# Toward Guaranteed Legal Representation for Children in Care

by

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Abstract

In most jurisdictions in Canada, the children and youth apprehended into care by way of Provincial and Territorial child protection legislation are not recognized as parties to the court proceedings that follow, even though it is their lives that are arguably being most affected and impacted by the decisions and outcome. In these court proceedings, the interests of the parent, the youth and the State are not necessarily congruent but only the parent and State are automatically afforded legal representation. Of all the rights holders, children and youth are often relegated to a position of not being afforded the right to be heard in matters that gravely impact their lives. They are often silenced and have no avenue to voice their opinion.

The methods of this research are qualitative in nature. The methodology of this study follows a human rights-based approach to research in that the main objective is to advance the realization of human rights for children and youth in care in Manitoba. The theoretical approach used to frame the analysis will be that of legal positivism. While there are moral arguments to be made as to why children and youth are entitled to legal representation, this research is focused instead on the identification and utilization of the existing laws and policies. These include the obligations through international treaties on the existence of the commitment to human rights through the *Canadian Charter of Rights and Freedoms.* The acknowledgement of those rights already established, and the political will in those jurisdictions that have established legal offices for children and youth will be relied upon to make the argument for a similar office in Manitoba.

This research found that the current system of legal representation provided to youth in care does not meet obligations under international legislation given the federal/provincial division of power in Canada's legal system and the inconsistencies youth face to access legal representation in child welfare court proceedings constitutes a violation of the rights guaranteed in section 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

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*"I've learned how much children can actually do for themselves if only we provide the necessary means. That part is up to us."*

-Senator Landon Pearson

# Dedication

To Manitoba's children in care who, in so many different ways over the past dozen years, have taught me to see what truly matters.

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# List of Abbreviations

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| CFS | Child and Family Services |
| ICCPR | International Covenant on Civil and Political Rights |
| UNCRC | United Nations Convention on the Rights of the Child |

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## Introduction

The premise behind any child welfare proceeding is that any actions taken must be in the best interest of the child. This is a widespread norm which is enshrined in child protection legislation throughout Canada and is a principle of the *United Nations Convention of the Rights of the Child (UNCRC)*. For the purposes of this paper, the term 'child welfare' will be used to denote the government system designed to safeguard children from abuse and neglect. This system is mandated through Provincial and Territorial child protection legislation[1] and includes services intended to encourage family stability, protection services such as investigations into abuse or neglect allegations, and alternative (or out-of-home) placement services. In situations where children are removed from their family home, the Province or Territory represented by a Child and Family Services (CFS) worker, has taken significant action to protect the child from harm and in so doing has inevitably disrupted the living arrangements and relationship between the child and their parent(s). Such action initiates child protection court proceedings where opposing attorneys are representing the state's position and the parents' position and the court must decide whether the child was indeed in need of protection at the time they were apprehended from their family and whether they remain in need of protection. The judge then decides whether to return the child to their family or issue order of guardianship to the state. In most jurisdictions across Canada, the children apprehended into state care are not recognized as parties to the child protection court proceedings, even though it is their lives that are arguably being most affected and impacted by the decisions and outcome. In these adversarial and emotion-laden court proceedings the interests of the parent, the child and the state are not necessarily congruent but, in most jurisdictions, only the parent and state are automatically afforded legal representation.

Each jurisdiction defines the term child in their child welfare legislation (in four jurisdictions it is under age 19; in five it is under age 18 and in four it is under age 16) and the *UNCRC* considers a child to be everyone under the age of eighteen years. Due to these inconsistencies, and while recognizing it is common to see younger children and older teenagers identified separately as children and youth, this paper will use the term child to include any person who has not yet reached the age of majority in their jurisdiction.

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[1] See appendix 1 for a comparison of the Provincial and Territorial child protection legislation.

