

ACCESS TO JUSTICE FOR CHILDREN 2020: BEST INTERESTS OF
THE CHILD
PAPER 5.1

Implementing Children's Participation in Family Court Cases: View of the Child and Beyond

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I. Overview

Children as Real Human Beings with Distinctive Rights:

Courts should “think of the child as a real human being, with his or her own distinctive personality and rights, and not as an extension of the adults involved”, Lady Brenda Hale, Chief Justice of the United Kingdom Supreme Court.¹

Child Participation: It’s about Empowerment, not Paternalism:

For any right to be more than just a promise, an individual must have a means with which to enforce the right. For children, accessing enforcement measures is particularly problematic because of the dependence, lack of maturity and actual or perceived voicelessness. Access to justice for children is about building a system that recognizes these difficulties, but nonetheless gives children participatory rights. It is not about paternalism. It is about empowerment. Chief Justice of British Columbia, Robert Bauman, 2017 CLEBC Access to Justice for Children Conference.²

Importance of a Rights Based Approach:

The rights-based approach is of particular importance in the discussion of children’s rights because of children’s often intense vulnerability, the frequent competition between children’s rights and those of adults, and the resulting ease with which a more paternalistic and needs based approach can be adopted. Children: The Silenced Citizens, Final Report of the Senate Standing Committee on Human Rights, April 2007.

The UN Committee on the Rights of the Child states that the “right of all children [under 18] to be heard and taken seriously constitutes one of the fundamental values of the UN Convention on the Rights of the Child”.³ Our title refers to views of the child and beyond. Obtaining views in court processes is now common. However, less attention has been paid to the equally important requirement that the views be taken seriously and given due weight in accordance with children’s age and maturity. The latter requires a much broader focus on children in court processes than has traditionally been the case. The UN Committee emphasizes the importance “of avoiding tokenistic approaches, which limit children’s expression of views, or which allow children to be heard, but fail to give their views due weight.”⁴ This approach is directly relevant to the interpretation of the obligation to “consider” views of children now found in the BC Family Law Act and that will be required by the new Divorce Act when it comes into force. Giving views due weight requires considering them not in isolation, but in relation to all relevant evidence and all relevant child rights legal principles.

Our introductory quotes emphasize the importance of a rights-based approach that has a focus on implementation of rights; child rights, such as the right to have their views taken seriously, are meaningless if children do not have the ability to realize them. As Chief Justice Bauman put it so well, implementation is about empowerment of children, not paternalism. Critical to the UN Convention child rights approach is the requirement for safeguards and guarantees of rights in determining the best interests of children. The safeguards and guarantees apply to the right to be heard and taken seriously, a right that is directly linked to the determination of the child’s best interests. Our paper discusses the eight safeguards and guarantees identified by the UN Committee on the Rights of the Child. Obtaining the views of the child is only one of the eight. Appropriate legal representation when a child’s best interests are being formally assessed by

courts is another, one we suggest can be critical to the implementation of all of the safeguards in court processes. The remaining six are: establishing relevant facts; avoiding delays in decision making; using qualified professionals; ensuring appropriate “legal reasoning” (taking children’s views seriously); review and appeal mechanisms; and using child rights impact assessments.

Part I of our paper, called *The Essential Role of Children’s Participation in Best Interests Decision-Making* discusses: A. The Child Rights Approach of the UN Convention on the Rights of the child; B. the Legal Status of the Convention and General Comments in Canada; and C. the UN Convention Participation Framework. Part II is called *Practical Essentials: Implementing the Child Rights Safeguards and Guarantees in Court Processes*. It provides a step-by-step approach to applying each of the eight safeguards and procedures. We have also created a separate Guide/Checklist for these steps. Part III is called Special Considerations. It includes: Child Protection; Cross-Border Child Abduction Cases; and Relevant Intersection Factors, including the girl child, sexual orientation, gender identity and gender expression; and Children with Differing Abilities.

The paper focuses on the UN Convention on the Rights of the Child and the child rights approach found in it, recognizing that there are important child rights found in other domestic and international law. Those rights are discussed by other conference speakers. More information about the Convention, its legal status in Canada, can be found in the Canadian Bar Association comprehensive, online *Child Rights Toolkit*:

<http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit>

II. Part I - The Essential Role of Children’s Participation in Best Interests Decision-Making

A. The Child Rights Approach of the UN Convention Child Rights

Children in Canada have legal rights separate from adult rights under domestic and international law which apply to family law cases, to: be safe, secure and well; and to participate in all judicial proceedings that affect them if they choose to do so; and to have their views taken seriously. However, they can have challenges knowing about and enforcing those rights and being treated as people with rights. Adults, and particularly adult professionals whose work impacts children, have obligations to assist them.

The [United Nations Convention on the Rights of the Child](#),⁵ (the Convention), ratified by Canada in 1991, and the [United Nations Committee on the Rights of the Child](#) created by Article 43 of the Convention to implement the child rights in it through General Comments address that challenge. They recognize that though on their face many domestic and international laws include children in the definition of “persons”, in reality, children, because of their special circumstances, need a way of both making clear what their rights are, AND, making sure that those rights are implemented. The Convention and the General Comments apply a child rights approach to identification of and the implementation of rights. The approach is relevant to the daily family law work of B.C. judges, lawyers and other professionals.

The General Comments particularly relevant to family law cases are: [General Comment 12](#) on “The right of the child to be heard”, 2009; [General Comment 13](#) on “The right of the child to

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freedom from all forms of violence, 2011; and [General Comment 14](#), on “The right of the child to have his or her best interests taken as a primary consideration (article 3 para. 1), 2013.

The General Comments identify four general principles, described as fundamental, which inform the interpretation of all Convention Articles and provide the overarching framework for a holistic approach: respecting and ensuring the rights to each child without discrimination (Article 2); making the best interests of the child a primary consideration in all actions affecting the child (Article 3(1); the child’s inherent right to life (Article 6); and the child’s rights to express his/her/their views freely in all matters affecting the child, those views being given due weight (Article 12(1)) and the children’s right to be heard in judicial proceedings affecting the child (Article 12(2)).⁶

The Convention and the General Comments also provide a basis for understanding children’s lived reality, comparing that reality to their legal entitlements, and addressing differences (contextual analysis using substantive equality principles).

B. Legal Status of the Convention and General Comments

The UN Convention and the General Comments of the UN Committee on the Rights of the Child have legal status in B.C., referred to by B.C. and other Canadian courts:⁷ Canadian laws and legal practices are presumed to conform to the Convention Articles. The Charter is presumed to provide protections at least as great as those found in the Convention. The General Comments provide persuasive guidance on the interpretation of the Convention Articles in family law matters and are entitled to significant weight. They represent international child rights norms which are well-founded and persuasive. In our view, they should be applied unless equally persuasive reasons are provided that they are not relevant and other viable options are identified to achieve the goals of the safeguards and guarantees.

C. The UN Convention Participation Framework

The UN Committee describes children’s overall involvement in processes of all kinds found in the Convention and the General Comments, as participation.⁸ In this section, we link children’s participation to the Convention’s four general principles, referred to above. We will begin with Article 2, non-discrimination – participation rights apply to all children and all types of cases. We then turn to Article 6 – the right to life, including the right to healthy development. Finally, we discuss Article 12, the right to be heard, and Article 3 – best interests of the child together with the safeguards and guarantees required to determine best interests. The UN Committee described the “inextricable links”⁹ between Article 12 and Article 3, making it clear there “can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decision making”.¹⁰

Article 2 – Non-discrimination

Article 2(1) provides that:

States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...

By its terms, it applies to children's rights to be heard and taken seriously. Canadian case law has concluded that the rights apply to all children and to all cases, including those dealing with domestic violence, parental alienation or both. The B.C. Supreme Court in *N.J.K v. R.W.F.*, citing *B.J.G v. D.L.G.* stated:¹¹

...There is no ambiguity in the language used. The *Convention* is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.

More recently, in 2019, the Ontario Superior Court of Justice cited the same comments with approval.¹² The court added that generally children capable of expressing their own views should be allowed to express them and the key issue will be the weight to be given to the child's views in light of the child's age and maturity and the other factors that inform the judicial assessment of a child's best interests.¹³

Article 6 – Right to Life and Healthy Development

Article 6 states:

1. States Parties recognize that every child has the inherent right to life
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

The CBA *Child Rights Toolkit* in its section on Life, Survival and Development makes the important point that "development" in Article 6 is to be interpreted in its broadest sense as a holistic concept, embracing the child's physical, mental spiritual, moral, psychological and social development.¹⁴ Being able to participate in decisions that impact upon their lives is a very important component of a child's healthy development.

Canadian case law also confirms that children's participation is both beneficial to them generally and doing so can help reach more effective settlements and decisions for them. Conversely, not being able to participate if they wish to, can impede healthy development. The B.C. Supreme Court in *N.J.K v. R.W.F.* and the Ontario Superior Court in *Medjuck v. Medjuck, 2019 ONSC 3254*, made this very point, citing *B.J.G v. D.L.G.*:¹⁵

[201] ...receiving children's input can reduce conflict by focusing or refocusing matters on the children and what is important to them. Their participation in the decision-making process also correlates positively with their ability to adapt to new family configurations. Conversely, excluding children and adolescents may have adverse effects such as feeling ignored, isolated and lonely; experiencing anxiety and fear; been confused and angry at being left out; and having difficulty coping with stress. Further, longer term effects of not consulting with children and adolescents can include loss of closeness in parent-child relationships; less satisfaction with parenting arrangements; less compliance with those relationships and more "voting with their feet; and longing for more or less time with the non-resident parent

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The benefits of participation and the harm that can be caused by non-participation were also canvassed in *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*,¹⁶ In addition to addressing the considerations just mentioned, the authors refer to research that suggests that children's direct participation can empower them to develop a sense of social competence, to understand the relationships between actions and decisions, and their consequences, to develop responsibility and ownership of situations, to develop skills in citizenship and to develop protective factors in their lives. The authors also note that such participation improves the quality of decision-making. Children often see things differently and at a much more practical level than adults and their ideas can assist in reaching creative solutions.

