70 [*Baker*]; *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para. 39, [*Kanthasamy*]; *A. C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, at para. 93; *A.B. v. Bragg Communications Inc.*, 2012 SCC 567, at paras. 17-18; *R. v. D.B.*, 2008 SCC 25, at para. 60; *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2119, 2005 FCA 436, at paras. 71, 87, 94, 104-105, 108; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, at para. 34 [*Balev*]; *A.M.R.I. v K.E.R.*, 2011 ONCA 417 (CanLII), at para. 82; *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, at paras. 51, 74-75; *B.J.G. v. D.L.G.*, 2010 YKSC 44; *Yenovkian v. Gulian*, 2019 ONSC 7279, at paras. 52-69.

compassionate decisions in the immigration context.<sup>5</sup> The province of Ontario also referenced the UNCRC in the preamble to its most recently enacted child welfare legislation, the *Child, Youth and Family Services Act, 2017*.<sup>6</sup> Canada is a dualist State. While the ratified but unimplemented UNCRC has interpretive value, its articles are secondary to Canadian domestic law where there is inconsistency.<sup>7</sup> A violation of a provision of the UNCRC cannot offer a valid cause of action in Canadian courts.

Canada must implement the UNCRC's provisions into domestic law so that children benefit from its full protection. The CRC Committee called on Canada in 2012 to enact domestic legislation to fully incorporate the provisions of the UNCRC and its Optional Protocols into Canadian law and to have clear guidelines for the consistent application of these provisions.<sup>8</sup> The CRC Committee also noted that Canada's failure to incorporate the UNCRC into domestic law led to "fragmentation and inconsistencies" across provinces and territories in how children's rights are protected and promoted. Children in common situations have different outcomes depending on the laws in their jurisdiction.

A recent private member's bill, Bill C-262, sought to incorporate another international human rights convention, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) into Canadian law.<sup>9</sup> Bill C-262 was passed by the House of Commons but died in the Senate when Parliament rose before the 2019 federal election. This would have been an important step toward ensuring that the rights of Indigenous peoples per the UNDRIP are actionable in Canadian courts and protected in Canada. In November 2019, British Columbia became the first Canadian jurisdiction to enact UNDRIP.<sup>10</sup>

## RECOMMENDATIONS

- 1. Canada and the provinces and territories pass enabling legislation incorporating the UNCRC into domestic law.**
- 2. Canada and the provinces and territories meaningfully review their existing domestic laws and bring them into conformity with the provisions of the UNCRC.<sup>11</sup>**

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<sup>5</sup> *Silenced Citizens, ibid* at pages 42-43; *Baker and Kanthasamy, ibid*.

<sup>6</sup> SO 2017, c 14, Sch 1, [online](#).

<sup>7</sup> *Silenced Citizens, ibid* at page 44; *R. v. Hape*, [2007] 2 S.C.R. 292, at para. 53. Two notable appellate decisions which rejected interpretations of domestic legislation consistent with the UNCRC include the Supreme Court of Canada decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, and the British Columbia Court of Appeal decision in *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286.

<sup>8</sup> United Nations Committee on the Rights of the Child, 61st Session, "Concluding observations on the combined third and fourth periodic report of Canada" (6 December 2012), [online](#), at para. 11 [*Concluding Observations 2012*].

<sup>9</sup> Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2019 (as passed by the House of Commons 30 May 2018).

<sup>10</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, [online](#).

<sup>11</sup> Canadian Coalition for the Rights of Children, "*Canadian Coalition for the Rights of Children Report to the UN Committee on the Rights of the Child: "Right in Principle, right in practice,"*" at page 11, [online](#). While Canada has asserted that it did this review prior to ratification, conformity is often superficial and inconsistencies remain.

## V. RATIFICATION OF THE THIRD OPTIONAL PROTOCOL

Canada has ratified the UNCRC and the first two of its three Optional Protocols. However, Canada has not yet ratified the Third Optional Protocol, which would create a communications procedure whereby children could make complaints about violations of their rights under the UNCRC directly to the CRC Committee.<sup>12</sup> This would provide an accountability and enforcement mechanism enabling the CRC Committee to address individual and systemic children's rights complaints in Canada. Canada should ratify the Third Optional Protocol to create an independent check on Canada's protection of children's rights and show its commitment to advancing children's rights.<sup>13</sup> This is particularly important given the lack of comprehensive implementation of the UNCRC in Canadian law, and in accordance with other legal obligations, including the collective and cultural rights in UNDRIP and the *Charter of Rights and Freedoms (Charter)*.<sup>14</sup> The *Charter* protects some individual rights but does not specifically enshrine many of the rights of children contained in the UNCRC.

Canada has fallen behind on this item. Since the Third Optional Protocol came into force on 14 April 2014, 52 states have signed on, and 46 states have ratified it, as of January 29, 2020.<sup>15</sup> In December 2012, the CRC Committee recommended that Canada ratify the Protocol.<sup>16</sup> The CBA Section also called on Canada to ratify the Third Optional Protocol to give individuals and groups in Canada the ability to directly contact the CRC Committee regarding violations of the UNCRC.<sup>17</sup>

### RECOMMENDATIONS

3. **Canada ratify the Third Optional Protocol immediately to promote better monitoring and resolution of children's rights violations and take any subsequent steps required to facilitate access to the communications procedure and to make children aware of the procedure.**

<sup>12</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, 19 December 2011, Registration No. 27531, United Nations Treaty Collection, [online](#), at Articles 5, 10, and 11; Canadian Bar Association, "Letter to Prime Minister *re. Optional Protocol*" (15 June 2018), [online](#). [CBA Letter to the Prime Minister *re. Optional Protocol*]

<sup>13</sup> *Ibid*, CBA Letter to Prime Minister *re. Optional Protocol*, [online](#). See also: *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, (2019) [online](#). [MMIWG Report] Call to Justice 1.2, which calls "upon all governments, with the full participation of Indigenous women, girls, and 2SLGBTQIA people, to immediately implement and fully comply with all relevant rights instruments, including but not limited to: i ICCPR, ICESCR, UNCRC, CEDAW, and ICERD, as well as all optional protocols to these instruments, including the 3rd Protocol to the United Nations Convention on the Rights of the Child (UNCRC)."

<sup>14</sup> *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, [online](#).

<sup>15</sup> *Status of Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, [online](#).

<sup>16</sup> *Concluding Observations 2012*, *supra* note 8, at para. 87.

<sup>17</sup> CBA Letter to Prime Minister *re. Optional Protocol*, *supra* note 12 at pages 1-2.



## VI. NATIONAL COMMISSIONER FOR CHILDREN AND YOUTH

While children make up almost a quarter of Canada's population,<sup>18</sup> Canada has no independent national office dedicated to promoting, monitoring and investigating children's rights, or expanding children's opportunities to participate in political processes and complaint mechanisms when their rights are violated.<sup>19</sup> An independent National Commissioner for Children and Youth would place children's best interests on the public agenda and encourage government departments to coordinate their efforts and promote better laws, policies and services for children. There is growing support for independent offices to promote children's rights. Over 70 countries, including most industrialized countries and many federal states, have an independent children's rights monitoring body.<sup>20</sup>

There is an acute need for a National Commissioner for Children and Youth due to gaps and overlaps among federal, provincial or territorial and Indigenous governments' constitutional responsibilities for children.<sup>21</sup> Federal areas of jurisdiction affecting children – such as immigration, youth criminal justice, child welfare funding, health and education services for Indigenous children on-reserve, divorce law, taxation and federal social benefits – fall between jurisdictional cracks for children, and could be more effectively addressed by a National Commissioner. This institution could also provide the response and engagement necessary to address the rights and interests of Indigenous children across Canada, in keeping with the spirit of reconciliation and the requirements of UNDRIP.<sup>22</sup>

The absence of a National Commissioner for Children and Youth has many negative consequences for children physically present or ordinarily resident in Canada including:

- there are few national standards that apply equally to all children across Canada (resulting in substantial variations in the protection and provision of children's rights between provincial/territorial jurisdictions and between Indigenous and non-Indigenous children);
- there are no means of regularly assessing the impact of proposed policies, laws and programs on the rights and best interests of children;
- there is difficulty in obtaining a clear picture of the state of Canada's children and the extent of their disaggregated budgetary needs to help guide future government decisions; and
- there is neither a comprehensive national strategy to guide future government actions for children, nor specific targets to measure progress.<sup>23</sup>

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<sup>18</sup> *Statistics Canada*, Population Estimates by Age and Sex, [online](#).

<sup>19</sup> The Canadian Bar Association, "Letter to Prime Minister Trudeau" (30 May 2018), at page 1, [online: The Canadian Bar Association online](#) [CBA Letter to Prime Minister re. National Commissioner]; UNICEF Canada, "It's Time for a National Children's Commissioner for Canada" (2010), at page 2, [online: online](#) [UNICEF Canada Report].

<sup>20</sup> UNICEF Office of Research, *Championing Children's Rights: A global study of independent human rights institutions for children – Summary Report*, (2012), at page 7, [online](#).

<sup>21</sup> CBA Child Rights Toolkit, *supra* note 1 at *Independent Human Rights Institutions for Children*, [online](#).

<sup>22</sup> *United Nations Declaration on the Rights of Indigenous People*, resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, [online](#).

<sup>23</sup> *UNICEF Canada Report*, *supra* note 19, at pages 11-12.

Neither the courts nor the Canadian Human Rights Commission are effective substitutes for a National Commissioner for Children and Youth. The courts are generally blunt and reactive instruments for resolving abuses of children's rights as they are often inaccessible to children and the UNCRC is not directly enforceable. While independent human rights institutions play an essential role in supporting children's access to remedies, they are generally designed for adults and children face greater barriers in commencing proceedings. Children's ability to participate is particularly limited if they live in remote areas. The mandate of the Canadian Human Rights Commission is insufficient, as it is concerned primarily with discrimination, is adversarial, and is not proactive in nature.<sup>24</sup> A National Commissioner for Children and Youth would help fill the gaps identified in Canada's national, Indigenous, and international legal obligations.

The CBA has recommended that Canada create a National Commissioner for Children and Youth.<sup>25</sup> The Senate Committee on Human Rights in 2007 also recommended that Canada establish a National Children's Commissioner. Four private members' bills to establish a National Commissioner for Children and Youth have been introduced by Opposition members but none have passed.<sup>26</sup> The Truth and Reconciliation Commission called on Canada to take specific actions to promote the rights of Indigenous children, and the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls made recommendations for rectifying historical injustices facing Indigenous girls.<sup>27</sup> Canada must create a National Commissioner for Children and Youth to demonstrate its commitment to children's rights and the UNCRC, and promoting the well-being of Canada's children. Canada was ranked an uninspiring 25<sup>th</sup> out of 41 affluent countries in UNICEF's 2017 Report Card 14.<sup>28</sup> While Canada performs well on indicators relating to education, there are wide and alarming gaps in child health, violence experienced by children, and children's sense of well-being, including the promotion of peace, justice and inclusive institutions.<sup>29</sup> A National Commissioner for Children and Youth could call on all levels of

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<sup>24</sup> *UNICEF Canada Report*, *supra* note 19, at page 12.

<sup>25</sup> *CBA Letter to Prime Minister re. National Commissioner*, *supra* note 19, at page 2; Canadian Bar Association, "Resolution 18-01-A, National Commissioner for Children and Youth" (15 February 2018), [online](#), at pages 3-4 [*CBA Resolution 18-01-A*].

<sup>26</sup> Bill C-418, *An Act to establish a Children's Commissioner of Canada The Children's Commissioner of Canada Act*, 2nd Sess, 40th Parl, 2009, (first reading 11 June 2009), [online](#); Bill C-420, *An Act to establish the Office of the Commissioner for Children and Young Persons in Canada*, 1st Sess, 41st Parl, 2012, (second reading 3 May 2012), [online](#); Bill C-701, *An Act to establish the Office of the Commissioner for Children and Young Persons in Canada*, 2nd Sess, 41st Parl, 2013 (first reading 19 June 2015), [online](#); Bill C-441, *An Act respecting the Office of the Commissioner for Young Persons in Canada* (first reading 8 April 2019), [online](#).

<sup>27</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission: Calls to Action*, (2015), [online](#) at paras. 1-5; *MMIWG Report*, *supra* note 13 at Call to Justice 12.9 "We call for the establishment of a Child and Youth Advocate in each jurisdiction with a specialized unit with the mandate of Indigenous children and youth. These units must be established within a period of one year of this report. We call upon the federal government to establish a National Child and Youth Commissioner who would also serve as a special measure to strengthen the framework of accountability for the rights of Indigenous children in Canada. This commissioner would act as a national counterpart to the child advocate offices that exist in nearly all provinces and territories."