Of all the rights holders, children are often relegated to a position of not being afforded the right to be heard in matters that gravely impact their lives. Due to power imbalances, children are often seen as objects under the control of their parents or guardians and their rights and voice are easily disregarded. They are often silenced and have no avenue to voice their opinion, as the Senate Committee on Human Rights reportedly heard from youth in care across Canada during its hearings leading up to their 2007 report[2] and children's advocates offices in various provinces and territories have been reporting consistently.[3] This consistent and widespread violation of their right to be heard is what makes the issue so important. Representation for youth in a criminal law proceeding is well established in Canada, and the "ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada's legal system."[4] However, children are not afforded this same protection and representation in child welfare or protection court processes. In two jurisdictions, representation for children in the child welfare legislation is not contemplated; in one jurisdiction the guardian is responsible to determine whether independent counsel is required; in eight jurisdictions the legislation speaks to the court having the authority to direct, appoint or ensure children have counsel depending on various qualifiers; and in one jurisdiction the legislation speak to a child over sixteen years of age being entitled to counsel.[5]

This research study seeks to answer two questions. Firstly, does the current system of legal representation provided to children involved with child welfare and protection processes meet the provincial and territorial obligations to uphold children's rights under international legislation given the federal/provincial division of power in Canada's legal system? Secondly, do the inconsistencies children face throughout the various jurisdictions in accessing legal representation in child protection proceedings constitute a violation of the rights guaranteed in the *Canadian Charter of Rights and Freedoms*?

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[2] Canada Standing Senate Committee on Human Rights, "Children: the Silenced Citizens: Effective Implementation of Canada's International Obligations with Respect to the Rights of Children" (April 2007), 101

[3] See for examples: New Brunswick Child and Youth Advocate, "State of the Child Report", 2018; Ontario Provincial Advocate for Children and Youth, "Searching for Home, Reimagining Residential Care" 2018; Saskatchewan Advocate for Children and Youth, "Shhh…Listen!! We Have Something to Say! Youth Voices from the North", 2017;

[4] Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," *Canadian Journal of Family Law* 31, no. 1 (2018): 154

[5] See Appendix 2 for more detail on the provincial and territorial legislation.

The objective of this study is then to consider the jurisdictions in Canada that have established dedicated bodies within their government structures to represent youth in care and to investigate the factors and events that led to the creation of these existing offices and consider their current scope and state of operations. It will then argue for the establishment of a similar office in Manitoba taking into consideration the legislative and political landscape in this province.

## Methodology

The methods of the research was a mixed methods approach but was largely qualitative in nature. The methodology of this study followed a human rights-based approach to research in that the main objective is to advance the realization of human rights for children and youth in care in Manitoba. The theoretical approach used to frame the analysis was legal positivism. While there are moral arguments to be made as to why children and youth are entitled to legal representation, this research is focused instead on the identification and utilization of the existing laws and policies.[6] This includes the obligations through international treaties on the existence of the commitment to human rights through the *Canadian Charter of Rights and Freedoms.*

All relevant international human rights legal instruments were analyzed, including, but not limited to, the *United Nations Declaration of Human Rights, International Covenant on Civil and Political Rights, The Convention on the Rights of the Child,* and *The United Nations Declaration on the Rights of Indigenous Peoples.* Other documents related to these instruments were analyzed such as interpretations by any of the various treaty monitoring bodies through general comments, country reviews and reports that are related to the right of children and youth to be heard and have legal representation. Canada's ratification of the relevant instruments, its reservations and its reporting on the implementation of these instruments as they relate to children's rights in this context were considered.

The *Canadian Charter of Rights and Freedoms* was analyzed, specifically section 7 requirements as they relate to children and youth's rights to security of person and liberty interests in child welfare court proceedings and section 15 equality rights to establish that children and youth are independent rights holders. A thorough review of all child welfare or

[6] Lee McConnel "Legal Theory as a Research Methodology" in *Research Methods in Human Rights*, eds Lee McConnell and Rhona Smith (New York: Routledge, 2018), 51

protection legislation throughout all provincial and territorial jurisdictions was conducted providing a comparative analysis.