Article 12

Article 12 has two distinct parts. Article 12(1) provides that the child has two participation rights: First, the child capable of forming his or her own views has the right to express those views freely in all matters affecting the child. Second, those views, once expressed, must be given due weight in accordance with their age and maturity. Article 12(2) provides that in particular the child shall be provided the opportunity to be heard in any judicial proceedings affecting the child...

Article 3(1)

Article 3(1) states:

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

The Committee on the Rights of the Child describes the best interests of the child as a threefold concept: a substantive right; a fundamental interpretative right, and a rule of procedure (General Comment 14, para 6). Our focus is on the third, best interests as a rule of procedure. A significant part of General Comment 14 is devoted to Implementation. The UN Committee on the Rights of the Child describes legal guarantees and procedural safeguards which are essential to the enforcement/implementation of children's rights. In General Comment 14, under a section called "Implementation: assessing and determining the child's best interests", the Committee states that two steps should be followed to assess children's best interests. First, give the best interests of the child concrete content within the specific factual context of the case (s. 46(a)). Second, to do so, "follow a procedure that ensures legal guarantees and proper application of the right" (s. 46(b)). The best interests determination, it says, describes the "formal process, with strict procedural safeguards designed to determine the child's best interests on the basis of the best interests assessment." (s. 47)).

The Committee then describes procedural safeguards under the heading "Procedural safeguards to guarantee the implementation of the child's best interests". Specifically, it says that, to ensure the correct implementation of the child's right to have his or her best interests taken a primary consideration, some child-friendly procedural guarantees "must" be put in place and followed. As such, the concept of the child's best interests is a rule of procedure. (s. 85) The Committee then "invites" States and all persons who are in a position to assess and

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determine the child's best interests to pay special attention to the following eight "safeguards and guarantees".

The Committee then describes eight specific procedural safeguards necessary to determine children's best interests, including their participation rights, in judicial proceedings.¹⁷ They include, but are not limited to, obtaining children's views. They are all found in General Comment 14:

1. Prioritizing processes, avoiding unnecessary delay (time perception) (para 93);
2. obtaining children's views (para 89-91);
3. establishing relevant facts (para 92);
4. using qualified professionals (para 94-95);
5. using appropriate judicial "legal reasoning" in decisions which: (para 97)
 - apply child rights principles, including giving due weight to children's views;
 - explain conclusions different from children's views; and
 - which are provided without delay.
6. providing mechanisms to revise or review decisions (para 98);
7. requiring governments to assess the impact of all laws and policies, including budget decisions, on children's well-being, (para 99); and
8. requiring all appropriate legal representation when children's best interests are being formally assessed by courts, and particularly when there is a potential conflict between the parties (which is not uncommon in contested cases involving parenting issues) (para. 96).

III. Practical Essentials: Implementing the Child Rights Safeguards and Guarantees in Court Processes

In this Part we provide more detail with respect to the eight safeguards and guarantees and suggestions/tips we hope will be helpful in applying them to family law cases. We consider legal representation last, as Safeguard Eight: Making Sure that Children Have All Appropriate Legal Representation When their Best Interests are Being Formally Assessed by Courts. It is, however, perhaps the most significant as it can be critical to actualizing all children's rights and ensuring the implementation of the other seven safeguards.¹⁸ We have integrated the participation principles described in Part I.

A. Safeguard One: Prioritize Court Proceedings and Avoid Unnecessary Delay¹⁹

WITHIN THE FAMILY LAW PROCEEDING

- The Supreme Court of Canada, in a family law (child abduction) case, has said that complacency towards judicial delay is unacceptable in all contexts.²⁰ Use all the tools

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at your disposal to ensure, to the greatest extent possible, timely, cost effective proceedings.

- Consider requesting one judge for all the court proceedings, where appropriate.

IDENTIFY OTHER RELATED PROCEEDINGS (CRIMINAL, CHILD PROTECTION) AND COORDINATE WITH THEM

- In family law cases the circumstances of the case can lead to not only family law proceedings, but also criminal proceedings, child protection proceedings, (and sometime immigration proceedings) relating to the same family. They usually operate in silos.
- A judge dealing with a family law proceeding MUST consider any civil or criminal proceeding relevant to the child's safety, security and well-being: s. 37(2)(j) of the *FLA* and s. 16(3) and 7.8 of the new Divorce Act, when it comes into force.²¹
- The reason for considering other proceedings is to avoid conflicting orders and outcomes, and to coordinate the proceedings to the greatest extent possible, avoiding undue delay.
 - These multiple proceedings can adversely affect a child's right to be free of violence of all kinds, to participate effectively – not having to be interviewed over and over – to have decisions made with all relevant information, and to have the case decided without unreasonable delay.²²
 - Several solutions have been proposed, including an integrated court model, in which one judge hears all cases, separately, but on the same day (The Toronto Integrated Court Model in the Ontario Court of Justice), use of a judicial coordinator, and better tracking of court files.

Consider using another proposal - judicial coordination and communication, in which communication, with the involvement of all of the parties, takes place between judges and/or courts.²³

B. Safeguard Two: Obtaining the Views of the Child – Why, Who and How²⁴

WHY CONSIDER THE VIEWS OF CHILDREN

- Under s. 37(2) of the *FLA*, judges (and guardians) must consider the child's views unless it is inappropriate to do so: s. 37(2)(b) of the *FLA*. Under section 16(3)(e) of the new Divorce Act judges must consider: the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained. Children have two rights under Article 12 of the *Convention*:²⁵
 - first, Article 12(1) gives to the child who is capable of forming his or her own views the right to express those views freely in all family law matters affecting the child, AND
 - second, Article 12(1) also gives to that child the right to have those views given due weight in accordance with the age and maturity of the child.

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- Article 12(2) states that the child has, for this purpose, to be provided with the opportunity to be heard in any judicial proceedings affecting the child. That would include family law proceedings.
- Applying Article 12 to the interpretation of s. 37(2)(b), it would only be inappropriate to consider the child's views if the child is not capable of forming his or her own views.²⁶
- There is a direct – “inextricable” - link between determining children's best interests, as set out in Article 3²⁷, and hearing the child's views and taking them seriously.²⁸
- Canadian case law confirms that considering children's views is both beneficial to children generally and doing so can help reach more effective settlements and decisions.²⁹

WHO – WHICH CHILDREN?

- The right to express views/be heard in judicial proceedings applies to all children, no matter what the nature of the claim; this includes cases where there are allegations of family violence and or alienation.³⁰
- Article 19(1) of the Convention protects children from all forms of violence while in the care of parents(s) legal guardian(s) or any other person who has the care of the child.
- The child's right to be heard has particular relevance in violence situations and the participation right commences with very young children who are particularly vulnerable to violence.³¹
- A child has the right to choose whether or not to participate.³²
- To exercise that right the child must have information and advice about the choices and their potential consequences.³³
- The capacity required to be heard should be a low one – focusing primarily on cognitive capacity; other factors relating to capacity and maturity are usually best left to determining “due weight”.³⁴
- There should be no age limits and capacity must be assessed on a case by case basis.³⁵
- There is a presumption of capacity.³⁶

HOW TO OBTAIN CHILDREN'S VIEWS

Methods:

B.C. courts have supported several ways of obtaining children's views³⁷, including:

- Full s. 211 *FLA* reports.³⁸
- Evaluative views of the child reports prepared by a mental health professional: s. 211(1)(b) *FLA*
- Non-evaluative views of the child reports prepared by a mental health professional or another trained person, including lawyers: ss. 37(2)(b), 202 and 224.

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- Facilitated through legal representation (the lawyer cannot “give evidence” about a child’s views but can state a position) based on s. 201 (generally or adding the child as a party) or s. 203, *FLA* (see legal advice/ representation, below explaining the legal representation can go beyond obtaining views and involves implementing all safeguards)
- Judicial interviews (which can be in addition to other methods – see “Judicial Interviews”, below)
- More generally s. 202, *FLA*³⁹ gives the Court a broad discretion to admit hearsay and give other direction it considers appropriate about how the “child’s evidence” is received. This could include the affidavit evidence of the parties.

Choosing the Method

- Article 12(2) of the *Convention* states that the child has the right to be heard in judicial proceedings “either directly or through a representative or an appropriate body”.
- The UN Committee on the Rights of the Child:
 - says that those responsible for hearing the child should inform the child about the matters, options and possible decisions to be taken and their consequences.⁴⁰
 - recommends that the child should have a choice about how to participate, and, wherever possible the child must be given the opportunity to be directly heard in any proceeding and to be advised of that option⁴¹; the BCCA has supported this.
 - says the representative can be the parent(s), a lawyer, or another person (inter alia a social worker),⁴² and
 - cautions that there are risks of a conflict between the child and their most obvious representative - parent(s).⁴³
- B.C. cases say the judge has the ultimate decision about the method used to hear the child, but also emphasizes the importance of giving children the chance to be heard directly.⁴⁴
- Proceedings must be accessible and child appropriate.