<sup>28</sup> *UNICEF Report Card 14; Child Well-Being in a Sustainable World* (2017), [online](#).

<sup>29</sup> CBA Child and Youth Law Section, *Statement celebrating the 30<sup>th</sup> Anniversary of the adoption of the UNCRC*, November 20, 2019, [online](#).

government and civil society to invest in children and take measurable steps to improve Canada's ranking.

The CRC Committee stated, in its General Comment No. 2, that it considers the obligation to create and support an effective independent national human rights institution "to monitor, promote and protect children's rights"<sup>30</sup> part of the commitment States make upon ratification "to ensure the implementation of the Convention and advance the universal realization of children's rights."<sup>31</sup> An independent National Commissioner for Children and Youth is required to fulfil Canada's international legal obligation under Article 4 of the UNCRC to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention."<sup>32</sup> The CRC Committee also set out, in its General Comment No. 5, a series of good governance structures, called the *General Measures of Implementation*, which include, among other things, independent human rights institutions for children.<sup>33</sup>

In its General Comment No. 2, the CRC Committee set out a series of requirements for national and sub-national human rights institutions with specific application to children. These are an extension of earlier human rights principles for national institutions adopted by the UN General Assembly, called the *Paris Principles*.<sup>34</sup> General Comment No. 2 then set out a compendium of requirements for fully-functioning independent human rights institutions for children at both the federal and provincial or territorial levels. A National Commissioner for Children and Youth should be legislatively mandated, focused on promoting and protecting the human rights of children, properly resourced, accessible to children, and have powers that include advocacy, investigation, ordering the attendance of witnesses and production of documents, hearing complaints, amplifying youth voice, intervening in cases before courts and tribunals as *amicus curiae*, and facilitating children's access to justice and appropriate remedies.<sup>35</sup>

In three sets of Concluding Observations from 1995, 2003 and 2012, the CRC Committee reiterated the pressing need for Canada to establish an independent human rights institution to protect, promote and monitor the implementation of children's rights. In 1995, the CRC Committee expressed concern that "sufficient attention has not been paid to the establishment of a permanent monitoring mechanism that will enable an effective

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<sup>30</sup> United Nations Committee on the Rights of the Child, 32nd Session, "General comment No. 2 (2002) on the role of independent national human rights institutions in the promotion and protection of the rights of the child" (15 November 2002), [online](#) at para. 7. [General Comment No. 2]

<sup>31</sup> *Ibid*, at para. 1, *CBA Child Rights Toolkit*, *supra* note 1, at *Independent Human Rights Institutions for Children*, [online](#).

<sup>32</sup> *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, (entry into force 2 September 1990), [online](#), at Article 4 [UNCRC]; *Ibid*, *CBA Child Rights Toolkit*.

<sup>33</sup> United Nations Committee on the Rights of the Child, 34th Session, General Comment No. 5 (2003) on the "General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)," (27 November 2003), [online](#), at paras. 46, 65 [General Comment No. 5]; *CBA Child Rights Toolkit*, *supra* note 1, at *Independent Human Rights Institutions for Children*, [online](#).

<sup>34</sup> UN General Assembly, Resolution 48/134, *Principles relating to the Status of National Institutions [The Paris Principles]* (20 December 1993), [online](#).

<sup>35</sup> *General Comment No 2*, *supra* note 30, at paras. 4, 8, 9, 10, 11, 19; see also *CBA Child Rights Toolkit*, *supra* note 1, at *Independent Human Rights Institutions for Children*, [online](#) for a more detailed description of this role and functions.

system of implementation of the Convention in all parts of the country.”<sup>36</sup> In 2003, the CRC Committee recommended that Canada “establish at the federal level an ombudsman’s office responsible for children’s rights and ensure appropriate funding for its effective functioning... [and] take fully into account the Paris Principles and the Committee’s general comment No. 2 on the role of national human rights institutions.”<sup>37</sup> In its most recent (2012) Concluding Observations to Canada, the CRC Committee recommended that Canada “take the necessary measures to establish a federal Children’s Ombudsman in full accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles), to ensure comprehensive and systemic monitoring of all children’s rights at the federal level ...[and] drawing attention to [the Committee’s] general comment No. 2 (2002) to ensure that this national mechanism is provided with the necessary human, technical and financial resources in order to secure its independence and efficacy.”<sup>38</sup>

Canada’s response to the three sets of Concluding Observations spanning a 25-year period is inadequate and disappointing. In its 2019 periodic report to the CRC Committee, Canada states that it “does not have a national independent monitoring body specifically for children’s rights. However, most provinces and territories have children’s advocates or representatives to promote and protect children’s rights, and/or to allow children to pursue remedies for violations of their rights.”<sup>39</sup> Canada then cites various activities involving these provincial and territorial offices.

Canada’s response to the CRC Committee fails to consider the current landscape of independent provincial and territorial Child Advocate and Representative Offices in Canada. While some form of independent human rights office promotes the rights, interests and views of children in all ten Canadian provinces and two of the three Territories (Nunavut and Yukon), there is no office in the Northwest Territories. In four Canadian jurisdictions, the offices are not stand-alone. In Quebec, the office is part of the Quebec Human Rights and Youth Rights Commission. In Nova Scotia, it is part of the Youth Division of the Ombudsman’s Office. In New Brunswick, the Office of the Child, Youth and Senior Advocate has a blended mandate to promote the rights of seniors, as well as children and youth. In Ontario, the Office of the Child and Youth Advocate was recently closed. Only some of its functions were transferred to the Children and Youth Unit of the Ombudsman’s Office.

This response fails to consider other limitations of the provincial and territorial offices. First, several areas of federal jurisdiction affecting children do not fall within the legislated mandates of provincial and territorial Child Advocates and Representatives. Secondly, the mandates and functions of these offices vary significantly across the country. Many of the offices’ mandates fall short of the role and functions stipulated by the Paris Principles and the CRC Committee’s General Comment No. 2. In its 2003 Concluding Observations to Canada, the CRC Committee recommended that independent human rights offices for children “be established in the provinces that have not done so, as well as in the three territories where a high proportion of vulnerable children live...[and] take fully into account the Paris Principles and the Committee’s general comment No. 2 on the role of national

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<sup>36</sup> United Nations Committee on the Rights of the Child, 9<sup>th</sup> Session, *Concluding Observations (Canada)* (1995), (20 June 1995), [online](#), [*Concluding Observations 1995*] at para. 9.

<sup>37</sup> United Nations Committee on the Rights of the Child, 34<sup>th</sup> Session, *Concluding Observations (Canada)* (2003), (27 October 2003), [online](#), [*Concluding Observations 2003*] at para. 15.

<sup>38</sup> *Concluding Observations 2012*, *supra* note 8 at para. 23.

<sup>39</sup> Canada’s 5<sup>th</sup> and 6<sup>th</sup> Reports on the Convention on the Rights of the Child, (2019), [online](#) at para. 34. [*Canada 5<sup>th</sup> and 6<sup>th</sup> Reports*]

human rights institutions.<sup>40</sup> The CRC Committee also expressed concern, in its 2012 Concluding Observations to Canada, that the provincial and territorial Child Advocate and Representative Offices have “mandates [which] are limited and that not all children may be aware of the complaints procedure.”<sup>41</sup> Many provincial or territorial offices were created in response to the death or severe injury of a child rather than a desire to promote and protect children’s rights. In some Canadian jurisdictions and other common law countries, this has led to a narrow construction of these sub-national offices as primarily an accountability and oversight mechanism for the provincial or territorial child welfare system.<sup>42</sup>

The recent closure of Ontario’s dedicated Provincial Advocate for Children and Youth shows that the lack of a National Commissioner for Children and Youth leaves children’s rights vulnerable to provincial restructuring and shifting political priorities and does not offer the child rights safety net suggested by the Canadian government in its recent periodic report to the CRC Committee. The Ontario government announced in November 2018 that the investigative work of the Provincial Advocate for Children and Youth would be transferred to the office of the Ontario Ombudsman.<sup>43</sup> Ontario’s Provincial Advocate for Children and Youth had broader functions and was specifically mandated as an independent advocate and voice for children and youth, whose office could hear and resolve complaints from anyone, including children and youth, about the child welfare system, children’s aid societies, youth criminal justice, children’s mental health, and other issues affecting children and youth, including Indigenous children and youth.<sup>44</sup> This closure included the Thunder Bay satellite office of the Provincial Advocate for Children and Youth,<sup>45</sup> so the advocacy needs of Indigenous children in Northern Ontario are unmet.

## RECOMMENDATIONS

### 4. Per CBA Resolution 18-01-A:<sup>46</sup>

- a. **The federal government “establish a National Commissioner for Children and Youth as an independent Officer of Parliament reporting to both Houses of Parliament, with a statutory mandate to:**
  - i. **protect and promote human rights under federal jurisdiction of children and youth in Canada, including immigrant and refugee children, and**
  - ii. **liaise with provincial, territorial and Indigenous counterparts on areas of mutual concern or overlapping jurisdiction;” and**

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<sup>40</sup> *Concluding Observations 2003*, *supra* note 37, at para. 15.

<sup>41</sup> *Concluding Observations 2012*, *supra* note 8, at para. 22.

<sup>42</sup> *UNICEF Canada Report*, *supra* note 19, at page 12.

<sup>43</sup> Marv Bernstein and Birgitte Granofsky, “Eliminating the Ontario Child Advocate’s Office a mistake,” *The Star* (19 November 2018), [online](#).

<sup>44</sup> Provincial Advocate for Children, “How we can help,” (website no longer available); Lorenda Reddekopp, “Ford’s move to axe child advocate office ‘a nightmare,’ children’s rights lawyer says,” *CBC News* (16 November 2018), [online](#).

<sup>45</sup> Matt Prokopchuk, “Closing Thunder Bay’s child advocate office ‘unacceptable,’ northern MPP says,” *CBC News*, (25 February 2019), [online](#).

<sup>46</sup> *CBA Resolution 18-01-A*, *supra* note 25, at page 3-4.

- b. The federal government consult and engage with Indigenous peoples in Canada to ensure the rights and interests of Indigenous children and youth are vigorously promoted and protected.**
- 5. Per the unfulfilled CRC Committee’s Concluding Observations to Canada (2012): Canada take the necessary measures to establish [and maintain] an independent national human rights institution in full accordance with the Paris Principles (1993) to ensure comprehensive and systemic monitoring of all children’s rights at the federal level and having regard to general comment No. 2 (2002) “to ensure that this national mechanism is provided with the necessary human, technical and financial resources in order to secure its independence and efficacy.”**
- 6. Per the unfulfilled CRC Committee’s Concluding Observations to Canada (2003): Canada and the provinces and territories ensure that independent human rights institutions for children are established [and maintained] in every provinces and territory in full accordance with the Paris Principles (1993) and the CRC Committee’s General Comment No. 2 (2002).**

## VII. CHILD RIGHTS IMPACT ASSESSMENTS

To implement the UNCRC, the CRC Committee has recommended that States Parties consider how their laws and policies will impact children through the systematic use of Child Rights Impact Assessments (CRIAs).<sup>47</sup> CRIAs can fulfil the procedural requirement needed to implement the best interests of the child principle, by scrutinizing whether policy and legislative decisions are in the best interests of children and groups of children. The CRC Committee has called for CRIAs to be part of government decision-making at all levels as early as possible, and has specified that CRIAs should incorporate input from a range of stakeholders including children, produce recommendations for amendments, and be made available to the public. In General Comment No. 5, the CRC Committee pointed out the value of both child rights impact *assessment* (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child rights impact *evaluation* (evaluating actual impact of after-the-fact implementation).<sup>48</sup>

A CRIA uses the framework of the UNCRC to assess a wide range of impacts on children’s rights. Those impacts can be positive or negative, intended or unintended, direct or indirect, and short-term or long-term.<sup>49</sup> It aims to understand how the matter under assessment will contribute to, or undermine, the fulfillment of children’s rights and well-being so that positive impacts are maximized and negative impacts are mitigated or avoided altogether.

<sup>47</sup> United Nations Committee on the Rights of the Child, 62nd Session, “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),” (29 May 2013), [online](#), at para. 99 [*General Comment No 14*].