A comprehensive review of Canadian jurisprudence was conducted citing or relying on *Canadian Charter of Rights and Freedoms* section 7 and/or section 15 arguments in association with provincial child welfare or protection legislation. The CanLii database was relied upon for the provincial, territorial and federal laws and the cases studied. This case law was sought using search terms and phrases including:

- Child right to counsel
- Convention on the Rights of the Child (UNCRC)
- Fundamental justice
- Parens Patriae
- Youth right to participation

A time frame for legal cases was not imposed but cases involving counsel for youth in criminal law were excluded.

Secondary sources of information were relied upon to establish best practice in the field of child welfare in an effort to bridge the gap between child welfare and the rights of the child as it relates to the children and youth being heard and represented by counsel.

# Chapter 1: Children's Rights Landscape in Canada

## 1.1 International Children's Rights

The progression of children's rights over time could be characterized as slow and steady. Historically children were not seen as rights bearers themselves but rather as property under the control of their parents until state paternalism became the common theme where the vulnerability of children and their need for protection was the focus. It has been discussed that "while clearly progressive in some respects, children continued to be viewed as objects in need of care either by their parents or by the paternalistic State."[7] In 1924, the League of Nations, predecessor to the United Nations, adopted the *Geneva Declaration on the Rights of the Child*, which has questionable language by today's standards but for the day it was progressive in recognizing that "mankind owes to the Child the best that it has to give."[8] In the aftermath of World War II human rights generally began to receive increasing attention and children's rights were no exception. With the 1959 *United Nations Declaration on the Rights of the Child*, many of the points of the League of Nations document were repeated, as well as recognizing the right to education and play and more specifics regarding healthcare. [9] Though clearly progressing towards more inclusive rights for children, the wording of the 1959 document maintained alignment with the paternalistic view whereby children are not yet seen as having their own opinions and self-sufficiency but rather as immature beings requiring protection.

As both the Geneva and United Nations child's rights documents were declarations, they were aspirational in nature and not enforceable. However, as a convention the 1989 *UNCRC* provides a more comprehensive framework for the realization of the rights noted within it. It was with this document that children began to be seen as intrinsic rights bearers, still requiring special status and protection from harm but also respecting their evolving capacity to provide input to the decisions that shape their lives. Today it is more widely recognized that there is a fine balance of respecting a child's autonomy while simultaneously providing the boundaries,

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[7] Myriam S. Denov, "Children's Rights or Rhetoric - Assessing Canada's Youth Criminal Justice Act and Its Compliance with the UN Convention on the Rights of the Child," *International Journal of Children's Rights 12*, no 1 (2004): 3.

[8] League of Nations, "Geneva Declaration of the Rights of the Child", September 1924, http://www.un-documents.net/gdrc1924.htm

[9] United Nations General Assembly. "Declaration on the Rights of the Child" GA A/4354 (GAOR, 14th sess., suppl. no. 16). U.N. Doc. A_RES_1386 (1959)

protection and tutelage to see them through childhood to adulthood. It has been stated that "[t]hrough the adoption of this text, the convention embodied a principle that transforms the status of children from one of passive recipient of adult protection, control, and guidance to one of agency and participation."[10] Undoubtedly children's rights still has a long progression toward being fully realized but the *UNCRC* provides the foundational principles.

The *UNCRC* is the most ratified international human rights instrument to date with all countries being signatories, save for the United States[11]. This unprecedented adoption of an international convention underscores universality in the belief that special consideration ought to be taken regarding the needs and rights of children. It confirms that children are rights holders themselves and not relegated to being simply an object under the control of their parents or guardians. While the *UNCRC* was the first international convention dedicated solely to children's rights, they were acknowledged in prior conventions such as in the *International Convention on Civil and Political Rights (ICCPR)*, which was ratified by Canada in 1976, and recognizes that: "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."[12] The small recognition in the *ICCPR* which forms the international bill of human rights shows that the recognition of children's inherent rights has been a progression over time.