Timing – When to Obtain Children’s views

- Children’s participation should begin early in the process and should form part of the decision-making processes at Family Case Conferences or other judicial settlement meetings as well as motions and trials
- Participation is a process, not a momentary act.⁴⁵
- But children should not be interviewed too often forensically, especially with respect to traumatic matters.⁴⁶

CHILDREN'S PARTICIPATION THROUGH A JUDICIAL INTERVIEW

Consider requesting/facilitating a judicial interview, particularly if the child wishes to meet with the Judge. The following comments about Judicial Interviews have been described by the Provincial Court as the Martinson Model.

Authority to Interview children

- Both the Provincial Court and the Supreme Court have jurisdiction to interview children, and consent is not required.⁴⁷

Why meet with children

- The purpose of a judicial interview is NOT to gather evidence or to have a child provide information about a factual matter. Instead, it can:⁴⁸
 - Enable children to be more involved and connected with the proceedings
 - Make sure the judge has understood the views and feelings of the child
 - Make sure the child understands the judge's task and the nature of the court process.
- Judicial interviews can take place in addition to other methods of obtaining views.

When to meet with children

- When appropriate, they can take place as part of Family Case Conferences and other settlement meetings as well as during a trial. Usually the earlier it is done, the better.
- Though the consent of parents/guardians is not required, and a judge can meet with the child on the judge's own initiative, the parents/guardians should have a chance to make submissions beforehand on both whether the interview should take place and how.
- Judicial meetings should be considered on a case by case basis, as a way for them to participate directly in court proceedings.
- Consider the length and the appropriate time of day for the child.

Where to meet with children

- Usually informally in a court room, though judicial interviews have been held in chambers, and in places like a school, a park or a restaurant.
- Consider how the child will be brought to the interview.
- Judicial interviews should be child friendly.

Who attends

- If at a courthouse usually a court clerk is there
- Though the parents and their lawyers if they have them, are not usually present, consider asking to include the child's lawyer or other representative of the child as part of the child's right to participate. (See, for example, s. 64(4) of Ontario's *Children's Law Reform Act*.)

How to meet with a child – Practical Tips

The Martinson Model contains these Tips for Judicial Interviews:

- Consider recording the courthouse interview through the clerk if that is possible and making and keeping notes; Supreme Court judges usually record the meetings and then seal the tape. If you do, tell the child you are doing it.
- Consider whether the meeting results are confidential and explain that to the child at the beginning; many judges state that there will be no secrets but explain that they will provide a summary only of what the child said to their parents/guardians. Think about reviewing your summary with the child to make sure it is accurate.
- It may be unwise to ask the child which parent they prefer to live with, but you can ask about their time with each parent.
- Consider, if appropriate, saying you know they love both parents and know that both parents love them.
- Remember to use open ended questions and avoid suggesting answers
- Think about having a broad structure for interviews, such as: (these are only suggestions)
 - Start with putting the child at ease by introducing yourself in a child friendly way
 - Ask general questions about neutral things in the child’s life such as hobbies, sports, school and other daily routines.
 - Explain your role and the general process, including confidentiality and the summary. If in a court room consider showing the child the judge’s chair, witness box etc. and let them sit in them.
 - Ask the child if he/she has any generally questions about the process.
 - In the more “formal” part of the meeting, consider asking if the child has anything in particular the child wants you to know.
 - Then ask specific open-ended questions based on the circumstances of the case, and what the child may have told you.
 - Again, ask if the child has any/further questions
 - Consider your summary and review it with the child.
 - End by reviewing what will happen next in the court process, and in particular how the child will find out about the decision you make.

1. Safeguard Three: Establishing Relevant Facts Including Those Relevant to the Child’s Views⁴⁹

ESTABLISHING RELEVANT FACTS GENERALLY

- Judges and all other decision makers, including mediators and arbitrators, require all relevant information relating to the child’s best interests generally, and in particular,

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with respect to their present and future physical and mental well-being in order to make recommendations/reach decisions which are in the best interests of the child only:

- The *FLA* requires judges to consider all of the factors in s. 37, and the s. 38 “risk” factors, because they are all relevant to a child’s best interests, and both sections require judges to consider any other relevant factors.
- Similarly, the new Divorce Act will require judges to consider specific factors under s. 16(3) and (4) as well as other relevant factors.
- The Convention on the Rights of the Child and the UN Committee General Comments, together with Canadian laws, including the Charter, can be used to
 - interpret those sections, and
 - to provide information about other relevant factors.

ESTABLISHING FACTS RELEVANT TO AND SUPPORTING THE CHILD’S VIEWS

- Judges, and all other decision makers, including mediators and arbitrators, when deciding the weight to be given to children’s views (see Safeguard Five, below)
 - need information relevant to those views,
 - including information that supports the child’s views.
 - information provided by parents in this respect, which may be presented from a partisan perspective, can be incomplete and/or unreliable.

C. Safeguard Four: The Need for Qualified Professionals⁵⁰

- Assessments of children’s interests should be carried out by professionals who have expertise in matters related to child and adolescent development in a friendly, safe atmosphere.
- S. 211 reports should only be conducted by qualified professionals whose qualifications include the nature, prevalence and potential consequences of family violence on the child’s safety, security and well-being.⁵¹

D. Safeguard Five: Judicial and Other Decision Making (Legal Reasoning) - Including How to Assess the Weight to be Attached to a Child’s Views⁵²

THE DECISION-MAKING PROCESS – GIVING DUE WEIGHT TO A CHILD’S VIEWS

- The UN Committee on the Rights of the Child states that:
 - The views of the child have to be seriously considered when the child is capable of forming their own view.⁵³
 - If the child is capable of forming their own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue.⁵⁴

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- Age alone cannot determine the significance of a child's views as their level of understanding are not uniformly linked to their biological age. A child's development can be affected by information, experience, environment, social and cultural expectations, and levels of support.⁵⁵
- Maturity refers to the ability to understand and assess the implications of a particular matter:⁵⁶
 - Maturity in the context of Article 12 is the capacity to express views on issues in a reasonable and independent manner.
 - The impact of the matter on the child must be considered; the greater the impact of the outcome on the child's life, the more relevant the appropriate assessment of the maturity of that child.
- Consideration needs to be given to the evolving capacity of the child and the direction and guidance from parents.⁵⁷
- The Supreme Court of Canada has dealt with how to determine the weight to be placed on the views of children when a child objects in a child abduction case.⁵⁸ The court's comments provide some guidance for other family law cases where due weight must be given to children's views:
 - "Determining sufficient age and maturity in most cases is simply a matter of inference from the child's demeanor, testimony, and circumstances...In some cases it may be appropriate to call expert evidence or have the child professionally examined. (para 79)
 - "As in the case of age and maturity, the child's objection should be assessed in a straight-forward fashion – without the imposition of formal conditions or requirements not set out in the text of the Hague Convention". (para 80)
 - "If the elements of (1) age and maturity and (2) objection are established, the judge has a discretion as to 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 relevant to her welfare, as well as the general [Hague] Convention considerations.'" (para 81)
- Courts have recognized the significance of child participation in decision-making. In ***A.C. v. Manitoba (Director of Child and Family Services)***, 2009 SCC 30, the Supreme Court of Canada stated:

The [Convention] describes "the best interests of the child" as a primary consideration in all actions concerning children (Article 3). It then sets a framework under which the child's own input will inform the content of the "best interests" standard, with the weight accorded to these views increasing in relation to the child's developing maturity.

...

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With our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from that child. The extent to which that input affects the "best interests" assessment is as variable as the child's circumstances, but one thing that can be said with certainty is that the input becomes increasingly determinative as the child matures. (at paras. 92-93)

- The British Columbia Court of Appeal has stated that:⁵⁹
 - Article 12 of the Convention applies, and children's views are an important factor. They are though only one of many factors and are not determinative.
 - As children gain maturity their wishes become proportionately more important.
 - Circumstances will exist when the child's wishes do not conform to what is in his or her best interests.
 - Children are sometimes incapable of identifying what is in their own best interests
- The British Columbia Supreme Court has concluded that:⁶⁰
 - If a child is forming a view in a reasonable and independent manner, the views must be considered a significant factor.

THE ACTUAL DECISION – EXPLAINED AND PROVIDED WITHOUT DELAY

The UN Committee on the Rights of the Child states:

- Decisions must be explained, stating explicitly:
 - The factual circumstances regarding the child
 - What elements have been found relevant and how they have been weighted
 - If the decision differs from the views of the child, the reason for that should be clearly stated.
- The decision should be provided in a timely manner, without delay.
- The decision maker should inform the child of the outcome and explain how the views were taken seriously.

E. Safeguard Six: The Child's Right to Have the Decision Reviewed for Correctness and Appealed if Appropriate⁶¹

- A child who has participated in a court process, has the right to have the court's decision reviewed and appealed if appropriate.
- The UN Committee on the Rights of the Child states that:
 - the child needs to know about appeal/review procedures, and
 - they should be accessible to the child or by his or her legal representative.

F. Safeguard Seven: Keeping Governments Accountable to Make Decisions in Children’s Best Interests⁶²

- Government decisions, including budget decisions, must not influence a judge’s obligation to make a decision in the best interests of a child.
- This includes prioritizing funding for such things as legal representation and supporting resources.