<sup>48</sup> *General Comment No. 5*, *supra* note *supra* note 33, [online](#), at para. 45,

<sup>49</sup> CBA Child Rights Toolkit, *supra* note 1, [online](#). *CBA Child Rights Toolkit, at Child Rights Impact Assessments*.

New Brunswick is the first Canadian province to systematically use CRIAs for decision-making.<sup>50</sup> Since February 2013, New Brunswick has required a CRIA for all new Cabinet-level policy and lawmaking decisions. In the province of Saskatchewan, the Ministry of Social Services issued a policy directive in 2014 requiring use of CRIAs as a framework for reforming its provincial child welfare and adoption legislation, and for ongoing policy and programming development.<sup>51</sup> Given that there is no single blueprint or template for a CRIA tool, those developed in New Brunswick and Saskatchewan have common elements, but differences as well. For example, Saskatchewan has a larger Indigenous population than New Brunswick, and thus relevant provisions of the UNDRIP have been added to the enumerated articles of the UNCRC.

There has been limited use of CRIAs in other Canadian provinces and territories, despite calls to use CRIAs. For example, in Ontario in 2016, the Coroner's Jury in the Katelynn Sampson Inquest recommended that "the Government of Ontario, Ministry of Children, and Youth Services, Ministry of Education, Ministry of the Attorney General, Family Rules Committee, Ontario Association of Children's Aid Societies, Association of Native Child and Family Services Agencies of Ontario and Children's Aid Societies of Ontario implement a CRIA process for future reviews of legislation, regulations, directive, policies and procedures, to screen for the impact upon children's rights."<sup>52</sup> Ontario has not announced the implementation of CRIAs in accordance with this recommendation.

While the federal government has made no public announcements on the implementation of CRIAs, there have been other promising developments. For example, a new law requires the Minister of Justice to table a *Charter* statement with every new bill to explain how proposed laws accord with or engage the *Charter*.<sup>53</sup> Canada is also using a gender-based analysis tool (Gender-Based Analysis Plus or GBA+) to ensure that its budgeting decisions consider how policies, programs, and laws will differentially affect diverse groups in Canada.<sup>54</sup> The federal government passed the *Canadian Gender Budgeting Act* in December 2018, created the Department for Women and Gender Equality, used GBA+ for every budget measure in the 2018 budget, and expressed plans to use this analytical tool for the 2019 budget.

Using these assessments is important to understanding the impacts of legislation and policy and promoting the needs of diverse Canadians and rights under the *Charter*. While CRIAs do not have to be stand-alone instruments and can be part of another type of impact assessment, none of these other impact assessments incorporate a CRIA component.

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<sup>50</sup> Norman J. Bosse, "Child Rights Impact Assessments: A Primer for New Brunswick," [online](#), at page 3, 7.

<sup>51</sup> Marvin M. Bernstein, *Children at the Centre: Their Right to Truth and Voice*, at p. 22, in *Children At the Centre: Their Right to Truth and Voice*, Sparrow Lake Alliance Publication, [online](#).

<sup>52</sup> Jury Verdict and Recommendations, *Inquest Touching the Death of Katelynn Sampson*, April 2016, Recommendation 3, [online](#). [*Verdict of Coroner's Jury*]

<sup>53</sup> Department of Justice, "Charter Statement — Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act," (6 June 2017), [online](#).

<sup>54</sup> Canada, "Budget 2019," (19 March 2019), [online](#).

While the CRC Committee, in its 2012 Concluding Observations to Canada, did not explicitly reference CRIAs, it left room for their widescale use in the context of developing “procedures and criteria” for more fully informed best interests of the child determinations. The CRC Committee urged Canada “to strengthen its efforts to ensure that the principle of the best interests of the child is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings, as well as in all policies, programmes and projects relevant to and with an impact on children.”<sup>55</sup> It also encouraged Canada “to develop procedures and criteria to provide guidance in determining the best interests of the child in every area, and to disseminate them to the public or private social welfare institutions, courts of law, administrative authorities and legislative bodies.”<sup>56</sup>

In its 2019 periodic report to the CRC Committee, Canada makes no reference to the use of CRIAs at the federal, provincial or territorial levels in its canvassing of ‘best interests’ achievements or anywhere else in its report.<sup>57</sup>

In accordance with General Comment No. 14, Canada should now implement legislation and clear policy directives making CRIAs mandatory for all legislative and policy decisions. This would allow the government to understand how these decisions impact children, who are among the most vulnerable members of society, and to promote consideration of children, including Indigenous children from geographically varied Nations and communities across Canada, at each stage of policy-making impacting children.<sup>58</sup>

## RECOMMENDATIONS

7. **Canada and the provinces and territories pass legislation making CRIAs mandatory for all new bills, regulations, policies and budgets with an impact on the rights and best interests of children. This legislation should be supplemented by clear and specific policy directives from the relevant government ministry or department, or Indigenous decision-maker.**
8. **Canada and the provinces and territories ensure that CRIAs accord with the recommendations of the CRC Committee in General Comments No. 5 and No. 14 and include the views of children and a broad range of stakeholders in the assessment process.**

## VIII. EDUCATION ON CHILD RIGHTS FOR JUDGES AND LAWYERS

There is a pressing need for more education on child rights for judges and lawyers. In its 2012 Concluding Observations, the CRC Committee found no systematic training on children’s rights and the UNCRC for professional groups working for or with children.<sup>59</sup> It recommended an integrated strategy for training on children’s rights for all professionals, including government officials and judicial authorities, which focuses on use of the UNCRC

<sup>55</sup> *Concluding Observations 2012, supra* note 8, at para. 35.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Canada 5<sup>th</sup> and 6<sup>th</sup> Reports, supra* note 39, at paras. 58, 59.

<sup>58</sup> *General Comment No 14, supra* note 47, at para. 99.

<sup>59</sup> *Concluding Observations 2012, supra* note 8, at para. 26.



in legislation and public policy, program development, advocacy, and decision-making processes and accountability.<sup>60</sup>

Since then, the CBA Section spent three years creating a comprehensive, online Child Rights Toolkit, aimed at the legal professional, and available to the public for free.<sup>61</sup> The Toolkit was featured at several education programs. CBA Child and Youth Law Sections have been created in several provinces and are working towards more education about child rights for lawyers. The CBA Section was pleased that the federal government, through Justice Canada, supported the creation of the Toolkit by commissioning papers focused on child rights, and invited CBA Section representatives to present an education program focused on the Toolkit to its lawyers. The CBA Section continues to support legal education on child rights.

There remains a major gap in the education of Canadian lawyers and judges, however, on child rights principles generally and the need for legal guarantees and procedural safeguards to ensure implementation, as described in General Comment 14. Most lawyers, including some family lawyers, have not participated in education programs on child rights. While child rights courses at law schools are increasing, they are accessible to a limited number of law students. Judicial education programming does not, for the most part, include programs on child rights. Though law societies across the country make some education programs mandatory for lawyers, and the Canadian Judicial Council makes some programs mandatory for judges, no education program on child rights for either lawyers or judges is mandatory. This education is also not mandatory at law schools.

The lack of child rights education and consequent lack of understanding of what a child rights approach requires manifests itself in court processes and decisions.

### **A. Legal Guarantees and Safeguards (General Comment 14)**

The UNCRC requires that children be afforded special safeguards, care and legal protection by the courts on all matters involving their best interests, including privacy. General Comment 14 on Article 3(1) deals specifically and in-depth with the legal guarantees and procedural safeguards required to ensure that the right of children to have their best interests taken as a primary consideration are effectively implemented.<sup>62</sup> Two of them are the right of children to express their own views (paras. 89-91) and the need for legal representation when a child's best interests are to be formally assessed by courts and other equivalent bodies (para. 96). There are important gaps in implementing these guarantees and safeguards.

Implementation of the other equally significant guarantees and safeguards when a child's best interests are being assessed by courts or equivalent bodies is also often problematic. Gaps with respect to the relevant safeguards and protections can all be linked to a lingering paternalism due in large part to this lack of child rights education. They include:

#### **a. Legal reasoning in court decisions (para. 97)**

There continues to be significant gaps in judicial legal reasoning in some cases in all areas of law, including the application of child rights principles generally, an analysis of how children's views are taken seriously or given due weight, and an explanation of why a decision that conflicts with the child's views does so. While there has been an increase in references to the UNCRC by some courts, it is often not raised by lawyers or

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<sup>60</sup> *Ibid* at para. 27.

<sup>61</sup> *CBA Child Rights Toolkit, supra* note 1.

<sup>62</sup> *General Comment No 14, supra* note 47.

referred to in decisions when it is clearly relevant to the issues being determined. Rather than seeing children as rights holders, with rights including participatory rights, some decision-makers continue to make statements that are paternalistic and protection focused and undermine children's rights.<sup>63</sup>

**b. Establishment of facts** (para. 92)

There are often no mechanisms to test the reliability of all evidence generally on behalf of children and ensure that facts supporting children's views form part of court processes. This is true in settlement discussions as well as court hearings and trials.

**c. Mechanisms to review or revise decisions** (para. 98)

There are usually no mechanisms in place to explain the decision to the child, discuss its legal correctness and significance, and where appropriate, facilitate an appeal. An exception is when the child has independent legal representation.

**d. Time perception** (para. 93)

Court proceedings are primarily adult-focused, and lengthy delays are common, which often disadvantages children.<sup>64</sup>

**e. Qualified professionals** (paras. 94 and 95)

In addition to judges and lawyers, other professionals who work in the court system are not educated about child rights principles and the need for legal safeguards and procedural guarantees. An area of significant concern in family law and child protection cases is the frequent use by courts of expert parenting assessments, which may significantly affect judicial decision-making. Many of these professionals may not be appropriately qualified in child rights principles generally or in assessing family violence.<sup>65</sup> Judges and lawyers need more support and training on how to determine

<sup>63</sup> See for example, *J.E.S.D. v. Y.E.P.*, 2018 BCCA 40, in which the court took a narrow approach to children's participatory rights and minimized the importance of the CRC Committee's comments in General Comment 14 on legal safeguards and procedural guarantees, generally, and with respect to legal representation (see heading on Legal Representation). See in particular para. 40. See also *A.M. v. C.H.*, 2019 ONCA 939, in which the Court of Appeal for Ontario found that the child's right to consent to treatment under provincial health care legislation (*Ontario's Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A) was usurped by the "best interests of the child" under the current *Divorce Act*, R.S.C. 1985, c. 3 (2<sup>nd</sup> Supp.) and provincial family law legislation (*Children's Law Reform Act*, R.S.O. 1990, c. C. 12). The child, who was 14, was ordered to engage in reunification therapy with his father against his will. Also, custody was changed to the father contrary to the child's views and the child was prohibited from having contact with his mother, siblings and maternal grandparents. In contrast, in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (*supra* note 4), the Ontario Court of Appeal adopted a rights-based approach to the interpretation of the child's best interests, having regard to the UNCRC. The Court held that a parent could not access the children's legal file through a Freedom of Information and Protection of Privacy Act request due to the best interests of the child and the confidential nature of the children's relationship with their lawyer. The Court took a "contextual approach to statutory interpretation,"<sup>63</sup> using the UNCRC to promote a holistic interpretation of the child's best interests.

<sup>64</sup> See *R. v. K.J.M.*, 2019 SCC 55 in which the Supreme Court of Canada applied the same rules governing delay in the youth criminal justice system as had been developed for the finding of unreasonable delay for adults.

<sup>65</sup> Family Violence and Parenting Assessments: Law, Skills and Social Context, The Honourable

qualifications and critically assess recommendations in order to effectively perform their gatekeeping role.

## **B. Access to Justice Advocacy**

Since the 2012 reporting period, the legal profession in Canada has engaged in important work focused on access to justice. Two national reports resulted: *Reaching Equal Justice*, an initiative of the CBA,<sup>66</sup> and *A Roadmap for Change: Access to Justice in Civil and Family Matters*, led by the Supreme Court of Canada.<sup>67</sup> These 2013 reports, highlight what the then Chief Justice of Canada called an access to justice crisis that includes access to courts, legal advice and representation. These reports are laudable in many ways, addressing significant access to justice concerns in Canada.

While these reports are significant, the recommendations are primarily focused on adults even though the access to justice concerns they raise apply with even greater force to children. Children's access to justice issues are, for the most part, considered by looking at how children benefit from a system that operates more effectively for adults. Since 2013, most of the institutional responses to access to justice focus on adults. This includes advocacy about legal representation and state funding for it. There have been calls for a specific access to justice roadmap for children, based on child rights principles.<sup>68</sup> These serious access to justice gaps for children are linked to the lack of education in the legal profession about children's rights and how to implement them. To effectively apply the best interests of the child principle, understanding and implementing child rights is a core professional competency for both lawyers and judges. Individual lawyers and judges have a professional responsibility to be educated on these issues.