## 1.2 Domestic adoption of International Children's Rights

Canada ratified the *UNCRC* in 1991[13] two years after it was open for signing. The delay in ratification is common with dual or federal legal systems such as Canada, where the federal government has the authority to enter into international human rights agreements but the *Constitution Act* of 1982 (the *Constitution)* "confers legislative and executive powers on two levels of government, which are each sovereign in their respective spheres…each level of government has responsibility, within its respective sphere, for implementing the rights set forth

[10] Gerison Lansdowne, "Exploring the Meaning of Children's Participation" in *The Children's Senator: Landon Pearson and a Lifetime of Advocacy,* ed. Virginia Caputo (Quebec: McGill-Queen's University Press: 2020), 22
[11] United Nations Human Rights Office of the High Commissioner. Status of Ratification. https://indicators.ohchr.org
[12] United Nations General Assembly, "International Covenant on Civil and Political Rights", GA Res 2200A (XXI), UNGAOR, 21st Sess, Supp No 16 UN Doc. A/6316 (1966), Art 24.1
[13] United Nations Human Rights Office of the High Commissioner. Status of Ratification. https://indicators.ohchr.org

in the CRC."[14] One option for countries that subscribe to a dualist or federalist system of laws is to incorporate the language of the international instrument into domestic law, resulting in it becoming hard law and enforceable. Canada "takes the position that Canadian domestic law complies with the *Convention*"[15] and has therefore chosen not to incorporate the language of the *UNCRC* directly into most domestic laws, resulting in the obligation to abide by the instrument as soft law and not directly enforceable by domestic courts.[16] It is important to note that international instruments are written broadly in order to apply to all countries and their various legal systems. As recognized by Justice Groberman of the British Columbia Court of Appeal, "[c]are must be exercised in interpreting the provisions of international conventions. The UNCRC applies across diverse legal systems and traditions. In the result, a purposive approach to its interpretation is required; it would be a mistake to assume that words in the convention necessarily correspond to specific concepts established in the Canadian legal system."[17] Because the language of international instruments are not embedded into domestic legislation in Canada, prior to ratifying an international treaty, the federal government confers with each Province and Territory regarding the implications to their jurisdictions' relevant legislation and the effect that entering into such a treaty will have. The expectation is that the provincial and territorial laws are not in contradiction to the intent of the international instrument.

Canada has received criticism by some in academia where the system of federalism is seen as a limiting factor, as described by Marvin M. Bernterin:

> The disenfranchisement of Canada's children is further compounded by the structural limitations of federalism that counteract aspirational efforts to implement initiatives of national importance. In Canada, the federal government has responsibility for compliance with the Convention within its sphere of jurisdiction…However, many of the matters covered by the UNCRC fall under provincial jurisdiction…in the Canadian federal system of government. This division of jurisdictional responsibility creates a significant challenge in terms of coordinating, implementing, and monitoring progress in the area of children's rights. Stalemates are frequent, wherein federal official maintain they cannot do more to advance children's rights as a result of the subject matter being under

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[14] United Nations Committee on the Rights of the Child "Implementation on the Convention on the Rights of the Child List of Issues Concerning Additional and Updated Information Related to the Third and Fourth Combine Periodic Reports of Canada" CRC/C/CAN/Q/3-4/Add.1 para 2

[15] G. (B.J.) v. G. (D.L.), 2010 YKSC 44 (CanLII), <http://canlii.ca/t/grssg>, retrieved on 2020-04-01 para 5

[16] Thomas Waldock, "Introduction: Children's Rights A Question of Status and Recognition" in *A Question of Commitment: The Status of Children in Canada*. eds.Thomas Waldock; Robert Brian Howe and Katherine Covell. (Ontario: Wilfrid Laurier University Press, 2020), 6

[17] J.E.S.D. v. Y.E.P., 2018 BCCA 286 (CanLII), <https://canlii.ca/t/ht00l>, retrieved on 2021-03-17 para 35

> provincial jurisdiction. Provinces, as well, are sometimes reluctant to assume any direct responsibility for meeting international commitments undertaken by Canada at the federal level.[18]