G. Safeguard Eight – Making Sure That Children Have all Appropriate Legal Representation When their Best Interests are Being Formally Assessed by Courts⁶³

PURPOSE OF LEGAL REPRESENTATION FOR CHILDREN

Generally

The Supreme Court of Canada has stated that the ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada’s legal system.⁶⁴ Legal representation includes general information about legal rights, confidential legal advice about how general rights apply in particular cases, and assistance in implementing, advancing, and protecting rights in court processes.

Legal Information and Legal Advice

For children, 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. For children in family law cases legal advice would include, for example: exploring relevant facts; exploring children’s views; explaining that they have a right to both provide their views and a right to have the court take them seriously; advising them generally on potential options and their pros and cons, including options about presenting their views; suggesting appropriate options about how views should be heard and who should participate; and, more generally, explaining the child’s options to advance and develop their rights in court processes, including settlement options.

Legal Representation in Court Proceedings

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. A lawyer can be very helpful in facilitating a resolution during settlement discussions of all kinds. At a contested hearing/trial the lawyer can participate on the child’s behalf: (1) in the presentation and testing of evidence; (2) with respect to s. 211 parenting assessments: (a) in the decision about whether one is necessary; (b) if it is, the qualifications of the expert and the method used; (c) its admissibility. (d) the appropriateness of a critique report; (3) in guarding against unreasonable delay; and (4) by advancing and protecting children’s rights during final submissions, including submissions on

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the relevant law, how the child's views are weighed, and the weight to be given to the parenting assessment in the context of all of the evidence.

Once the court's decision is provided, a lawyer can also: explain the decision to the child; review the ultimate decision for correctness; and recommend appealing the decision if appropriate.

HOW TO INVOLVE A LAWYER IN COURT PROCEEDINGS

- B.C. Supreme Court cases support children getting advice from a lawyer outside the Court process but say that Court approval is required for that lawyer to participate in court proceedings.⁶⁵
- The Court can order that a lawyer for a child participate under s. 201 or s. 203 of the *FLA*.

S. 203 FLA⁶⁶

- Section 203(1) gives the court authority to appoint a lawyer to represent the interests of a child in the proceeding if the court is satisfied that (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and (b) it is necessary to protect in the best interests of the child.
- The right provided by the legislature under this section is limited and has been narrowly applied by the B.C. Supreme Court, supported by the B.C.C.A.⁶⁷
- The section makes parental conflict and parents' inability to decide what is in the best interests of the child the determining factors. Doing so is arguably not consistent with treating the child as a person with rights separate from those of the child's parents.
- Consider that, applying a child rights analysis, in almost every contested family law case, by the time the case reaches a formal trial, the conflict between the parents is such that they fundamentally disagree on what is in the best interests of the child – that is why they are asking the court to make the decision. Having a lawyer to assist the child would be in the best interests of the child.
- Unlike Ontario, where the government funds an extensive legal representation for children office – the Office of the Children's Lawyer - section 203(2) makes parents and guardians responsible for the cost.

S. 201 FLA

- There is an emerging view that s. 201(2)(b) can be used to provide the child with participation rights with independent legal representation.
 - Section 201(1) states that a child has the capacity to make, conduct or defend a proceeding under the Act without a litigation guardian if the child is 16 years or older, a spouse or a parent. Subsection 2 states that there is nothing in the section which prevents a court if the court considers it appropriate, from: (b) allowing a child who is not described in subsection 1 [that is, a child under the

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age of 16] to make, conduct or defend a proceeding under this act without a litigation guardian.

- Therefore, subject to the judge's discretion:
 - A child has the right to be involved in making, conducting or defending ANY family law proceeding, which includes those relating to guardianship, parenting arrangements, contact, child support and parental cross-border child abduction.
 - The right is not limited to specific issues within a proceeding but applies to all issues.
 - As a participant in the proceedings the child is entitled to independent legal representation.
- The section does not deal with adding a child as a party. However, Rule 20(5)(b) of the *Provincial Court (Family) Rules*, gives the court authority (may) to “at any time order that a person be added as a party for the purpose of a hearing or proceeding generally”.
- This emerging view is based on: the plain wording of the section, which allows a child under 16 to make, conduct or defend any FLA proceedings; the context of the section within the FLA as a whole; and the ways in which a child rights analysis applies to the exercise of a judge's discretion.⁶⁸

This emerging view is also based on British Columbia and Ontario case law.⁶⁹ Courts in B.C. have permitted children to both make and defend FLA family law proceedings with the benefit of a lawyer, without using s. 203. In **A.B. v. C.D. and E.F.**, 2020 BCCA 11, the Court of Appeal supported a child's ability to have an independent lawyer. The Court confirmed a B.C. Supreme Court order permitting the 14-year-old boy, A.B. to bring an application under section 201(2)(b) of the FLA and to bring or defend any further or future proceedings concerning his gender identity. A.B.'s lawyer(s) participated fully throughout both the Supreme Court and Court of Appeal proceedings. See also the discussion in **N.K. v. A.H.**, 2016 BCSC 744.

AVAILABILITY OF LAWYERS FOR CHILDREN IN B.C.

- The Child and Youth Legal Centre provides legal advice and representation for children and is funded by the Law Foundation of B.C. and operated by the B.C. Society for Children and Youth.
- The Legal Services Society of B.C. does not provide a lawyer for children in family law cases.
 - Consider seeing if the Child and Youth Legal Centre would provide a lawyer for the child.⁷⁰
 - Consider encouraging (at least through the court, institutionally) the Legal Services Society to provide lawyers for children in these cases.
- In some cases, the parents may be able to afford an independent lawyer for the child.

SUPPORT FOR LEGAL REPRESENTATION FOR CHILDREN

- In 1974 the Law Reform Commission of Canada said consideration should be given to the appointment of independent legal counsel to represent the child where the interests of a child are directly or indirectly affected by a court proceeding.
- In B.C., the Office of the Children's Representative supports legal representation for children in family law and in child protection cases.⁷¹
- Internationally, as already noted, the UN Committee on the Rights of the Child support legal representation for children.⁷²
- The UN High Commissioner for Human Rights supports free or subsidized legal (and other) assistance for children, saying they need it to effectively engage with the legal system.⁷³
- The UN Human Rights Council also supports legal aid for children under the same or more lenient conditions as adults (including the right to challenge decisions with a higher judicial authority).⁷⁴
- International human rights instruments, including the International Covenant on Civil and Political Rights, which Canada has ratified, recognize the right to a fair trial and due process, which includes the right to legal representation in both criminal and civil law matters. These instruments apply to children as well.

EVOLVING APPROACHES TO LEGAL REPRESENTATION FOR CHILDREN IN CANADA

Legislatures/Government Support

- There are significant differences in the wording of legislation providing for court appointed legal representation for children across Canada. B.C.'s s. 203 is among the narrowest.⁷⁵
- Similarly, there are significant differences in government support for legal representation. B.C is among the most limited. This is in stark contrast to the entitlement of Ontario children to assistance and representation by a lawyer. The Ontario Office of the Children's Lawyer is funded by the Ontario Government, and, as of 2018, had 25 (total) staff lawyers, a roster of 400 lawyers throughout Ontario, 10 in house social workers and some 250 clinicians throughout Ontario. It covers family cases and child protection cases.

Judicial Approaches to Legal Representation

- On April 20, 2018 the Supreme Court of Canada, in a family law case dealing with the Hague Convention,⁷⁶ dealt with an Ontario case where the Office of the children's lawyer was appointed for the children during the original hearing, and that lawyer participated in the proceedings throughout the hearing. The OCL lawyers also reviewed the original decision, recommended an appeal, launched the appeal, and appeared and made arguments on the children's behalf at all stages of appeal, including seeking leave to appeal to the Supreme Court of Canada, and arguing the appeal before the Supreme Court of Canada. The Supreme Court accepted this extensive participation without comment. The Ontario Court of Appeal had also

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recognized that the OCL had become involved at the court's request to help determine the children's wishes and to represent their interests.

- On June 18, 2018, the Ontario Court of Appeal (leave to appeal to the Supreme Court of Canada denied)⁷⁷ provided a strong endorsement for legal representation for children in family law cases, including cases where there are allegations of alienation, emphasizing how legal representation is fundamental to the proper functioning of the legal system⁷⁸, as well as how important it is for children to be able to confidentially speak to a lawyer.⁷⁹ A lawyer was appointed for the children and appeared as their counsel throughout the entire court proceedings, including the initial hearings.
- On July 13, 2018 the British Columbia Court of Appeal⁸⁰ allowed a lawyer appearing for the child to make arguments supporting legal representation for the child, but would not hear counsel's argument relating to an access to justice for children Charter Challenge based on s. 7 and 15 because it had not been raised before the hearing judge. The Court upheld the hearing judge's s. 203 decision not to appoint a lawyer for the child. However, in *obiter* comments the Court: expressed a concern about a child being able to cross-examine a parenting assessor or a parent in a contested parenting case, placing the child in an adversarial role;⁸¹ observed that while Article 12 gives children the right to participate, it does not "in its terms go so far as to guarantee children a right to legal representation or to party status. Rather, it requires that children's voices be heard in proceedings that affect them"⁸². The court stated although the English Version of General Comment 96 of the UN Committee on the Rights of the Child refers to the importance of legal representation when courts are formally assessing the child's best interests, the French version refers to 'un conseil juridique' which "appears to indicate that the level of 'representation' contemplated by the commentary is not a full right to counsel, but rather to have the benefit of legal advice."⁸³
- The Yukon Supreme Court⁸⁴ has supported legal representation in the proceedings, not just legal advice, as a meaningful way to ensure that more than lip service is paid to children's legal rights to be heard throughout the court processes.