### **RECOMMENDATIONS**

- 9. Law societies, legal education institutes, judicial education institutes and government Ministries of Justice must facilitate mandatory, comprehensive, in-depth and on-going child rights education, with a focus on the UNCRC.**
- 10. Governments and organizations, taking the lead in advancing access to justice, create and implement an access to justice roadmap focusing specifically on children and their rights.**

## **IX. ARTICLE 3: BEST INTERESTS OF THE CHILD PRINCIPLE**

UNCRC Article 3 states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

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Donna Martinson and Professor Emerita Margaret Jackson, June 2019, [online](#); Curtis, Carole, "Limits of Parenting Capacity Assessments in Child Protection Cases," *Canadian Family Law Quarterly*; Toronto, Vol. 28, Iss 1, (2009): 1-23; Bala, Nicholas; Birnbaum, Rachel; Watt, Carly. "Addressing Controversies About Experts In Disputes Over Children" *Canadian Journal of Family Law*; Vancouver Vol. 30, Iss. 1, (2017): 71-128, [online](#).

<sup>66</sup> Canadian Bar Association, *Reaching Equal Justice: Balancing the Scales, An Invitation to Envision and Act* (Ottawa: 2013), [online](#).

<sup>67</sup> Action Committee on Access to Justice in Civil and Family Matters, *A Roadmap for Change: Access to Justice in Civil and Family Matters*, (Ottawa: 2013), [online](#).

<sup>68</sup> See for example, The Honourable Donna Martinson Q.C. retired Justice of the B.C. Supreme Court, *A Roadmap for Change for Children*, in "Children's legal Rights in Canada under the United Nations Convention on the Rights of the Child" at pp. 51 to 56, [online](#).

legislative bodies, the best interests of the child shall be a primary consideration.”<sup>69</sup> The best interests of the child principle is a *substantive right* of children to have their interests be a primary consideration in decisions impacting them, an *interpretive legal principle* that must be used to interpret legislation impacting children, and a *procedural rule* requiring decision-making processes impacting children to show that the child’s best interests were duly considered.<sup>70</sup>

While there has been some progress in Canada on including the best interests of the child principle in legislation and court decisions, this has not been consistent in all areas.<sup>71</sup> Forthcoming amendments to the federal *Divorce Act*, and recent amendments to Canada’s *Immigration and Refugee Protection Regulations* and Guidelines now establish specific criteria to be considered by decision-makers when assessing the best interests of the child.<sup>72</sup> Comprehensive application of the best interests of the child principle in all immigration and refugee protection decisions remains elusive, however, and is not the overriding consideration in these matters.

The final reports of the Truth and Reconciliation Commission and National Inquiry into Missing and Murdered Indigenous Women and Girls show that much work needs to be done for Indigenous children, who enjoy less protection than non-Indigenous children.<sup>73</sup> For example, the application of Jordan’s Principle has not been effective despite its aim to facilitate the equitable provision of services to Indigenous children, creating a crisis for Indigenous health care and other services.<sup>74</sup> There must be better coordination in legislation, judicial decisions and administration to ensure that children’s best interests are a primary consideration in all decisions affecting them.<sup>75</sup>

The CRC Committee expressed concern in 2012 that the best interests of the child principle was not widely known and was inconsistently applied in legislative, administrative and judicial proceedings impacting children. The CRC Committee recommended that Canada develop procedures to provide guidance for determining the best interest of the child, that the principle should be applied in all decision-making regarding children, and that reasons for a decision must specify the criteria used to assess the best interests of the child.

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<sup>69</sup> *UNCRC*, *supra* note 32, at Article 3.

<sup>70</sup> *General Comment No 14*, *supra* note 47 at para. 6.

<sup>71</sup> See for example: *First Nations Child and Family Caring Society of Canada and the Assembly of First Nations v. Attorney General of Canada (Caring Society v. Canada)* 2016 CHRT 2, [2016] 2 C.N.L.R. 270 [*Caring Society*].

<sup>72</sup> *Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act* S.C. 2019, Ch. 16, at s. 16 [*Bill C-78*]; *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 248.1. See also Immigration and Refugee Board of Canada, “Chairperson Guideline 2: Detention — Guidelines Issued by the Chairperson, Pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act,” (1 April 2019), at clause 4, [online](#) [*Chairperson Guideline 2*].

<sup>73</sup> Truth and Reconciliation and MMIWG Reports, *supra* notes 13 and 27.

<sup>74</sup> The Jordan’s Principle Working Group, “Without denial, delay, or disruption: Ensuring First Nation children’s access to equitable services through Jordan’s Principle,” (2015), at pages 25, 35, 46, [online](#). [*Jordan’s Principle Report*]

<sup>75</sup> *Concluding Observations*, *supra* note 8, at para. 35.

## A. Family Law

Though Canada's *Divorce Act*, enacted in 1985, made the best interests test the only consideration, it offered minimal direction on how the test should be applied. Amendments to the Act in Bill C-78, scheduled to come into force in July 2020, list factors that a court shall consider in determining the best interests of the child, including several directed at family violence.<sup>76</sup> Courts must give primary consideration to the child's physical, emotional and psychological safety, security and well-being.<sup>77</sup> The CBA Child and Youth Law and Family Law Sections (CBA Sections) made joint submissions to Parliament on Bill C-78.

The forthcoming amendments to the *Divorce Act* improve on the Act in force since 1986 in several ways, including: making family violence, broadly defined, a best interests factor; adding a specific provision on children's views (see Participation section below); and stating, through the absence of a presumption of joint parenting, that best interests determinations must focus on the individual child. However, there continues to be several child rights concerns, linked to a lack of knowledge about child rights in the legal profession and paternalism in decision-making. We highlight three areas of concern:

### a. The UNCRC is not referenced in the Act

Although the UNCRC is referenced in other legislation,<sup>78</sup> it is not referenced in the *Divorce Act*. The CBA Sections and other civil society organizations advocated for its inclusion in the House of Commons and Senate.<sup>79</sup> Justice Canada took the position at Parliamentary hearings that the Act does not need to reference the UNCRC, as it conforms with the UNCRC.<sup>80</sup> Experience shows that this approach, also used to explain why the UNCRC need not be incorporated into domestic legislation, will not have the intended effect, particularly when judges and lawyers lack the necessary child rights knowledge or willingness to implement the UNCRC in the absence of explicit incorporation.

### b. Safety, security and well-being of the child

Under the forthcoming *Divorce Act* amendments, when considering the best interest factors in the Act, "the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being."<sup>81</sup> The intent seems to be to

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<sup>76</sup> *Bill C-78, supra note 72, at s. 16(3).*

<sup>77</sup> *Ibid, at s. 16(2).*

<sup>78</sup> See preamble to the *Youth Criminal Justice Act*, S.C. 2002, c. 1; s. 3(3)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which indicates that the Act must be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory; the preamble to *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24; and the preamble to Ontario's child welfare legislation, the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1.

<sup>79</sup> Canadian Bar Association submission on Bill C-78, *Divorce Act amendments* (November 2018), [online](#), at p. 2 [CBA Submission on C-78]; see also submissions of the Canadian Coalition on the Rights of Children (June 5, 2019), [online](#), and Evidence of John-Paul E. Boyd, Principal, John-Paul Boyd Arbitration Chambers (June 6, 2019), [online](#). The federal government only makes reference to the UNCRC in its explanatory background document to the legislation.

<sup>80</sup> More generally, it has stated that it is not the practice of the federal government to reference international treaties in domestic legislation, but it has done so in various instances. See *supra note 78*.

<sup>81</sup> *Bill C-78, supra note 72 at s. 16(2).*

ensure that children's best interests, not those of adults, inform decision-making, and that the new family violence provisions are implemented to ensure that children are protected from violence of all kinds. Significant concerns have been raised over time in Canada about decision-makers, including judges, minimizing the significance of violence, thinking it is not related to post-separation parenting, and ignoring or minimizing children's views about the existence of violence and its impact.

The section should not be interpreted to create a hierarchy of rights, in which a decision-maker's views about what is in the best interests of the child would trump all a child's rights under the UNCRC. To do so would derogate from fundamental principles of the UNCRC, as elaborated in the General Comments, including: the need for a holistic approach; the indivisibility, interdependent and interrelated nature of rights; the statement that an "adult's judgment of a child's best interests cannot override the obligation to respect all of the child's rights under the UNCRC (General Comment 14, para. 4); and the clear importance of children's participatory rights, which includes taking children's views, including their views about violence and its impact, seriously. The section should be interpreted in a manner which reflects those principles.

There is a danger that decision-makers who have limited knowledge about child rights and the UNCRC will use the provision to effectively create a hierarchy of rights. This would undermine a child rights approach, rather than support it. The concern reinforces the need for comprehensive child rights education.

### **c. Concerns Raised by Canada's Senate Legal and Constitutional Affairs Committee**

At Parliamentary hearings to study the draft legislation, concerns were raised about the potential inappropriate interpretation of some of the best interests factors in s. 16 of the Act, ones that could be detrimental to the implementation of children's rights to be free from violence and to have their voices heard. The Senate Legal and Constitutional Affairs Committee took these concerns seriously, and made official Observations about the interpretation of the section and suggestions on monitoring and amendments given the concerns.<sup>82</sup> The Senate Committee took this approach rather than making amendments, because of concern that the Bill would not pass before a looming federal election.<sup>83</sup> Four Observations of particular relevance are:

- i. Each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse (s. 16(3)(c))*

The Senate Committee heard concerns that this subsection could be interpreted as placing more value on assertions of parental willingness to facilitate a relationship with the other parent than on whether the child has a positive relationship with that parent and on the views of the child. The Senate Committee stated:<sup>84</sup>

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<sup>82</sup> *Observations to the thirty-fourth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-78), (2019) [online](#).*

<sup>83</sup> *Ibid* at page 2: "The committee is mindful that with the pending dissolution of Parliament, there is insufficient time to make the amendments to the bill that would clarify its interpretation. Among these amendments, the committee noted legal concerns in relation to the interpretation of certain parts of proposed new section 16 of the Act. Given the importance of passing this bill into law, and the consensus among witnesses that this should happen as soon as feasible, the committee has chosen to make the observations set out below instead of amending the bill."

<sup>84</sup> *Ibid* at page 6.

There are many reasons why having a post-divorce relationship with a child may not be in the best interests of the child. Witnesses also expressed concern that the provision may have a silencing effect, because women and children who allege parental behaviour that is not beneficial to the child, are, in turn, met with allegations that mothers are poisoning children against fathers, or not facilitating contact with fathers.

- ii. *The ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child (s. 16(3)(j)(i))*

The Senate Committee stated that this factor “elevates a parental assertion over and above the key consideration, which should be what the family violence established about a perpetrator’s parenting ability.” It added that “willingness” can be used as a wedge to gain control over the child as a means of controlling the family.<sup>85</sup>

- iii. *Use of the Heading “Maximum Parenting Time” (s. 16(6))*

The 1985 *Divorce Act* contains a provision headed “Maximum Contact.” Though the section itself refers to as much time as is consistent with the best interests of the child, many lawyers and judges have referred to, and continue to refer to the maximum parenting time, without acknowledging that an individual best interests analysis is required. This is clearly inconsistent with a child rights approach. Bill-C-78 initially contained the same heading. Many organizations, including the CBA Sections, advocated to replace it with a heading more reflective of the content of the subsection. At the Senate hearings the Minister of Justice said the heading would be changed administratively and while it is said to have done so, the online version available to the public still contains it.<sup>86</sup> Emphasizing through education and other means that maximum parenting time is *not* a child rights principle is critical.

- iv. *Ongoing Responsibilities of the Minister of Justice*

The Senate Committee invited “the Minister of Justice to take measures to ensure the next review of the *Divorce Act* occurs within five years of the adoption of Bill C-78; and propose[d] that an independent body of experts be established by the Government of Canada to assist with this proposed legislative review and to provide recommendations for the modernization and reform of the *Divorce Act*.<sup>87</sup> The Senate Committee also encouraged the Minister of Justice to immediately begin monitoring the application of section 16 to ensure that it is interpreted as intended, and consider introducing these particular amendments quickly to ensure greater clarity, rather than waiting for the proposed review period of five years.<sup>88</sup>

## B. Immigration and Refugee Law

There are no *overriding* best interests considerations in Canadian immigration and refugee law.<sup>89</sup> However, the *Immigration and Refugee Protection Act* and *Regulations* mandate a

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<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, at pages 6-7.