Criticism of Canada's approach is also noted by the international community for not fully implementing the *UNCRC* throughout the various levels of provincial legislation and for a lack of overall national legislation. In the 2012 response to Canada's report on the status of implementation of the *UNCRC*, the Committee on the Rights of the Child recommended that Canada "finds the appropriate constitutional path that will allow it to have in the whole territory of the State Party, including its provinces and territories, a comprehensive legal framework which fully incorporates the provisions of the Convention…and provides clear guidelines for their consistent application."[19] This recommendation for an appropriate constitutional path has yet to come to fruition and in all likelihood never will, which does not diminish the value or importance of having clear guidelines for consistent application of the *UNCRC* throughout Canada's jurisdictional legal frameworks.

Though not enshrined in legislation, the Supreme Court of Canada has invoked the *UNCRC* in twenty decisions to date "as an interpretive guide to the rights of children under the Charter,"[20] consequentially advancing children's rights identified in the *UNCRC* into Canadian case law as the majority decisions of the Supreme Court's "must be followed across Canada as authoritative and definitive statements of the law."[21] One such decision, delivered for the majority by Justice L'Heureux-Dubé who, while recognizing that the *UNCRC* is not part of Canadian law because it has not been implemented by Parliament, wrote "[n]evertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review… It is also a critical influence on interpretation of the

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[18] Marvin M. Bernterin, "Honouring the Twenty-Fifth Anniversary of the United Nations Convention on the Rights of the Child: Transforming Child Welfare in Canada into a Stronger Child Rights-Based System" in *Transforming Child Welfare Interdisciplinary Practices, Field Education and Research* eds. Dorothy Badry, Daniel Kikulwe, Don Fuchs, and H. Monty Montgomery (Regina: University of Regina Press: 2016), 8

[19] United Nations Committee on the Rights of the Child "Consideration of reports submitted by States parties under article 44 of the Convention" CRC/C/CAN/CO/3-4 5 October 2012 para 11

[20] J.C. Blockhuis, "The Supreme Court of Canada and the Convention" in *A Question of Commitment: The Status of Children in Canada*. eds.Thomas Waldock; Robert Brian Howe and Katherine Covell. (Ontario: Wilfrid Laurier University Press, 2020), 161

[21] J.C. Blockhuis, "The Supreme Court of Canada and the Convention" in *A Question of Commitment: The Status of Children in Canada*. eds.Thomas Waldock; Robert Brian Howe and Katherine Covell. (Ontario: Wilfrid Laurier University Press, 2020), 164

scope of the rights included in the *Charter."*[22] The Canadian Bar Association, relying on subsequent Supreme Court rulings, maintains that the *UNCRC* is a binding instrument and not only to be used as a tool for interpreting *Charter* rights.

1.3 Domestic Children's Rights

The *Canadian Charter of Rights and Freedoms (*the *Charter)*, incorporated into the *Constitution*, which means "it applies to and takes precedence over all federal and provincial legislation. In general, Canadian laws, the Canadian government, and bodies created, supported, or connected to the Canadian government, cannot violate the guaranteed rights of Canadians under the Charter."[23] Effectively then, each provincial and territorial child welfare legislation must conform to the Charter rights of individuals impacted by said legislation, which must provide equal protection and equal benefit of the law without discrimination. Specific sections of the *Charter* applicable to this research will be discussed in further in Chapter 4.

The *Legal Status of Children's Rights* section of the Canadian Bar Association's Child's Rights Toolkit includes analysis of Canadian legislation and jurisprudence compared to the *UNCRC* and other international instruments and states that the *Charter* provides protection to children just as great as the *UNCRC.* [24] The Toolkit includes a useful chart (see following page) showing the intersections between the *UNCRC* and the *Charter*. The similarities are intriguing given that the *Charter* came into being nearly ten years before Canada ratified the *UNCRC* which again speaks to the fundamentality of these inherent rights.