IV. Special Considerations

A. Special Consideration One: Child Protection

- Children's rights to be heard, and to legal representation, discussed above, are particularly important in child protection cases; children face both temporary and permanent separation from parents/guardians or other caregivers.
- British Columbia is only one of two Canadian provinces/territories in which a child is not entitled to legal representation by child protection legislation. (The other is Newfoundland)
- For more information specific to children's rights and their implementation see the CBA Child Rights Toolkit section on Child Protection.⁸⁵ Here are some particular matters to consider:

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- Although domestic legislation and the Convention recognize that the best interests of the child may necessitate separation from parents where there is abuse, neglect or maltreatment, Article 9 of the Convention encourages Canada to respect the right of the child to maintain personal relations and direct contact with parents on a regular basis, except if it is contrary to the best interests of the child.
- Child protection laws, regulations and practices that provide for this intervention, particularly when the child is removed from the home, must conform with the child's Charter rights and, presumptively, the child's rights under the Convention.
- The Convention contains Articles particularly relevant to indigenous children:
 - Article 30: Children have the right to profess, practice, and enjoy their own religion, language, and culture.
 - Article 25: Children have the right to have their living arrangements regularly looked at.
 - Article 20-21: Children have the right to care and protection if they are adopted or in foster care.
- Consider the additional rights and interests of Indigenous children, including those found in the *UN Declaration on the Rights of Indigenous Peoples*, the Recommendations of the Truth and Reconciliation Commission, recently enacted Bill C-92 An Act respecting First Nations, Inuit and Métis children, youth and families, and indigenous laws and traditions.

B. Special Consideration Two: Cross-Border Child Abduction Cases

GENERAL CHILD RIGHTS FACTORS

- Children's rights to be heard, and to legal representation are equally important in cases where there are allegations of cross-border child abduction, whether under Part 4 of the *FLA*, Division 7, Extra-provincial Matters Respecting Parenting Arrangements, or Division 8, dealing with international child abduction (children under 16).
- The UN Convention generally applies to these cases, and Article 35 provides children with protection against child abduction.
- Courts are increasingly considering the child's perspective on all relevant issues, not just their views. See the Supreme Court of Canada decision in *Office of the Children's Lawyer v. Balev*.⁸⁶
 - The court considered the perspectives of children when determining habitual residence, creating a hybrid model, rather than just focusing on parental intention.
 - The majority provided guidance in determining how a child's objections (Article 13 of the Hague Convention) should be determined and weighed. (See Part II, Safeguard Five)

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- The appeal was launched by the children's lawyer, who participated fully throughout on behalf of the children.

JUDICIAL COORDINATION AND COMMUNICATION IN CROSS BORDER CASES

- Consider initiating or participating in judicial communication and coordination in any cross-border case
- In a family law case, a BC judge may receive a request for communication from a judge in another jurisdiction or may wish to initiate such a communication.
- Consider the example of a communication between B.C. Provincial Court Judge B.K. Davis and Judge Laff of the Colorado District Court and the BC Supreme court judgment referred to in it.⁸⁷
- Direct Judicial Communication involves communication between judges, with the knowledge of the parties, often in a joint hearing - with the parties and their counsel present - for the purpose of coordinating and harmonizing the proceedings so that a resolution of all the outstanding issues can be reached in a just, timely and cost effective way.
- The communications do not relate to the merits of each case, and there are safeguards in place to ensure that the processes are fair and do not interfere with the judicial independence of either Court; a judge of one court does not make decisions which are within the jurisdiction of the other court. Joint hearings take place in open court, there is a record of the proceedings, the parties are notified, and the parties and their lawyers, if they have lawyers, can participate.⁸⁸

C. Special Consideration Three: Relevant Intersectional Factors

- When considering children's rights and their implementation on a case by case basis, consider that a particular child may have particular attributes or circumstances, or a combination of them, that can make implementing their rights particularly challenging.
- The following topics are meant as examples of relevant topics and some highlights with respect to each are provided. Other topics may include the unique circumstances of indigenous children and, more broadly, age, racialization and class.

The Girl Child

- See this section of the CBA Child Rights Toolkit.⁸⁹
- Gender and other intersecting forms of diversity must be taken into account to fully meet the needs of Canada's young people. Gender socialization, especially as it intersects with age, race, class, ability and sexual orientation has a particular impact in a young person's life.
- The UN Commission on the Status of Women recommends referring to standards set in both the UN Convention on the Rights of the Child and UN Convention on the Elimination of all Forms of Discrimination Against Women, when issues pertaining to girls are indicated. Rather than looking at the articles in the UN Convention on the

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Rights of the Child in a gender-neutral manner, consider looking at their general provisions as offering a wide range of possibilities to address violations that are specific to girls. By reading the Convention on the Rights of the Child with the Convention on the Elimination of Discrimination Against Women, the distinctive needs of the girl child can be prioritized.

- Girls in vulnerable situations are particularly affected by violence, including Indigenous, African Canadian and other racialized girls, and those with differing abilities; for Indigenous girls see in particular the final report of the Inquiry into Missing and Murdered Aboriginal Women and Girls.⁹⁰

Sexual Orientation, Gender Identity and Gender Expression

- See this section of the CBA Child Rights Toolkit.⁹¹
- All children and youth have the right to be free from discrimination because of sex, gender, sexual orientation, gender identity and gender expression. This right is founded in Article 2 of the UN Convention on the Rights of the Child, as well as in the *Canadian Charter of Rights and Freedoms*, the *Quebec Charter of Human Rights and Freedoms*, and provincial and territorial human rights legislation.
- Legislative protection against discrimination based on sexual orientation has been in place for some time.
- As of 2017, gender identity or gender expression has been explicitly codified in all human rights legislation at the provincial, territorial, and federal level.
- In addition to forms of discrimination generally, there are a number of challenges children and youth face in this area.⁹²

Children with Differing Abilities

- The UN Convention on the Rights of the Child protects children's rights to the highest attainable standard of health, which includes physical and mental health: Article 24.
- The UN Convention on the Rights of People with Disabilities has been ratified by Canada. All of the rights apply equally to adults and children.
- Article 7 of that Convention deals specifically with children with disabilities and states:
 1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
 2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
 3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

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- There is a Committee on the Rights of Persons with Disabilities; Its General Comment No. 3 deals with Article 6, Women and Girls with Disabilities.

V. Endnotes

¹ Forward, May 31, 2017, in Helen Stalford, Kathryn Hollingswoth and Stephen Gilmore, editors, *Rewriting Child Rights Judgments*, Oxford and Portland, Oregon, 2017, at ix.

² https://www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/Speech_Why_Access_to_Justice_for_Children_Matters.pdf

³ General Comment 12, para 2.

⁴ General Comment 12, para 132

⁵ 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

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Article 2.

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 3(1)

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

Article 6

1. States Parties recognize that every child has the inherent right to life
2. States Parties shall ensure to the maximum extent possible the survival and development of the child

Article 12

1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Other Articles are of particular relevance to family law matters are:

Article 19: Protection from all forms of violence

Article 24: Right to the highest attainable standard of health

Article 27: Right to an adequate standard of living

Article 35: Protection from abduction

Article 36: Protection from all forms of exploitation.

Article 14: Freedom of expression

Article 16: Right to privacy

Article 5 recognizes parents' (and others) responsibilities, rights and duties to provide direction and guidance to the child in the exercise of their rights consistent with the evolving capacity of the child.

Article 9: right not to be separated from parents, except by competent authorities and when in the child's best interests, and if separated, the right to maintain contact with both parents on a regular basis, except if contrary to the child's best interests.

Article 18(1) recognizes both parents' (and guardians') role: parents (guardians) are primarily responsible for the child's upbringing and development with the best interests of the child as their basic concern.

⁷ Canada has taken and continues to take the position that it is not necessary to implement the Convention through legislation because Canadian laws already comply with it. The British Columbia Court of Appeal has commented on the legal status of the CRC in Canada in July 2018, in [*J.E.S.D v. Y.E.P.*](#), 2018 BCCA 286. With respect to the presumption of conformity, the Court said that it is well settled that international obligations can inform the interpretation of domestic statutes, even when those obligations have not been implemented in domestic law. If possible, courts will avoid statutory interpretations that place Canada in breach of its international obligations and will prefer interpretations that reflect the principles of international law: at para. 32. This is a rebuttable presumption that can be rebutted by the clear words of the statute under consideration. Where the provisions of the statute are not genuinely ambiguous or require clarification, it is inappropriate for the court to look to international law for guidance: at paras. 32 and 33.

With respect to General Comments, the Court stated that while commentaries are not binding, they can shed light on the correct interpretation of the articles of the UNCRC: at para. 38. The Court also cautioned that the Convention applies across diverse legal systems and care must be exercised in interpreting the provisions of international conventions. A purposive approach is required, and it would

be a mistake to assume that words in the convention necessarily correspond to specific concepts established in the Canadian legal system: at para. 35.

⁸ General Comment No. 12 (2009) *The right of the child to be heard*, deals with Article 12 of the UN Convention on the Rights of the Child. Para. 3 of the General Comment states: "...A widespread practice has emerged in recent years, which has been broadly conceptualized a "participation", although this term itself does not appear in the text of article 12. This term has evolved and is now widely used to describe ongoing processes which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes."