<sup>89</sup> In the context of applications for permanent residence on humanitarian and compassionate grounds, despite the fact that a consideration of the best interests of the child is codified in

consideration of a child's best interests in several areas,<sup>90</sup> and the Supreme Court of Canada has made clear that close attention must be given to a child's interests and needs in certain immigration decisions.<sup>91</sup>

Since the last reporting period, the federal government has made some strides in clarifying the content of a best interests assessment in the immigration detention context. In 2019, the *Immigration and Refugee Protection Regulations* were amended to include consideration of the best interests of a child directly affected by an immigration detention or release decision.<sup>92</sup> This could include a Canadian-born (citizen) child of foreign nationals. This amendment was prompted by a 2015 Federal Court decision.<sup>93</sup>

A new section was added to the *Regulations* affirming the principle at s. 60 of the Act, that a minor child shall be detained only as a measure of last resort, and delineating a non-exhaustive list of factors to consider when determining the best interests of the child:

- (a) the child's physical, emotional and psychological well-being;
- (b) the child's healthcare and educational needs
- (c) the importance of maintaining relationships and the stability of the family environment, and the possible effect on the child of disrupting those relationships or that stability;
- (d) the care, protection and safety needs of the child; and
- (e) the child's views and preferences, provided the child is capable of forming their own views or expressing their preferences, taking into consideration the child's age and maturity.<sup>94</sup>

Immigration enforcement officials must consider the level of dependency of the child on the person whom there are grounds to detain when determining the best interests of the child.<sup>95</sup> New Detention Guidelines, which are non-binding and do not have the force of law, came into effect on 1 April 2019. These guidelines indicate that if a child or their parent or guardian are detained, the Minister must submit an assessment of the child's best interests

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IRPA, the federal government explicitly states that this "does not mean that the interests of the child outweigh all other factors in a case." Canada, Humanitarian and compassionate assessment: Best interests of a child, [online](#).

<sup>90</sup> See, for example, ss. 25(1), 25.1, 28(2)(c), 60, 67(1)(c), 68(1), 69(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, [IRPA], and ss. 248, 248.1 and 249 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, [IRPR].

<sup>91</sup> *Baker and Kanthasamy*, *supra* note 4.

<sup>92</sup> *IRPR*, *supra* note 90, at s. 248(f).

<sup>93</sup> *B.B. v. Canada (Citizenship and Immigration)*, 2016 FC 1423 (CanLII). In this case, a parent was detained at an immigration holding centre and, at the mother's request, her Canadian-born child was staying at the centre with her. During a detention review before the Immigration Division, the mother asked that the Division consider the best interests of her Canadian-born child. The Division's conclusion that it could not do so was challenged before the Federal Court. The federal government ultimately conceded that the best interests of the non-detained child could be considered and on the consent of both parties, the Court issued an order that the best interests of the non-detained child may be considered under the relevant sections of the Act.

<sup>94</sup> *IRPR*, *supra* note 90 at s. 248.1(1).

<sup>95</sup> *Ibid*, at s. 248.1(2).



at each detention review, and include in the reasons for the decision how the best interests of the child were assessed.<sup>96</sup>

These welcome changes are limited only to best interests considerations in immigration detention and release decisions.<sup>97</sup> In other immigration and refugee contexts, failure to apply article 3 of the UNCRC remains a concern. In each of its Concluding Observations to Canada (1995, 2003 and 2012), the CRC Committee expressed specific and significant concern that Canada has not appropriately applied the best interests of the child principle in all immigration and asylum processes and urged Canada to bring its immigration and asylum laws into full conformity with the UNCRC and other international standards.<sup>98</sup>

For example, the best interests of the child principle does not apply to family reunification for refugee children in Canada whose parents are in other countries. Canada lacks a clear policy framework consistent with the best interests of unaccompanied minors seeking asylum. Children must wait for lengthy periods to reunite with Canadian resident parents and are often denied the ability to visit with a parent who resides in Canada, contrary to the UNCRC provisions relating to the non-separation of children from their parents (unless it is necessary for their best interests), and the requirement that applications for the purpose of family reunification be dealt with in a positive, humane and expeditious manner (Articles 9 and 10). Parents may sponsor their dependent children but children may not bring their parents to Canada, and children who remain in their country of origin are not permitted to join their parents in Canada if their parents did not name them as dependents in their applications for permanent residence.<sup>99</sup> Failure to disclose a family member, including a minor child, whether inadvertent or intentional, creates a lifetime bar on the ability to sponsor the child's admission to Canada as a permanent resident, resulting in disproportionate hardship to non-accompanying children.

The federal government has recently taken steps to address this concern by implementing a two-year public policy pilot project. The policy is designed to facilitate immigration to Canada of a narrow subset of foreign nationals applying as family class members, including a small number of dependent children negatively affected by this bar.<sup>100</sup> This is a positive, albeit limited, step to address some of the most vulnerable populations impacted by the sponsorship bar but it remains to be seen how the government assesses the impact of this policy on the integrity of the immigration system. As with all policies, it may be cancelled at any time.

As evidenced by the amendments to the detention provisions of *the Immigration and Refugee Protection Regulations*, it is often through litigation that enhanced compliance with the principles of the UNCRC is achieved.

In *Kanthisamy v. Canada (Minister of Citizenship and Immigration)*, a 2015 decision, the Supreme Court of Canada, referred to international human rights instruments to which Canada is a signatory, including the UNCRC. The Court emphasized the centrality of the best interests of the child principle to humanitarian and compassionate considerations in

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<sup>96</sup> *Ibid*, at clauses 4.1.3 and 4.1.5.

<sup>97</sup> Regulations Amending the Immigration and Refugee Protection Regulations: SOR/2019-213, Canada Gazette, Part II, Volume 153, Number 13, June 17, 2019, [online](#).

<sup>98</sup> *Concluding Observations 2012*, *supra* note 8, at paras. 73 and 74; *Concluding Observations 2003*, *supra* note 37 at paras. 46 and 47; and *Concluding Observations 1995*, *supra* note 36, at para. 24.

<sup>99</sup> *IRPR*, *supra* note 90, at ss. 117(9)(d) and 125(1)(d).

<sup>100</sup> Public Policy to facilitate the immigration of certain sponsored foreign nationals excluded under paragraph 117(9)(d) or 125(1)(d) of the *Immigration and Refugee Protection Regulations*, July 5, 2019, [online](#).

applications for permanent residence. It also noted the need to consider the best interests of a child who is “directly affected” as a “singularly significant focus and perspective.” This includes deciding the kind of environment in which a particular child has the best opportunity for receiving needed care and attention, having regard to the “multitude of factors” that may impact on a child’s best interests and being responsive to each child’s particular age, capacity, needs and maturity. If the child’s interests are not “well-defined” and examined “with a great deal of attention,” the decision may be found unreasonable.<sup>101</sup>

In *Canadian Doctors for Refugee Care v Canada*, a 2014 decision, the Federal Court found that cuts to the Interim Federal Health Program for refugees and refugee children violated their *Charter* rights. The decision emphasized the application of the best interests of the child principle in health-related decisions.<sup>102</sup> The Federal Court stated that: “The United Nations Committee on the Rights of the Child has provided guidance in how the ‘best interests’ principle is to be applied, noting that the child’s right to health is central in assessing a child’s best interests.”<sup>103</sup>

However, courts (including the Supreme Court of Canada), do not consistently apply the best interests of the child as a paramount consideration. In *M.M. v. U.S.A.*, a 2015 extradition decision, a majority of the Supreme Court of Canada cited the UNCRC and other instruments that require attention to children’s interests and rights when making decisions that affect their future. The Court stated these instruments weigh in favour of requiring the Minister to give careful consideration to the best interests of a child who may be impacted by a parent’s extradition.<sup>104</sup> It nonetheless ordered the mother extradited to face criminal charges in the U.S., differentiating the criminal law context of extradition from humanitarian and compassionate considerations in the immigration context.<sup>105</sup>

### C. Indigenous Children

Indigenous children across Canada are subject to a dismal generational history of colonization and inter-generational trauma, reflected in the legacy of the residential school system and “Sixties Scoop,” and the lack of a cohesive legal approach to ensuring their protection. Indigenous laws and justice systems often put children at the centre of every consideration a community or Nation makes. Canada and the provinces and territories can learn from this approach. The UNCRC and UNDRIP offer a framework for including Indigenous law in all legislation that impacts Indigenous children. Indigenous Nations are requesting that they be considered in nation-to-nation negotiations in order to protect children. Young Indigenous people are speaking up, often traveling long distances to be heard, requesting that their rights to a clean and healthy environment be honoured.

Canada has indicated its commitment to reconciliation with Indigenous peoples. It has an opportunity to implement that commitment with every law implemented and every

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<sup>101</sup> *Kanthasamy supra* note 4, at para. 39.

<sup>102</sup> *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, [2015] CarswellNat 172, at paras. 11-12, 462.

<sup>103</sup> *Ibid*, at para. 462.

<sup>104</sup> *M.M. v. United States of America*, 2015 SCC 62, at paras. 146-147.

<sup>105</sup> *Ibid* at paras. 149-151. A minority of the Court disagreed, viewing the Minister’s inadequate consideration of the children’s best interests and his conclusions with respect to the availability of a *Criminal Code* defence as unreasonable. The Minister’s uncertainty as to the children’s best interests ought to have led him to err on the side of the children’s right to be with a loving parent, not on the side of surrendering the mother to face a criminal process in a different country where a key defence was unavailable (at paras. 262-264).

decision made regarding children and youth. So far, remedies to injustices have been ordered by courts and human rights tribunals in response to individuals bringing claims forward.<sup>106</sup> Indigenous Nations may not engage in non-Indigenous legal systems, and often have their own laws and justice systems. For example, Indigenous leaders often prefer to meet with other Nations leader-to-leader, to follow protocols that ensures everyone is heard, and to make consensus agreements that then become law. These ways of enacting law must be recognized and honoured. Children and youth in Indigenous communities across Canada vary in material respects and have distinct languages and traditions that encompass their way of law and order. Federal, provincial and territorial governments must work to develop the capacity to enshrine that law. That work can be done by adhering to the relevant international instruments, and acknowledging the shortcomings and barriers of the current system.

Jordan's Principle is a child-first principle meant to ensure that jurisdictional disputes between levels of government do not prevent First Nations children from getting services they are entitled to.<sup>107</sup> However, Canada has ineffectively and narrowly implemented the principle and denied children services in violation of the best interests of the child.<sup>108</sup> Jordan's Principle was passed in a unanimous House of Commons vote in December 2007.<sup>109</sup> The principle holds that when a First Nations child requires services that are available to all other children, the government of first contact must pay for and provide the service, and then seek reimbursement from another other government if appropriate.<sup>110</sup>

In the 2013 decision in *Pictou Landing Band Council & Maurina Beadle v. Attorney General of Canada*, the Federal Court stated that "Jordan's principle is not to be narrowly interpreted."<sup>111</sup> In the 2016 Canadian Human Rights Tribunal (CHRT) decision *First Nations Child and Family Caring Society of Canada and the Assembly of First Nations v. Attorney General of Canada (Caring Society v. Canada)*, the CHRT found that First Nations children were not receiving the same amount of funding as other children towards social services meant to keep families together and therefore First Nations children were prematurely and disproportionately removed from their homes and placed in care in violation of the best interests of the child.<sup>112</sup> The CHRT decision stated: "the best interest of the child is a paramount principle in the provision of [child welfare or child and family] services and is a principle recognized in international and Canadian law."<sup>113</sup> The CHRT affirmed that:

In the best interest of the child, all First Nations children and families living on-reserve should have an opportunity...equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society.<sup>114</sup>

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<sup>106</sup> *Caring Society*, *supra* note 71; and *Brown v. Canada* (Attorney General), [2017] O.J. No. 692, 2017 ONSC 251.

<sup>107</sup> *Caring Society*, *supra* note 71, at para. 351.

<sup>108</sup> *Jordan's Principle Report*, *supra* note 74, at pages 25, 35, 46, online: [online](#) at page 46.

<sup>109</sup> *Pictou Landing Band Council & Maurina Beadle v. Canada (Attorney General)*, 2013 FC 342, [2013 CarswellNat 2484, at para. 83 [*Pictou Landing*].

<sup>110</sup> *Caring Society*, *supra* note 71, at para. 351.