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[22] Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817, <https://canlii.ca/t/1fqlk>, retrieved on 2021-03-17 para 70
[23] Cheryl Regehr, Karima Kanani, Michael Saini, and Jesstina McFadden. *Essential Law for Social Work Practice in Canada* Third edition (Ontario: Oxford University Press, 2015), 3
[24] Canadian Bar Association. "The CBA Child's Rights Toolkit" Accessed April 5, 2021, http://cba.org.uml.idm.oclc.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit

*Table 1: Intersections Between Charter and CRC Rights*[25]

| **CANADIAN *CHARTER OF RIGHTS AND FREEDOMS*** | **UN *CONVENTION ON THE RIGHTS OF THE CHILD*** |
|---|---|
| Section 1: The Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. | The Convention as a whole can be used to assist in the interpretation of this section and the application of the Oakes test to any rights infringement that the government seeks to justify.<br>Article 3 (best interests of the child) helps to justify legislation that is being challenged in ways that might adversely impact the rights and interests of children. |
| Section 2: Everyone has the following fundamental freedoms:<br>• freedom of conscience and religion<br>• freedom of thought, belief, opinion and expression, including freedom of the press and other media communication<br>• freedom of peaceful assembly; and<br>• freedom of association. | Art. 14: freedom of thought, conscience and religion<br>Art. 12: right to express own views in all matters affecting the child<br>Art. 13: right to freedom of expression (includes right to seek, receive and impart information)<br>Art. 15: freedom of association and peaceful assembly |
| Section 6: Every citizen of Canada has the right to enter, remain in and leave Canada. | Art. 10: right to enter or leave state for purpose of family reunification |
| Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. | Art. 6: inherent right to life, and survival and development of the child<br>Art. 9: right not to be separated from his or her parents<br>Art. 12: right to express views in all matters affecting the child and the right to be heard in judicial and administrative proceedings either directly or through a representative or appropriate body |

[25] https://www-cba-org.uml.idm.oclc.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/The-Charter-and-Constitutional-Protection-for-Chil/Intersections

| CANADIAN ***CHARTER OF RIGHTS AND FREEDOMS*** | UN ***CONVENTION ON THE RIGHTS OF THE CHILD*** |
|---|---|
| | Art. 19; protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation<br>Art. 34: protection from all forms of sexual exploitation and abuse |
| Section 8: Everyone has the right to be secure against unreasonable search or seizure. | Art. 16: no arbitrary or unlawful interference with privacy, family, home or correspondence |
| Section 9: Everyone has the right not to be arbitrarily detained or imprisoned. | Art. 37: not to be deprived of liberty unlawfully or arbitrarily |
| Section 10: rights upon arrest and detention<br>Section 11: rights upon being charged with an offence | Art. 40: rights of the child who is alleged as, accused of or recognized as having infringed the penal law |
| Section 12: Everyone has the right not to be subjected to cruel and unusual treatment or punishment. | Art. 19: protection from all forms of violence<br>Art. 37: not be to subjected to torture or other cruel, inhuman or degrading treatment or punishment |
| Section 15: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. | Art. 2: rights respected and ensured without discrimination of any kind (race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status) |
| Section 28: Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed to male and female persons. | Art. 2: rights without discrimination on basis of sex |

# Chapter 2: Child Welfare Context

## 2.1 Evolution of Child Welfare

With the advent of state paternalism noted in the previous chapter came expansion of the child welfare system where government policies tremendously impact families' lives. In Canada the history of child welfare is closely tied and associated with the state-sanctioned Residential School System, where more than 150,000 children were removed from their homes and sent away.[26] The experiences, not only of abuse that occurred in many of these schools, but also the impacts of children growing up away from family and love and culture has had devastating intergenerational impacts to many families. Putting it succinctly, "[f]orcible removal, relocation, and separation of families, loss of cultural identity, and western cultural impositions all contribute to the myriad of multigenerational social and economic disadvantages that Indigenous communities in Canada…face today."[27] Along with federal Indian Agents and law enforcement, social workers actively placed Indigenous children in residential schools leading into the 1960's[28] where the practices of child welfare workers shifted to placing them with non-Indigenous families instead of the schools. This practice later became known as the 'Sixties Scoop' after a study led by Canadian Council on Social Development. Director Patrick Johnston is known for coining the term in the 1983 report. He attributed the term to a social worker interviewed for the report who indicated that social workers sincerely believed that what they were doing was in the best interests of the children and that they "felt that the apprehension of Indian children from reserves would save them from the effects of crushing poverty, unsanitary health conditions, poor housing and malnutrition."[29] This statement represents one of the major cruxes of the child welfare issue, which is whether responding to the immediate perceived need of protection takes precedence over the long term traumatic impacts of removing a child from their family and placing them in the care of others. It also raises another important point which