⁹ General Comment 12, para 43.

¹⁰ General Comment 12, para 74.

¹¹ [N.J.K. v. R.W.F.](#), 2011 BCSC 1666, at para 201, citing *B.J.G v. D.L.G.*, 2010 YKSC 44 at para 3. (Note that the Honourable Donna Martinson was the judge in that latter case)

¹² [Medjuck v. Medjuck](#), 2019 ONSC 3254 at para 31, also citing *B.J.G v. D.L.G.*

¹³ At para 32. The Court added that In some cases the alienating behaviour of the parent "may be such that the child is not really capable of forming his or her own views": there is nothing in the Answer, or the evidence on this motion, to lead to that conclusion in this case.

¹⁴ This reflects the views of the UN Committee found in General Comment 5.

¹⁵ [N.J.K. v. R.W.F.](#), 2011 BCSC 1666, at para 201, citing *B.J.G v. D.L.G.*, 2010 YKSC 44 at para 3.

¹⁶ The Honourable Donna J. Martinson and Catrina E. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, 2018 31 Can.J.Fam.L., 151 at 164-165.

¹⁷ General Comment 14, paras 85-88.

¹⁸ For a more in-depth look at how the safeguards and guarantees apply, see The Honourable Donna J. Martinson and Catrina E. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, 2018 31 Can.J.Fam.L., 151. See also Caterina E. Tempesta, *Legal Representation as a Critical Aspect of the Child's Right to be Heard*, Master of Laws Thesis: Advanced Studies in International Children's Rights Leiden University of Faculty of Law, the Netherlands, 2018-2019 (available from the authors of this paper)

¹⁹ General Comment 14, para 93.

²⁰ [Office of the Children's Lawyer v. Balev](#), 2018 SCC 16 at para 82. The Court was dealing with a child abduction case under the Hague Convention and added that some cases can tolerate delay more than others. Hague Convention cases cannot. (The same concerns exist with respect to contested family law parenting issues, as opposed to, for example, business law decisions.)

²¹ Though the Supreme Court not the Provincial Court has jurisdiction over granting divorces, the provisions of [Bill-C 78](#) will be in effect in British Columbia and can provide useful guidance in the

application of s. 37(2)(j) of the FLA. The new Divorce Act provides that the court has a duty to consider if any of the following are pending or in effect, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so:

Bill C-78 (An Act to Amend the Divorce Act)

16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

- (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Duties

Court

7.8 (1) The purpose of this section is to facilitate

- (a) the identification of orders, undertakings, recognizances, agreements or measures that may conflict with an order under this Act; and
- (b) the coordination of proceedings.

Information regarding other orders or proceedings

(2) In a proceeding for corollary relief and in relation to any party to that proceeding, the court has a duty to consider if any of the following are pending or in effect, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so:

- (a) a civil protection order or a proceeding in relation to such an order;
- (b) a child protection order, proceeding, agreement or measure; or
- (c) an order, proceeding, undertaking or recognizance in relation to any matter of a criminal nature. In order to carry out the duty, the court may make inquiries of the parties or review information that is readily available and that has been obtained through a search carried out in accordance with provincial law, including the rules made under subsection 25(2).

²² The ongoing uncoordinated processes can increase conflict, exacerbating and escalating the harmful consequence for children. The requirement to take the time, energy and resources, including financial resources, required to participate in multiple proceedings can discourage people from using the courts and undermine confidence in the justice system.

The individual proceedings most often operate in isolation – in silos, with little or no information about either the existence of, or what is happening in, other proceedings. This can lead to a fractured approach to the making of decisions that affect the same children. Inconsistent approaches and inconsistent orders can increase the risk of harm to victims of violence, including children. The individual judges may be making decisions without relevant information available in other processes.

It is well recognized that this disconnect is an important justice issue for children; it has been the focus of two B.C. Justice Summits.

²³ Formal communications and coordination efforts between courts when there are multiple court proceedings relating to the same family began as a means of addressing cross border cases. Its use has also been recommended as one way of coordinating cases when there is more than one proceeding within a jurisdiction:

- In May 2014 the national network judges (see the discussion, below under Special Considerations relating to cross border communication) passed a resolution supporting the use of judicial communication when there are multiple proceedings within a province.
- That resolution says that they support: 1) the extension of judicial communication from communication between judges in different jurisdictions to communication between judges within a province or territory; 2) adapting the existing judicial communication guidelines and the step-by-step procedures to apply to such communications; and 3) taking the matter back to their courts for consideration.
- The same processes and safeguards used in cross-border cases (again, see the discussion below under Special Considerations relating to cross border communication) could be used in coordination and communication between courts and judges when there are two different proceedings taking place in different courts within British Columbia, relating to the same family, and their domestic violence situation. The cases are not merged in any way; judges of one court do not make decisions which are within the jurisdiction of the other court. Rather cases would be coordinated and managed as they are in cross border ones.

Doing so is one way of advancing the rights of children to participate meaningfully, and to have their rights and interests assessed in a just, timely, cost effective manner.

In a consultation in 2015, involving some members of both the BC Provincial Court and Supreme Court, these initial possible approaches were discussed:

- A software system that would allow data sharing about other proceedings between/among courts.
- The use of court Rules to facilitate the sharing of information about other court proceedings. (The Provincial Court is in the process of revising its rules and the Rules Committee will consider this issue)
- Carefully worded plain language court forms containing tick boxes which would require people using the court to provide information about other court processes.
- Using, as a starting point, the requirements in the *Family Law Act* that judges and parents must consider other criminal and civil proceedings when deciding the best interests of a child. (S. 37(2)(j) of that *Act* requires that judges, lawyers and parents, when determining the best interests of a child, consider other civil and criminal proceedings affecting the safety, security and well-being of the child.)
- Similarly, using as a starting point as well as the provision in the *Family Law Act* that a non-parent applying for guardianship must file an affidavit providing the relevant information (S. 51(2) of the *Act*).

-
- A systemic rather than ad hoc cross-referencing of files.
 - Judges having the ability to appoint a lawyer for an unrepresented person when appropriate to assist that person in dealing with the challenges created.

²⁴ General Comment 14, paras 89-91.

²⁵ Article 12 states:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

General Comment 12, para 15: Article 12 establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity.

²⁶ See [B.J.G v. D.L.G.](#), 2010 YKSC 44 at para 44 where the Court applied Article 12 to a similar provision in the Yukon Children's Law Act.

²⁷ Article 3(1)

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

²⁸ General Comment 14, para 43 and Comment 12, paras 70 – 74.

²⁹ See [N.J.K. v. R.W.F.](#), 2011 BCSC 1666, at para 201, citing [B.J.G v. D.L.G.](#), 2010 YKSC 44. See also [Medjuck v. Medjuck](#), 2019 ONSC 3254 at para 30, also citing [B.J.G v. D.L.G.](#).

³⁰ Article 12 on its face applies to all children who are capable of forming their own views. Article 2 provides that the Convention applies to all children, without discrimination.

See [N.J.K. v. R.W.F.](#), 2011 BCSC 1666, at para 200, citing [B.J.G v. D.L.G.](#), 2010 YKSC 44. See also [Medjuck v. Medjuck](#), 2019 ONSC 3254 at para 32. The B.C.C.A., in [J.E.S.D v. Y.E.P.](#), 2018 BCCA 286 supported the trial judge's decision to hear from the child in a case involving allegations of alienation.

³¹ General Comment 13, para 63.

³² General Comment 12, para 16.

³³ General Comment 12, paras 16 and 25.

³⁴ See *N.J.K. v. R.W.F.*, 2011 BCSC 1666, at para 202, citing *B.J.G v. D.L.G.*, 2010 YKSC 44. See also General Comment 12, para 21: it “is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views.”

³⁵ General Comment 12, para 21.

³⁶ General Comment 12, para 20.

³⁷ See for example, *N.J.K v. R.W.F.*, 2011 BCSC 1666, where the court stated:

[204] ...there are many ways in which children’s views can be obtained, depending on the age and the maturity of the child and the particular circumstances of the case. In appropriate cases the court may decide to interview the child...Evidence of the child can be presented by either parent, or by a lawyer or other representative of the child, or by witnesses as to what the child has said to the person about his or her wishes, or by an expert report ...

³⁸ Section 211 states:

Orders respecting reports

211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [*Care of and Time with Children*], one or more of the following:

- (a) the needs of a child in relation to a family law dispute;
- (b) the views of a child in relation to a family law dispute;
- (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

(2) A person appointed under subsection (1)

- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
- (b) unless each party consents, must not have had any previous connection with the parties.

(3) An application under this section may be made without notice to any other person.

(4) A person who carries out an assessment under this section must

- (a) prepare a report respecting the results of the assessment,
- (b) unless the court orders otherwise, give a copy of the report to each party, and
- (c) give a copy of the report to the court.

(5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

³⁹ Section 202 states:

Court may decide how child's evidence is received

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

- (a) admit hearsay evidence it considers reliable of a child who is absent;

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- (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

⁴⁰ General Comment 12, para 25. See also para 41.

⁴¹ General Comment 12, para 35.

⁴² As the B.C.C.A. points out in *J.E.S.D v. Y.E.P.*, 2018 BCCA 286, at para 39, the Committee on the Rights of the Child, in General Comments 12, para 36 states that the representative can be the parent(s), a lawyer, or another person (inter alia, a social worker).