<sup>111</sup> *Pictou Landing*, *supra* note 109 at para. 95.

<sup>112</sup> *Caring Society*, *supra* note 71, at para. 347.

<sup>113</sup> *Ibid*, at para. 3.

<sup>114</sup> *Ibid*, at para. 482.

Canada should ensure full compliance with Jordan's Principle and take leadership to promote consistent application and implementation of Jordan's Principle across the provinces and territories. Despite the aim of Jordan's Principle to facilitate the equitable provision of services to Indigenous children, there have been denials, delays and disruptions of services to these children, creating a crisis for Indigenous health care and other services.<sup>115</sup> There must be better coordination in legislation, judicial decisions and administration across the country, as well as meaningful consultation with Indigenous lawmakers and Nations, to ensure that children's best interests are indeed a primary consideration in all decisions affecting them.<sup>116</sup>

## RECOMMENDATIONS

- 11. Canada specifically incorporate reference to the UNCRC in all legislation affecting children, including in the areas of family and immigration and refugee law, so that there can be no doubt that child rights principles inform the interpretation of the best interest of the child.**
- 12. Canada and the provinces and territories include the best interests of the child, including those interests specific to Indigenous children, in all legislation, court decisions and policy decisions affecting children.**
- 13. Canada ensures that its policies and procedures for children in all immigration and refugee determination and immigration detention processes give primacy to the principle of the best interests of the child and that immigration authorities are trained on the principle and procedures of the best interest of the child.**
- 14. Canada make all efforts to minimize the separation of children from their family members in the immigration and refugee determination and immigration detention context, except if it is necessary for the best interests of the child. To this end, it must facilitate applications and measures for family reunification in a positive, humane and expeditious manner, consistent with article 10 of the UNCRC.**
- 15. Canada comply with Jordan's Principle and ensure that Indigenous children are always able to access needed services quickly without jurisdictional disputes, or administrative processes like case conferencing causing delay.**
- 16. Canada follow the recommendations in the Observations of the Senate Legal and Constitutional Affairs Committee on the amended *Divorce Act* by: (a) taking measures to ensure that the next review of the *Divorce Act* occurs within five years; (b) monitoring the application of section 16 to ensure that it is interpreted as intended; and (c) creating an independent body of experts to assist with the review and to provide recommendations for the modernization and reform of the *Divorce Act*. This body of experts should include experts in child rights.**

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<sup>115</sup> *Jordan's Principle Report*, supra note 74.

<sup>116</sup> *Concluding Observations 2012*, supra note 8, at para. 35.

## X. ARTICLE 12: RIGHT OF THE CHILD TO PARTICIPATE

### A. Participation Generally

The right of children to be heard in matters affecting them, pursuant to UNCRC Article 12, is inextricably linked to the best interests of the child principle, and is essential to help decision-makers determine what a child's or group of children's best interests are.<sup>117</sup> When the State considers action that would affect the best interests of large groups of children, it should offer opportunities for children's views to be heard and given due weight.<sup>118</sup>

#### a. Canada's Participation Progress

Children's right to be heard per Article 12 of the UNCRC have been affirmed by Canadian courts in "child protection, health, youth criminal justice, immigration, and education,"<sup>119</sup> but not always consistently. Currently, most Canadian jurisdictions consider the views of children in custody/access and child protection proceedings through a best interests of the child test. The views of the child are not determinative,<sup>120</sup> however, and in many cases they do not appear to be given due weight by decision-makers.<sup>121</sup>

In its Concluding Observations in 2012, the CRC Committee called on Canada to ensure that children have the right to participate in meaningful ways in their schools, families, and communities.<sup>122</sup> The CRC Committee also recommended that the views of children be required for all State decision-making relating to children, including custody, child welfare, criminal justice, immigration, and the environment and that Canada create complaints mechanisms for children in case their right to be heard is violated with regard to judicial and administrative proceedings, and that children have access to an appeals procedure.<sup>123</sup>

Since 2012, Canada has promoted technical compliance with Article 12 in several areas. In Canada's forthcoming amendments to the *Divorce Act*, the child's views and preferences must be specifically considered "giving due weight to the child's age and maturity, unless they cannot be ascertained" in determining the best interests of the child.<sup>124</sup> The CBA Child and Youth Law and Family Law Sections have differing views on this section. The CBA Child and Youth Law Section supports the inclusion of children's views as a mandatory consideration in the determination of their best interests as is consistent with Canada's obligations under the UNCRC. The CBA Child and Youth Law Section would have removed "unless they cannot be ascertained" to ensure that children's participatory rights are not unnecessarily excluded. The CBA Family Law Section was concerned that the wording of this section implied that unless it was impossible, the child's views must always be obtained. The CBA Family Law Section believes that courts must clearly retain discretion to determine when seeking children's views and preferences would be inappropriate and

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<sup>117</sup> *General Comment No. 14*, *supra* note 47, at paras. 43-45.

<sup>118</sup> United Nations Committee on the Rights of the Child, 51st Session, "General Comment No. 12 (2009) The right of the child to be heard," (20 July 2009), at para. 73, [online](#) [*General Comment No 12*].

<sup>119</sup> Nicholas Bala & Claire Houston, "Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada," (31 August 2015), at page 3 [*Participatory Rights*].

<sup>120</sup> *Ibid* at pages 9-10.

<sup>121</sup> *See, for example*, *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286; *A.M. v. C.H.*, 2019 ONCA 764; *Jewish Family and Child Service of Greater Toronto v. L.R.*, 2017 ONCJ 472.

<sup>122</sup> *Concluding Observations 2012*, *supra* note 8, at paras. 36-37.

<sup>123</sup> *Ibid*.

<sup>124</sup> Bill C-78 *supra*, note 72.

potentially harmful to children. The CBA Sections agreed that the wording inappropriately applies “due weight” to the child’s age and maturity, rather than the child’s views, as article 12 contemplates. This creates an access to justice barrier as discussed in the next section.

When there are allegations of family violence, family, criminal and child protection cases can occur at the same time. Canadian court processes like these typically operate in silos, without coordination between the proceedings. This can result in conflicting orders, relevant information not being shared, significant delay, and require children to participate separately in each proceeding.<sup>125</sup> These problems create significant access to justice challenges for children. Section 7.8 of the Act Amending the *Divorce Act* imposes duties on judges to facilitate: the identification of orders, undertakings, recognizances, agreements or measures that may conflict with an order under the Act; and the coordination of proceedings. To date there has been little appetite to address these issues. While the new law should help, education on the challenges of siloed proceedings will also be necessary.

Ontario’s recently enacted child protection legislation, the *Child, Youth and Family Services Act, 2017*, more meaningfully espouses child rights principles than other legislation in Canada, including the child’s right to be heard. This is reflected in the preamble to the Act, acknowledging that “children are individuals with rights to be respected and voices to be heard.” The preamble also states that the aim of the Act “is to be consistent with and build upon the principles expressed in the United Nations Convention on the Rights of the Child.”<sup>126</sup> Part II of the Act has sections on the Rights of Children Receiving Services and the Rights of Children in Care which delineate the elements of children’s meaningful participation in decisions affecting them, consistent with the wording and spirit of article 12.<sup>127</sup> In the context of judicial decision-making, where courts are directed to make an order in the best interests of a child, the child’s views and wishes shall be considered and given due weight in accordance with the child’s age and maturity, unless they cannot be ascertained. This is now mandatory. Under the previous incarnation of the Act, discretion was left to the decision-maker to consider the child’s views if deemed relevant.<sup>128</sup>

A significant impetus for the new legislation was the recommendations after an inquest into the death of 7-year-old child.<sup>129</sup> The inquest examined child welfare, justice and education processes, resulting in extensive recommendations for systemic change with a clear child

<sup>125</sup> For more information see: The Honourable Donna Martinson, and Dr. Margaret Jackson (Principal Investigator) *Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts*, January 14, 2016, [online](#).

<sup>126</sup> *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1, preamble.

<sup>127</sup> *Ibid.* Specifically, at s. 3, every child and young person receiving services under the Act has the following rights:

1. To express their own views freely and safely about matters that affect them.
2. To be engaged through an honest and respectful dialogue about how and why decisions affecting them are made and to have their views given due weight, in accordance with their age and maturity.
3. To be consulted on the nature of the services provided or to be provided to them, to participate in decisions about the services provided or to be provided to them and to be advised of the decisions made in respect of those services.
4. To raise concerns or recommend changes with respect to the services provided or to be provided to them without interference or fear of coercion, discrimination or reprisal and to receive a response to their concerns or recommended changes.
5. To be informed, in language suitable to their understanding, of their rights.

<sup>128</sup> *Ibid.*, at s. 74(3)(a).

<sup>129</sup> *Verdict of Coroner’s Jury*, *supra* note 52.

rights focus. This included a recommendation that Ontario take steps to implement the UNCRC and specifically, that the Premier of Ontario “champion” the implementation of the UNCRC to afford children and youth their rights under the UNCRC, and to recognize that children’s voices must be heard in matters affecting them, and their views must be given due weight in accordance with the age and maturity of the child.<sup>130</sup> Despite the enactment of progressive child welfare legislation, the Ontario government has yet to take steps to fulfill the recommendations to include reference to the UNCRC and the rights of children in Ontario’s *Children’s Law Reform Act* (custody/access legislation) and *Education Act*.

In the amended *Immigration and Refugee Protection Regulations*, the views and preferences of the child are a factor that must be considered when assessing the best interests of the child directly affected by an immigration detention.<sup>131</sup> There is no other statutory requirement to consider the views of the child in an immigration or refugee determination process.

The Supreme Court of Canada has also recognized the views of the child as an issue to be decided in international abduction proceedings under the Hague Convention.<sup>132</sup> In 2018, in *Office of the Children’s Lawyer v. Balev*, the Court adopted a hybrid approach to assess the threshold issue of habitual residence to determine the applicability of the Hague Convention. This approach requires the judge to “determine the focal point of the child’s life...immediately prior to the removal or detention”<sup>133</sup> by looking at the “entirety of the child’s situation” with no one factor being determinative.<sup>134</sup> In *Ludwig v. Ludwig*, the Ontario Court of Appeal elaborated on *Balev*, finding that children’s views are a legitimate consideration in determining their habitual residence.<sup>135</sup>

In *Balev*, the Supreme Court also adopted a non-technical approach to considering a child’s objections to return, one of the exceptions to mandatory return under the Hague Convention, if rights of custody have been breached. The Court endorsed a “straight-forward” assessment of the child’s age, maturity and objections “without the imposition of formal conditions or requirements not set out in the text of the *Hague Convention*.”<sup>136</sup> Although this analysis suggests an approach in line with Article 12 of the UNCRC, the Court then held that even if the elements of age, maturity and objection are established, the application judge has discretion on whether to order the child returned, having regard to “the nature and strength of the child’s objections, the extent to which they are ‘authentically her own’ or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations.”<sup>137</sup> This could undermine the due weight accorded to the objections of a child of sufficient age and maturity, a concern which has been borne out in subsequent decisions.<sup>138</sup>

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<sup>130</sup> *Ibid*, recommendation no. 2.

<sup>131</sup> *IRPR*, *supra* note 90, s. 248.1(1)(e).

<sup>132</sup> *Participatory Rights*, *supra* note 119, at pages 22, 33.

<sup>133</sup> *Balev*, *supra* note 4, at para. 43.

<sup>134</sup> *Ibid*, at paras. 44, 47.

<sup>135</sup> *Ludwig v. Ludwig*, 2019 ONCA 680 (CanLII), at para. 47.

<sup>136</sup> *Ibid*, at para. 80.

<sup>137</sup> *Ibid*, at para. 81.

<sup>138</sup> See *Andegiorgis v. Giorgis*, 2018 ONCJ 965, at paras. 65-68, 76; *Cormier v. Borsk*, 2019 ONCJ 889, at paras. 42, 48, 50; *Children’s Aid Society of Toronto v. P.B.*, 2019 ONCJ 683, at para. 56(1).