⁴³ General Comment 12, para 36 states that the representative can be the parent(s), a lawyer, or another person (inter alia, a social worker). But the Committee adds: "However, it must be stressed that in many cases (civil, penal or administrative), there are risks of a conflict of interest between the child and their most obvious representative (parent(s))."

⁴⁴ *N.K. v. A.H.*, 2016 BCSC 744 at para 43.

⁴⁵ General Comment 12, para 13.

⁴⁶ General Comment 12, para 24.

⁴⁷ *N.L.S. v. C.R.T.*, 2017 BCPC 125.

⁴⁸ *C.J.J. v. A.J.*, 2016 BCSC 676, citing *I.E.G. v. A.G.*, 2002 BCSC 1455 (as a good starting point.) See also *Rupertus v. Rupertus*, 2012 BCCA 426.

⁴⁹ General Comment 14, para 92.

⁵⁰ General Comment 14, paras 94-95.

⁵¹ For more information on this topic see, the Honourable Donna Martinson and Professor Emerita Margaret Jackson, *Family Violence and Parenting Assessments: Law, Skills and Social Context*, 2019.

<http://www.fredacentre.com/wp-content/uploads/2010/09/Martinson.-Jackson-Family-Violence-and-Parenting-Assessments-Report-Highlights-and-Report-Brief.pdf>

⁵² General Comment 14, para 97.

⁵³ General Comment 12, para 28.

⁵⁴ General Comment 12, para 44.

⁵⁵ General Comment 12, para 29.

⁵⁶ General Comment 12, para 30.

⁵⁷ General Comment 12, para 31.

⁵⁸ *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 at paras 79-81.

⁵⁹ *J.E.S.D v. Y.E.P.*, 2018 BCCA 286, at paras 50 to 53, citing, at para 51, the Supreme Court of Canada decision in *A.C. v. Manitoba (Director of Child and Family Services)*, (at paras 87 and 92.)

⁶⁰ [M.Y.T.C. v. L.H.N.](#), 2018 BCSC 1174, at para 31.

⁶¹ General Comment 14, para 98.

⁶² General Comment 14, para 99.

⁶³ General Comment 14, para 96, which states:

Legal Representation

96. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

⁶⁴ [Canada \(AG\) v. Federation of Law Societies of Canada](#), 2015 SCC 7.

⁶⁵ See [N.K. v. A.H.](#), 2016 BCSC 744 in which both the 11 year old child, and A.H, his mother wanted a lawyer to act for him. A.H. and/or J..K. could retain [the name of the lawyer], or another lawyer, to advice J.K about his rights, such a retainer does not then automatically result in a right of participation in this proceeding, either for J.K or [the name of the lawyer]. As the relevant provisions of the FLA and the Supreme Court Family Rule make clear, it is for the court to determine the manner in which a child will be permitted to participate in the proceedings.” See also [J.E.S.D v. Y.E.P.](#), 2017 BCSC 495 in which the Court states, at para 33 that though the 15 year old child would “obviously benefit from having legal advice about the process and the issues that might be alive at trial”. (See also the B.C. Court of Appeal’s comments in this case, found under the heading “Judicial Approaches to Legal Representation” below).

⁶⁶ **Children’s Lawyer**

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

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

(b) Is necessary to protect the best interests of the child

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

⁶⁷ See [J.E.S.D v. Y.E.P.](#), 2017 BCSC 495 and the cases cited in it. The judge’s decision not to appoint a lawyer was upheld by the B.C. Court of Appeal: [J.E.S.D v. Y.E.P.](#), 2018 BCCA 286.

⁶⁸

The plain wording of the section

Section 201(1) states that a child has the capacity to make, conduct or defend a proceeding under the Act without a litigation guardian if the child is 16 years or older, a spouse or a parent. Subsection 2 states that there is nothing in the section which prevents a court if the court considers it appropriate, from:

(b) allowing a child who is not described in subsection 1 [that is, a child under the age of 16] to make, conduct or defend a proceeding under this act without a litigation guardian.

Therefore, subject to the judge's discretion:

- A child has the right to be involved in making, conducting or defending ANY family law proceeding, which includes those relating to guardianship, parenting arrangements, contact, child support and parental cross-border child abduction. Defending a claim may include responding to the claims of a parent which are ostensibly contrary to the child's views/preferred outcome.
 - The right is not limited to specific issues within a proceeding but applies to all issues.
 - As such a participant in the proceedings the child is entitled to independent legal representation. The wording of s. 203 does not preclude children seeking out/retaining counsel on their own (for e.g. through the Child and Youth Legal Centre).
- The section does not deal with adding a child as a party. However, Rule 20(5)(b) of the Provincial Court (Family) Rules, gives the court authority (may) to "at any time order that a person be added as a party for the purpose of a hearing or proceeding generally".

The Context of Section 201(2)(b) within the FLA as a Whole

Relationship to Section 203

- Section 201(2)(b) is distinct from s. 203; it deals with the right of the child to make, conduct or defend a proceeding under the Act and to retain a lawyer chosen by the child to do so, subject to the judge's discretion.

Section 203, on the other hand is narrower in scope, and judge driven. That is, it is the judge who determines, in the specific and limited circumstances set out in the section, whether a lawyer should be appointed (and whether to allocate fees and disbursements either among the parties or to one party alone). Arguably, s. 203 only applies where there is no existing lawyer for the child.

Relationship to other FLA Sections

- The right of the child to make, conduct or defend a proceeding under section 201(2)(b) is consistent with sections in the FLA directed at evidentiary means by which the child's views can be presented. These sections include s. 202 (giving the court authority to admit hearsay and to give direction about evidence) and s. 211 (dealing with assessments, including those dealing with the child's views). Those sections provide means by which the child, through the child's lawyer, can present evidence of the child, including her views. Presenting such evidence is but one of the many functions the lawyer will have during the proceedings.

Exercising Judicial Discretion under s. 201(2)(b) Using Child Rights Principles

Allowing a child to make, conduct or defend a proceeding, among other things:

-
- Is consistent with Article 12 of the UN Convention, which, in addition to giving children the right under s. 12(1) to express their views, also, in Article 12(2) gives them the right to be heard in any judicial proceeding directly or through a representative.
 - Recognizes that a judge cannot apply s. 37(2) (b) in a vacuum. That is, to meaningfully consider a child's views as required, they must be tested in the context of all the evidence; the child should have a role in providing, testing and making submissions about that evidence.
 - Is consistent with the strong support found in Canada and internationally for legal representation in all cases where their best interests are being formally assessed by courts, which is described in this Child Rights Chapter.
 - Is consistent with the requirement to implement the numerous legal safeguards discussed in this chapter, hearing the voice of the child being just one.

62 *ii. British Columbia:*

A.B. v. C.D. and E.F. 2020 BCCA 11

In this case a 14-year-old transgender boy brought a family claim under the FLA, applying for a Protection Order restraining his father from interfering in his treatment. He did so through his own lawyer, and that lawyer, and co-counsel appeared on his behalf throughout. While the Court of Appeal allowed the appeal on some substantive issues, it upheld the hearing judge's order under s. 201(2)(b), which declared under the FLA that "pursuant to to para. 201(2)(b), AB is permitted to bring this application under the Family Law Act and to bring or defend any further or future proceedings concerning his gender identity". (at para. 38) The Court of Appeal stated that they would leave this para. "as is, with the declaratory language removed. Allowing a child to conduct a proceeding without a litigation guardian is a straightforward order of the court and requires no declaration." (at para. 144)

N.K v. A.H., (2016 BCSC 744):

In this 2016 case the BC Supreme Court dealt an applications to appoint independent (separate) counsel by an 11-year-old transgender child directly, through a lawyer retained by him (pro bono) and attending on his behalf, based on s. 201(2)(b) of the FLA. There was also an application to be added as a party. The family law application filed by A.H., the father, arose within a dispute between the parents about the proper course of treatment for a child diagnosed with gender dysphoria.

The result was that the judge exercised his discretion and appointed a litigation guardian instead, noting that the guardian must act through a lawyer. He also added the child as a party. In doing so, he stated that the child undoubtedly had a right to retain any lawyer to advise the child about the child's rights, but it is for the court to determine the manner in which a child will be permitted to participate in the

proceedings. [para. 43] In exercising his discretion on the facts before him, he concluded that this case was about the child, and the child's role in determining his own future, and he should be able to participate directly. [paras. 39 and 40]

Though not in issue on the facts before him and therefore obiter, he commented that the case: "is different from the many family law cases that come before the courts in which the views of the child are sought on issues relating to guardianship and parenting time, and where those views are typically presented through third party reports." [at para. 39]

When the issue of the exercise of discretion in one of the more typical parenting cases is squarely before the court, the court can consider that:

- S. 201(2)(b) applies, on its face, to all proceedings and all issues within those proceedings, not just unique ones.
- In many of them, especially those where there are allegations of domestic violence and/or parental alienation, the impact of the court proceedings themselves can be highly significant. The results of the judge's decision can have a profound effect on the child's future well-being; orders can include preventing a child from seeing one parent at all, and they may be enforced by police intervention. arguably engaging the child's s. 7 Charter rights.

J.E.S.D v. Y.E.D (2017 BCSC 495)

The hearing judge referred, at para. 26, to paras. 39 and 40 of *N.K v. A.H.*, above, in a case dealing with s. 203, not 202. Though *J.E.S.D.* went to the Court of Appeal, the question of s. 201 did not arise.

Ontario

Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner), (2018 ONCA 559, leave to appeal to the Supreme Court of Canada denied)

In this case the Ontario Court of Appeal concluded that the role of the Office of the Children's lawyer was fundamental to the proper function of the legal system. (2018 ONCA 559, leave to appeal to the Supreme Court of Canada refused; see our Report at pp. 56-57 and 64-65). It also considered the issue of whether children can represent themselves and have a lawyer, without a litigation guardian, concluding that, "children can represent themselves without a litigation guardian and do so regularly in family law proceedings." (para 91).

The court concluded that the original Adjudicator was "wrong" in concluding: (1) that the existence of the Children's Lawyer is premised in part on the fact that children cannot represent themselves or retain counsel without a litigation guardian, as they are under the legal disability of childhood; and (2) that even with respect to child protection cases, the role of the Children's Lawyer as legal representative differs from a conventional solicitor-client relationship. (paras. 89-91)

C.M.M. v. D.G.C. (2015 ONSC 2447)

Here, the Ontario Divisional Court considered whether a child could make an application for child support without a litigation guardian. In answering “yes”, the Court, at para. 24, raised what it described as a consequential access to justice issue that arises if the child is required to have a litigation guardian. The Court noted that normally the logical persons to act as a litigation guardian for a child is that child’s parents. However, in child support cases, the parents (or at least one of them) is likely to be on the opposite side to the child in the application. It concluded that there is a legitimate concern that the requirement that a child must always have a litigation guardian in such matters “may effectively disenfranchise many children from the very relief that the Family Law Act (and a number of other statutes) accords to them.”

⁷⁰ The Child and Youth Legal Centre is operated by the B.C. Society for Children and Youth, and is supported by the Law Foundation of BC. It was set up to assist BC children in obtaining legal advice and representation from a lawyer. It began as a time limited project but is expected to both continue and expand. There are three full time lawyers, and it has created a roster of lawyers throughout B.C. The Centre is committed to improving the well-being of children and youth in British Columbia through the advancement of their legal rights. The role of the Centre is to advocate on behalf of vulnerable children and youth in BC.

As the website explains the Centre: provides legal help for young people who are experiencing problems relating to family law, child protection, a breach of your human rights and many other legal issues. It helps children and youth who are up to 19 years old. Even if you are older than 19, if the legal problem started before you turned 19, we may be able to help.

<https://www.scyofbc.org/child-youth-legal-centre/>

“We help children and youth to make sure that their rights, interests and points of view are heard and respected.”

⁷¹ Long-time B.C. Children’s Representative, Dr. Mary Ellen Turpel-Lafond, was a strong advocate for children’s legal representation. Bernard Richard, her successor, described the concern in 2017: “In B.C., lawyers are only ever rarely provided for children or youth in child protection or child custody matters – in complete violation of Canada’s commitment to the principles of the Convention.” See Bernard Richard, Keynote Address, *The UNCRC as Foundational to Competency in Work with Children*, CLEBC, CBABC Children Law Section Access to Justice for Children: Child Rights in Action, Speaking Notes.

The exact same sentiment was expressed by the present Representative, Dr. Jennifer Charlesworth, speaking in Vancouver in honour of National Children’s Day, on November 20, 2018 as well as at the CBABC Children’s Law Section program, “Legal Representation for Children” on June 26, 2019. Her

office is presently undertaking an investigative project expected to lead to a Special Report to the Legislature on legal representation for children and youth.

⁷² See General Comment 14, para 96:

Legal Representation

The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by court and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

⁷³ In December 2013 the UN High Commissioner for Human Rights, in a report to the Human Rights Council on Access to Justice for Children, supports legal and other appropriate assistance for children, saying: (A/HRC/25/35)

40. As children are usually disadvantaged in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty.

...

43. While the right to free legal assistance is not explicitly provided for in international law outside the criminal law context, access to legal and other assistance in these matters is essential for ensuring that children are able to take action to protect their rights...

⁷⁴ The Human Rights Council, in March 2014, in “Rights of the child: access to justice for children” also supports legal aid for children:” (A/HRC/25/L.10)

The Council:

9. *Reaffirms* the need to respect all legal guarantees and safeguards at all stages of all justice processes concerning children, including due process, the right to privacy, the guarantee of legal aid and other appropriate assistance under the same or more lenient conditions as adults, and the right to challenge decisions with a higher judicial authority.

...

10. Stresses that children should have their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parent or other legal guardian.

⁷⁵ See *Legal Representation in Canada*, prepared for the Federal Department of Justice.

<https://www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rje/lrc-rje.pdf>

⁷⁶ *Office of the Children's Lawyer v. Balev*, 2018 SCC 16.

⁷⁷ *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559.

⁷⁸ See:

[46] The unique role of the Children's Lawyer is fundamental to the proper functioning of the legal system...

[53] In summary, the role of the Children's Lawyer is fundamental to the proper functioning of our system of justice...

⁷⁹ See:

[70] 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. Children must be able to disclose feelings and facts to the children's Lawyer that cannot or will not be communicated to parents. Children's interests can be averse to that of their parents. Feelings of guilt and betrayal that may influence a child require a safe person to speak to.

⁸⁰ *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286.

⁸¹ At paras 54 and 55. While it may be inappropriate to allow a child to personally and directly cross-examine a parent, and it may (or may not) be inappropriate to let the child personally and directly cross-examine a parenting assessor, this concern is arguably different in nature from the child having an independent lawyer to test the admissibility and reliability of those forms of evidence through cross-examination. For a further discussion on this issue 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 at 192-193.

We suggest, respectfully, that this concern [raised in a different case from the UK and before the BCCA decision] fails to consider that lawyers, as officers of the court, have professional obligations to act with courtesy and respect, while, at the same time, firmly advancing their client's position. As Justice Abella stated in *Re W*, [when she was a judge of the Ontario Provincial Court] the lawyer is an officer of the court and, as such, is obliged to represent the child's interests in accordance with well-defined standards of professional integrity. The lawyer

may also serve as a buffer between the parent(s) and the child and can assist in brokering settlement by re-directing the focus of the parties to the interests of the child and the impact of the conflict on them. In addition, courts have the ability in various ways to control their own processes.

One must also be cautious about equating the negative effects of parental conflict with children's rights to have their voices heard and be adequately represented in family law proceedings. The causes of difficulties in family relationships generally go much deeper and should not be a justification to deny to children meaningful participation and just outcomes. The overarching goal is to reach a fair, just, equality-based decision about the best interests of children within the child rights framework we have described. Legal representation, when cases are within the court process, is an important aspect of achieving that goal.

⁸² At para 36.

⁸³ At paras 41 and 42.

⁸⁴ **B.J.G. v. D.L.G.**, 2010 YKSC 44 at paras 47 and 48. The Court stated that the child should be: informed, at the beginning of the process, of their legal rights to be heard; be given the opportunity to fully participate early and throughout the process, including being involved in judicial family case conferences, settlement conferences, and court hearings or trials; have a say in the manner in which they participate so that they do so in a way that works effectively for them; have their views considered in a substantive way; and be informed of both the result reached and the way in which their views have been taken into account.

⁸⁵ CBA Child Rights Toolkit

<http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/legalAreas/Child-Protection>

⁸⁶ 2018 SCC 16.

[42] Finally, the hybrid approach holds that instead of focusing primarily or exclusively on either parental intention or the child's acclimatization, the judge determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case at hand.

(See also paras 43-46).

⁸⁷ Judge Davis' case, referred to above, was **N.B. v. L.E.**, 2009 BCPC 0395, a custody case in which the convenient forum was the issue. He and the Colorado District Court Judge engaged in an open court discussion. Judge Davis ultimately concluded that BC was the convenient forum. In doing so he referred to the B.C. Supreme Court case, *Hoole v. Hoole*, 2008 BCSC 1248, and said that "the ability to avoid multiplicity of hearings and court orders is such an advantage to child custody proceedings. I can see little disadvantage utilizing such a procedure."

⁸⁸ The communications are normally coordinated through a designated “network” judge in each of the Provincial and Supreme Courts in the provinces and territories. Each judge is a member of a national network of judges.

There are national *Recommended Practices for Court-to-Court Judicial Communications*, referred to as Judicial Communications Guidelines, for direct communication between courts. There are also Step-by-Step Communication Procedures.

See Martinson, *Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases*, NJI, 2012.

⁸⁹ <http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Girl-Child>

⁹⁰ <https://www.mmiwg-ffada.ca/final-report/>

⁹¹ <http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Sexual-Orientation-Gender-Identity-and-Gender-Expr>

⁹² See the CBA Child Rights Toolkit section.

Issues commonly encountered include:

- Physical, sexual and emotional harassment, cyberbullying and violence
- Privacy concerns related to sexual orientation, gender identity and gender expression
- Barriers to obtaining identification documents reflecting gender identity
- Denial of access to medical and sexual health information and care
- Denial of access to facilities, services, programming, and social opportunities that accord with a child or youth’s gender identity or expression, including group homes and youth justice facilities, appropriate washroom, change room and locker room access, and access to supportive affiliations like gay-straight alliances
- Denial of appropriate safety and dignity protection in the school context, including respect for chosen names and gender pronouns, and protection from harassment, bullying and violence (See Canadian Human Rights Commission, [LGBTQ2I+ Rights](#): 36% of trans youth report being physically threatened or injured at school)
- Erasure of representation and lack of positive role models in educational materials
- Rejection and estrangement from family
- Barriers to name and sex designation change, including obtaining parental consent
- Parental disputes and litigation over support for children’s gender identity and gender expression
- Social rejection and exclusion, including extremely high levels of homelessness