In considering whether the Hague Convention conflicts with the UNCRC, the Supreme Court determined that “[f]or present purposes, there is no conflict between the two conventions”:

Both conventions seek to protect the best interests of children — the one by deterring child abduction and promoting prompt resolution of custody disputes, and the other by ensuring that decision-making focuses on the best interests of the child. Both conventions seek to protect the child’s identity and family relations. The *Hague Convention* does this by mandating the return of a child to the place of his or her habitual residence (Article 3) so that a custody determination may be made in that place — a place normally central to a child’s identity; Article 8 of the *CRC* rests on the same policy. Both conventions seek to prevent the illicit transfer and retention of children: see *CRC*, Article 11; United Nations Children’s Fund, *Implementation Handbook for the Convention on the Rights of the Child* (rev. 3rd ed. 2007), by R. Hodgkin and P. Newell, at pp. 143-47. And both conventions accept the principle that a child of sufficient maturity should have a say in where the child lives, as discussed below in connection with Article 13(2) of the *Hague Convention*.<sup>139</sup>

Although superficially attractive, this analysis fails to recognize that best interests of individual children in Hague proceedings are often sacrificed to the collective good of deterring child abduction. Objections to return expressed by children are often given less than due weight in the judicial exercise of discretion even when sufficient age and maturity are established, which minimizes children’s effective participation.<sup>140</sup> This speaks to the need for judicial education on the child rights principles in the UNCRC. It would also be helpful for the CRC Committee to explain the intersections between the two Conventions in a General Comment or a decision adopted by the CRC Committee under the Optional Protocol on a communications procedure<sup>141</sup> to promote judicial interpretations of the Hague Convention which are consistent with the UNCRC in Canada and internationally.

In *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*, a 2018 decision, the Ontario Court of Appeal emphasized the role of Ontario’s Office of the Children’s Lawyer in giving children meaningful participation rights in custody and access and child protection decisions. The Court held that ensuring the confidentiality of the child’s legal records is necessary to facilitate the child’s ability to freely provide their views and preferences.<sup>142</sup> The Court of Appeal stated:

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<sup>139</sup> *Balev*, *supra* note 4, at para. 34.

<sup>140</sup> For examples of other commentators who have expressed concern that the child objection defence does not appropriately recognize the child’s views, see R. Schuz, *The Hague Child Abduction Convention. A Critical Analysis* (2013), at 330, 332 and 334; M. Henaghan, *The voice of the child in international child abduction cases – Do judges have a hearing problem?*, Hague Conference on Private International Law, XXII The Judges’ Newsletter on International Child Abduction (Summer-Fall 2018), at 14; Baroness B. Hale, *Child Abduction from the Child’s Point of View*, Hague Conference on Private International Law, XXII The Judges’ Newsletter on International Child Abduction (Summer-Fall 2018), at 43; S. Lembrechts, M. Putters & K. Van Hoorde, *Conversations between children and judges in child abduction cases in Belgium and the Netherlands*, Family and Law (2019), at 7; Factum of the Appellant, *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, [online](#), at paras. 92-102.

<sup>141</sup> This is not currently an option with respect to Canada since, as has been noted, Canada has yet to ratify the Third Optional Protocol on a communications procedure.

<sup>142</sup> *Ontario Children’s Lawyer v. Ontario (Information and Privacy Commissioner)*, *supra* note 4, at paras. 70 at 79.



The Children’s Lawyer not only represents the child’s interests; she provides a safe, effective way for the child’s voice to be heard. For her to do this, she must provide a promise of confidentiality.<sup>143</sup>

The Court of Appeal also described how courts have increasingly “taken great initiative to seek out and consider the views and preferences of the child” and stated that: “research clearly suggests that children’s inclusion in the post-separation decision-making process is important to the promotion of their well-being.”<sup>144</sup>

Canada has also recently sought greater inclusion of children as a group in legislative and policy decisions that affects them. For example, Canada created the Prime Minister’s Youth Council in July 2016 for youth to consult with the Prime Minister on policy issues.<sup>145</sup> Yet, as the CRC Committee has noted, more consistent and widespread inclusion of children’s voices in decisions that affect them across a range of policy areas is required to give full meaning to their rights under Article 12 of the UNCRC.<sup>146</sup>

**b. Access to Justice Barriers to Effective Participation**

*Children’s views and preferences under the Amended Divorce Act.*

Under the forthcoming amendments to the *Divorce Act*, the CBA Sections expressed concern that placing due weight on the child’s age and maturity, rather than the child’s views as article 12 requires, minimizes the obligation to place due weight on children’s views, opening the door for paternalistic interpretations of the child’s best interests when the child’s views are seen to conflict with what courts perceive to be in their best interests.<sup>147</sup> Children’s voices can be lost when decision-makers fail to consider child rights principles including giving due weight to children’s views. The issue of the chosen wording was raised by the CBA Sections and civil society groups when the legislation was before Parliament, but Parliament did not make the requested amendment to align the section with the wording of article 12.<sup>148</sup> As previously discussed, the CBA Sections disagreed about whether there should be any qualification on the requirement to obtain a child’s views and preferences.

*Limiting Children’s Participation in Court Processes to a One Time Presentation of Views, Often Through a Third Party*

Several issues arise relating to General Comment 12:

- a. Often children’s views are sought only once and not until late in court processes. This is inconsistent with the CRC Committee’s recommendation in para. 13 that participation is a process, not a momentary act.
- b. Children are rarely offered a choice of participating directly or through a representative (para. 35).
- c. There continue to be assumptions about how old children must be, and what is required to meet the capacity threshold test, before children have the right to express their own views contrary to paras. 20 and 21.

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<sup>143</sup> *Ibid*, at para. 70.

<sup>144</sup> *Ibid*, at para. 62.

<sup>145</sup> Canada, “Report of the Prime Minister’s Youth Counsel,” (16 January 2019), [online](#).

<sup>146</sup> *Participatory Rights*, *supra* note 119, at p. 75-76.

<sup>147</sup> *Bill C-78*, *supra* note 72, at clause 16.

<sup>148</sup> CBA submission on Bill C-78, *supra* note 79, at p. 11; see also LEAF (Women’s Legal Education and Action Fund) (June 5, 2019), [online](#), at p. 3.

*Lack of Information Provided to Children*

Children are rarely informed about all aspects of the process, including matters, options and decisions to be taken and their consequences (para. 25). The exception is when the child has independent legal representation. Without this information, the child's right to choose whether to participate has little meaning.

*Participation in cases where there are allegations of violence*

Though the child's right to be heard is particularly relevant in cases involving allegations of violence against children (General Comment 13, para. 63), lawyers and judges often conclude that it is not appropriate for them to participate.

*Non-compliance with Legal Guarantees and Safeguards in General Comment 14*

While the right to express views is addressed, little attention is paid to the other equally important procedural safeguards relating to the establishment of facts, legal reasoning, time perception, qualified professionals and mechanisms to review or revise decisions.

**B. Participation and Independent Legal Representation for Children**

The role of legal representation for children in cases where their best interests are being assessed is a critical means of actualizing the rights of children.<sup>149</sup> The CRC Committee has endorsed this perspective in identifying legal representation as a necessary procedural safeguard when the child's best interests are being determined by courts and there is a potential conflict between the parties in the decision.<sup>150</sup> Legal representation affords children confidential legal advice about how rights apply in their particular cases, and assistance in implementing, advancing, and protecting those rights in court processes.<sup>151</sup>

Other international and regional human rights standards add substance to this fundamental right, including the fair trial and due process guarantees of the binding International Covenant on Civil and Political Rights,<sup>152</sup> the report and resolution of the UN Office of the

<sup>149</sup> For an analysis of legal representation for children from a child rights perspective, see The Honourable Donna J. Martinson and Caterina E. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, (2018) 31 Can.J.Fam.L.151. For a Canadian approach which does not engage in a child rights analysis, see Nicholas Bala and Rachel Birnbaum, *Rethinking the Role of Lawyer's for Children: Child Representation in Canadian Family Relationship Cases*, 2018, Cahiers de Droit.

<sup>150</sup> *General Comment No. 14*, *supra* note 47, at para. 96. By definition, this is the case in all family law proceedings.

<sup>151</sup> Legal information includes information about their legal rights generally; their rights to participate and the choices available; the way the court processes work; and the role of the judge. This information can but does not have to be provided by a lawyer. With respect to legal advice, where lawyers provide specific advice relevant to the child's specific circumstances, lawyers have professional obligations to, in a confidential setting, investigate facts, identify issues, determine client objectives, consider possible options and develop and advise the client on appropriate courses of action. Learning about legal rights and obtaining legal advice from a lawyer will not assist the child in implementing those rights in court processes if the lawyer cannot participate in settlement discussions and contested hearings/trials.

<sup>152</sup> United Nations, International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, [online](#).

High Commissioner for Human Rights on access to justice for children,<sup>153</sup> and the Council of Europe Guidelines on Child-Friendly Justice,<sup>154</sup> as well as the Guidelines on Children in Contact with the Justice System by the International Association of Youth and Family Judges and Magistrates.<sup>155</sup>

These human rights standards recognize that access to justice for children requires the legal empowerment of all children, which includes legal representation, particularly when there is a potential conflict of interest between the child and parent or another party to the proceedings.

**a. Access to Justice for Children Barriers – Independent Legal Representation for Children**

*Overall Concerns*

In Canada, children are not afforded the same legal protections offered by lawyers that the legal system affords adults in family law court cases. Adults have the legal right to participate in court proceedings and to be represented by a lawyer if they are able to retain one privately or through government-funded legal aid programs. Legal representation in family law cases is not affordable to many adults, and government-funded legal aid for family law matters are often inadequate or inconsistently available in jurisdictions across the country. Children face even greater barriers to accessing justice as they typically have no status as parties in family law and child protection proceedings, and no automatic right to have their interests protected through independent legal representation. Children's ability to obtain legal representation also depends on the Canadian jurisdiction in which they live.<sup>156</sup> For example, in British Columbia, children are not entitled to a legal aid lawyer when a court is determining their best interests. In Ontario, the Office of the Children's Lawyer, funded by the provincial government, offers legal services to children at the request of the court in certain family court processes.<sup>157</sup>

The CBA advocates for publicly-funded legal services to meet the essential legal needs of everyone in Canada who cannot afford those services privately.<sup>158</sup> Essential legal needs are viewed as those "arising from legal problems or situations that put into jeopardy the

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<sup>153</sup> United Nations, Report of the United Nations High Commissioner for Human Rights on access to justice for children, Human Rights Council, Twenty-fifth session, Agenda items 2 and 3, A/HRC/25/35, [online](#).

<sup>154</sup> Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, [online](#).

<sup>155</sup> International Working Group of the International Association of Youth and Family Judges and Magistrates, Guidelines on Children in Contact with the Justice System, Adopted by the Council of the IAYFJM London, October 21st, 2016, Ratified by the members of the IAYFJM, April 26th 2017, [online](#).

<sup>156</sup> See Debra Lovinsky & Jessica Gagné, "Legal Representation of Children in Canada" (Paper presented to The Family, Children and Youth Section, Department of Justice Canada, 2015) at 8. See also Nicholas Bala & Claire Houston, "Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada" (Paper presented to the Family, Children and Youth Section, Department of Justice Canada, 31 August 2015).

<sup>157</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 89(3.1); *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched. 1, s. 78. Although the Office of the Children's Lawyer is required to provide legal representation to children in child protection proceedings when directed to do so by the courts, it has the discretion to accept or reject a referral from the court in custody/access matters. Limited resources prevent the Office from accepting every referral in this context.

<sup>158</sup> *Reaching Equal Justice*, *supra* note 66.

security of a person or that person’s family’s security,” including liberty, personal security, health, employment, housing or ability to meet the basic necessities of life and extending to other urgent legal needs.<sup>159</sup>

Children should have access to legal aid to meet their essential legal needs. Essential legal needs include instances where a court or administrative decision-maker makes binding decisions impacting children’s best interests that pose a risk to a child’s security, including their physical and psychological health, access to safe and secure housing and ability to live in a situation where their basic necessities of life are met.

The ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada’s legal system.<sup>160</sup> *Meaningful Change for Family Justice: Beyond Wise Words* identifies legal representation in the family justice system as an important element of access to justice.<sup>161</sup> The report describes unmet legal needs as widespread and pervasive and notes that vulnerable individuals experience more frequent and complex interrelated civil legal problems.<sup>162</sup> The report states, “the majority of family cases involve children, who are vulnerable, usually unrepresented non-parties who seldom participate directly in the process.”<sup>163</sup> This results in minimal legal protection to children in a way that discriminates against them based solely on their age. Legal representation for children for essential legal needs is necessary to achieve just, equality-based outcomes for them. Governments in Canada should offer this representation.

Children’s lack of legal representation is particularly concerning in complex, contentious family law cases before the courts, with high stakes for children’s security. It is well-recognized that toxic stress—which can be caused by domestic violence, alienation or other harmful behaviour, and exacerbated by ineffective court processes—can lead to significant short and long-term damages to children and their healthy development.<sup>164</sup>

#### *Variations in Legislative Provisions and Judicial Interpretations*

Provincial and territorial legislatures deal with the issue of legal representation. There is a significant variation in the laws, from narrow to permissive. There is a lack of consistency in judicial approaches to legal representation, explained in part by different legislative frameworks and in part by differences in willingness to interpret the UNCRC and the General Comments in a way that supports legal representation. For example, the British Columbia Court of Appeal and Ontario Court of Appeal take different approaches.

The Ontario Court of Appeal decision in *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)* took an expansive approach to legal representation in a case

<sup>159</sup> *Reaching Equal Justice*, *supra* note 66, at p. 11.

<sup>160</sup> *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7 at para. 101, [2015] 1 SCR 401.

<sup>161</sup> Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013).

<sup>162</sup> *Ibid.*, at 19.

<sup>163</sup> *Ibid.*, at 16.

<sup>164</sup> Sibylle Artz et al, “A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth” (2014) 5:4 Intl J Child Youth & Family Studies 493; Nicholas Bala, Rachel Birnbaum & Justice Donna Martinson, “One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict” (2010) 26:2 Can J Fam L at 395 at 396. See also Alberta Family Wellness Initiative, “The Brain Story”, [online](#) discussing how “[b]rain health (including risk for physical and mental illness) is determined by more than just our genes” and how early experiences can be built into children’s brains and bodies.

involving allegations of parental alienation.<sup>165</sup> The decision commented on the unique role of the Children’s Lawyer, describing it as “fundamental to the proper functioning of the legal system.”<sup>166</sup> The Court linked the role of the Children’s Lawyer to the best interests of the child, who is entitled to heightened protections within the law, and to the importance of the relationship between children and their lawyers to the administration of justice.<sup>167</sup>

The British Columbia Court of Appeal in *J.E.S.D. v. Y.E.P.*<sup>168</sup> was less enthusiastic about legal representation for a 16-year-old girl in a family law case. The Court noted that General Comment 14 “invites” state parties to “pay special attention” to a list of procedural safeguards to guarantee the protection of the best interests of children, pointing out the one in para. 96. It then stated that interpretation of the recommendation is not straightforward as it is not clear what is meant by “legal representation” or “legal representative.” The Court suggests that the French version shows the ambiguity by using the term “un conseil juridique.” It “appears to indicate” that the level of “representation” contemplated is not a full right to counsel, but rather a right to have the benefit of legal advice.”<sup>169</sup> Given the purpose of the UNCRC, it is difficult to imagine that the CRC Committee intended children to have less than full legal protection in judicial proceedings where their best interests are being assessed and where there is a conflict with a parent. Given the difference in the wording between the English and French versions of paragraph 96 of General Comment 14, however, it would be helpful for the CRC Committee to clarify this issue. The same Court, in *A.B. v. C.D.*<sup>170</sup> fully supported a 14-year-old trans boy’s ability to bring and defend a family law proceeding with his own lawyer of choice.

#### *Government Funding*

In some jurisdictions, such as British Columbia, the government gives no funding for legal representation for children and has actively opposed this prospect.<sup>171</sup> Canada’s federal, provincial and territorial governments must allocate sufficient resources for children’s meaningful participation in family court processes including ensuring that children have access to publicly-funded legal representation for matters relating to their essential legal needs.

### **C. Participation and Legal Representation for Children in Immigration and Refugee Matters**

In other areas of law, legal representation of children is critical to facilitate their effective participation, regardless of whether their best interests are the primary focus of the decision-maker’s analysis. For example, in immigration and refugee law, heightened procedural requirements including independent legal representation are required to address the vulnerabilities of migrant and asylum-seeking children, the challenges of navigating Canada’s complex immigration and refugee determination system, and the serious and potentially life-threatening consequences of negative decisions.

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<sup>165</sup> 2018 ONCA 559.

<sup>166</sup> *Ibid*, at paras. 46 and 53.

<sup>167</sup> *Ibid*, at para. 56.

<sup>168</sup> 2018 BCCA 286.

<sup>169</sup> *Ibid* at paras. 41 and 42.

<sup>170</sup> 2020 BCCA 11.

<sup>171</sup> *Balev, supra* note 4, Factum of the Intervener Attorney General of British Columbia, at paras. 25 and 26, [online](#).

The CRC Committee has expressed concerns that Canada has not appropriately applied the best interests of the child principle in all immigration and asylum processes and has urged Canada to bring its immigration and asylum laws into full conformity with the UNCRC and other international standards.<sup>172</sup> The procedural safeguard of legal representation when the child's best interests are to be formally assessed by courts and equivalent bodies (including administrative decision-makers) is attenuated when there is a potential conflict between the parties in the decision.<sup>173</sup> Even if the best interests of the child is a mandated factor in certain immigration and refugee processes, the primary focus of the State is the integrity of the immigration system rather than an outcome that facilitates full enjoyment of children's rights, including meaningful participation in all matters that affect them.

The legislated mechanism to assist children and others unable to appreciate the nature of proceedings is the appointment of a Designated Representative (DR) by the Immigration and Refugee Board.<sup>174</sup> The DR is responsible for protecting the interests of the minor and explaining the process to them. The functions of a DR include deciding whether to retain counsel, instructing or assisting the child in instructing counsel if they are retained, and making or assisting children in making other decisions regarding their case such as gathering and providing evidence. As Canada noted in its current review of the DR Program,<sup>175</sup> a DR is not the same as counsel. DRs are often parents but can be family members, guardians or friends. They can also be persons remunerated by the Immigration and Refugee Board or working *pro bono*, including, for example, social workers, refugee advocates and sometimes lawyers (although not acting in that capacity). We are concerned about the presumptive appointment of a parent as the DR of accompanied minors, especially in cases of domestic violence, where gender or honour-based violence or forced marriage are at issue, or where a youth's sexual orientation or gender identity may be a source of persecution and parental support has not been forthcoming. In these cases, a parent's values may impede the child from fully presenting their case.

The *Immigration and Refugee Protection Act* does not include a right to state-funded counsel. It makes reference to a right to counsel, at the person's expense, in proceedings before the Immigration and Refugee Board and Minister.<sup>176</sup> Although limited legal aid coverage is available for low-income refugee claimants in most provinces, other immigration processes do not qualify for this assistance.<sup>177</sup> Legal aid funding is susceptible to cuts based on shifting federal and provincial political priorities.<sup>178</sup> Accompanied children

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<sup>172</sup> *Concluding Observations 2012*, *supra* note 8 at para. 73 and 74; *Concluding Observations 2003*, *supra* note 37, at paras. 46 and 47; and *Concluding Observations 1995*, *supra* note 36 at para. 24.

<sup>173</sup> *General Comment No. 14*, *supra* note 47, at para. 96.

<sup>174</sup> *IRPA*, *supra* note 90 s. 167(2).

<sup>175</sup> Immigration and Refugee Board of Canada, Questionnaire – Designated Representatives, [online](#).

<sup>176</sup> *IRPA*, *supra* note 90, s. 167(1).

<sup>177</sup> *See, for example*, Legal Aid Ontario, *Refugee and Immigration Legal Services*, [online](#); Government of Canada, Department of Justice, Legal Aid, [online](#).

<sup>178</sup> This is exemplified by a 30% budget cut to Legal Aid Ontario announced by the provincial government in April 2019, which, amongst other things, forced the agency to stop all funding for new legal services for immigration and refugee clients, except for the preparation of asylum claim forms. The shortfall in funding was subsequently addressed by the federal government in August 2019. *See* F. Sayed, *Legal Aid Ontario stops taking new refugee cases after Ontario budget cuts*, Canada's National Observer, April 16, 2019, [online](#); A.

often do not have the benefit of separate legal representation, which may have the effect of obscuring their interests if their circumstances differ from or conflict with those of their family members or legal guardians.

In 2015, the CBA Immigration Law Section wrote to the federal government about the DR program recommending enhancing justice for vulnerable immigrants and refugees, including children, who enter Canada with the hope of remaining.<sup>179</sup> The CBA Immigration Law Section concluded that children and vulnerable adults require both competent DRs and legal representatives from the time they arrive to the point that their immigration status is resolved or they are forced to leave Canada. Several reasons were advanced for having representation from the outset and not only at the hearing of the refugee claim, including that statements made to an immigration officer at the port of entry can subsequently be used to impugn the child's credibility at an immigration or refugee hearing.<sup>180</sup>

Given the vulnerabilities of migrant and asylum-seeking children, particularly those arriving as unaccompanied or separated minors, and the potentially serious implications to the child's life, liberty and security interests if forced to return to their country of origin, the lack of competent representation from the port of entry creates a risk of denying the child's fundamental rights under the UNCRC and the *Charter*. Although the appointment of a DR is a statutory mechanism designed to protect the interests of children in Immigration and Refugee Board matters, the DR may have little or no knowledge of immigration and refugee processes, particularly if they lack specialized knowledge of immigration law and Immigration and Refugee Board procedures. A non-legal representative may be ineffective for children who are unaccompanied or separated minors, where they are principal applicants in refugee claims or in conflict with a parent such as in cases of domestic violence. In this situation, the parent's representation of a child may have the effect of silencing the child. The CBA Immigration Law Section stated that children require the services of both a DR and lawyer to make their cases and voices heard effectively.<sup>181</sup>

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Balakrishnan, *Feds pledge \$25.7M to Ontario immigration and refugee legal aid*, Law Times, August 12, 2019, [online](#); *Refugee lawyers applaud federal funding after Ford's legal aid cuts; province questions timing*, CBC News, August 12, 2019, [online](#); *Federal funding for immigrant and refugee legal aid good step; but won't support community legal clinics serving immigrants and refugees*, Parkdale Legal Services, August 15, 2019.

<sup>179</sup> Canadian Bar Association Immigration Law Section, *Designated Representatives in Immigration and Refugee Matters: Using Them to the Fullest Potential*, (December 2015), [online](#). [CBA Designated Representatives]

<sup>180</sup> The Federal Court of Canada has recognized the prejudice to vulnerable persons and minors when they do not have the benefit of both counsel and DRs in immigration processes, indicating that "[w]ithout representation, an individual may not be able to participate effectively in the decision-making process, especially when facing a more powerful adversary, such as a government department" (*Hillary v. Canada (Minister of Citizenship and Immigration)*, [2011] F.C.J. No. 184, 2011 FCA 51, at para. 34). The Court has also held that the need for a representative applies to the entirety of the proceedings in respect of a refugee claim and not just to the actual hearing of the claim, including conferences, applications, interviews, etc. (*Duale v. Canada (Minister of Citizenship & Immigration)*, [2004] F.C.J. No. 178, 2004 FC 150 (F.C.), at paras. 3 and 5). Similarly, in another case, the Federal Court noted the refugee claimant's minority (17) at the port of entry and the fact that she did not have a DR at that interview, holding that the duty to appoint a DR arose prior to the interview and therefore, the Immigration and Refugee Board should not have used her answers to impugn her credibility (*Altenor v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 731, 2004 FC 150, at para. 9).

<sup>181</sup> CBA Designated Representatives, *supra* note 179.

## **RECOMMENDATIONS**

- 17. Canada and the provinces and territories increase the participation of children through advisory bodies that can provide input from children as a group on legislative and policy related decision-making.**
- 18. Canada and the provinces and territories offer a range of ways for children to participate in proceedings that respect their choice of how and whether to participate in the proceeding.**
- 19. Canada ensure that in all cases where courts and equivalent bodies formally assess their best interests children are meaningfully informed about their participation rights, including their right to independent legal representation.**
- 20. Canada and the provinces and territories commit dedicated and adequate funding for legal representation for children's essential legal needs. This includes immigration and refugee processes where the child's best interests may not be the central focus of the determination. Representation must be made available to child from the time of arrival until the child's status has been resolved or all avenues of appeal or judicial review have been exhausted.**

## **XI. CONCLUSION**

Since 2012, Canada has progressed judicially, legislatively, and administratively in promoting and protecting the rights of children. However, there are several areas where Canada must take immediate steps to promote compliance with the UNCRC. Canada should work to swiftly meet the outstanding items in the CRC Committee's 2012 Concluding Observations. It would be timely and appropriate for Canada to mark the 30<sup>th</sup> anniversary of the UN General Assembly's adoption of the UNCRC by committing to implement legislative and policy reforms and ratify the Third Optional Protocol as recommended in this Alternative Report. These actions would help Canada re-establish its reputation on the international stage as a leader in promoting and protecting children's rights.