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[26] National Centre for Truth and Reconciliation, "Residential School History"https://nctr.ca/education/teaching-resources/residential-school-history/

[27] Cindy Blackstock, Muriel Bamblett, and Carlina Black, "Indigenous Ontology, International Law and the Application of the Convention to the over-Representation of Indigenous Children in Out of Home Care in Canada and Australia," *Child Abuse & Neglect* 110, no.1 (2020): 3

[28] Cindy Blackstock, "The Occasional Evil of Angels: Learning from the Experiences of Aboriginal Peoples and Social Work" *First Peoples Child & Family Review 4,* no. 1 (2009): 30

[29] Patrick Johnston, "Native Children and the Child Welfare System" (Toronto: Canadian Council on Social Development in association with James Lorimer & Co.:1983), 23

seems to be quickly and easily overlooked when negative effects of the child welfare system are made very public. As is often the case with many large, complex and rigid social welfare systems, the problems with the system are just that, systemic problems. From a human rights perspective, these systems have inherent design flaws which cause more harm than good. With few exceptions, the individual people who are drawn to do social work within the flawed system are well intentioned people with a desire to do good work and help people.

Whether a symptom of intergenerational impacts from residential schools and the Sixties Scoop, or systemic discrimination, there is consistent over-representation of Indigenous children in child welfare systems across Canada.[30] It has been argued that "the reasons why First Nation children come to the attention of child welfare personnel are also different. By far the most important reason is physical neglect, which means that in many cases their parents are unable to care for the child because of factors such as poverty, poor housing and problems with addiction."[31] The over-representation of Indigenous children in child welfare and the historic systemic discrimination inherent in the established system is widely acknowledged throughout Canada and has led to the establishment of new legislation aimed at reducing the number of Indigenous children in care and improving child and family services more broadly. Coming into force in January 2020, *An Act respecting First Nations, Inuit and Métis children, youth and families* is intended to affirm the rights and jurisdiction of Indigenous peoples in relation to child and family services, and set out principles applicable on a national level to the provision of child and family services in relation to Indigenous children, such as the best interests of the child, cultural continuity and substantive equality.[32] The act provides for an Indigenous governing body to draft child welfare legislation which will prevail over federal and provincial laws but must still comply with the *Constitution*, including the *Charter* and the best interests of the child. At the time of this writing, there have been twenty Indigenous Governing Bodies who have given notice to the Federal Government of their intent to exercise legislative authority with a further eighteen who have requested a coordination agreement which is implicitly considered a notice of intent to

[30] Indigenous Services Canada, "Reducing the number of Indigenous children in care," last modified March 30, 2021, http://www.sac-isc.gc.ca/eng/1541187352297/1541187392851
[31] Fred Wien, Cindy Blackstock, John Loxley and Nico Trocmé,,"Keeping First Nations children at home: A few Federal policy changes could make a big difference," *First Peoples Child & Family Review 3,* No. 1, (2007), 10-11
[32] An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24, <https://canlii.ca/t/544xh> retrieved on 2021-03-17

exercise jurisdiction.[33] While two Indigenous Governing Bodies have drafted legislation, they are yet to be enacted so it is difficult at this time to ascertain what the future landscape of child welfare law will be throughout the provinces and territories in Canada.

The child welfare system in Manitoba is unique, given the devolution efforts resulting from the Aboriginal Justice Inquiry – Child Welfare Initiative (AJI-CWI)[34], which saw the division of powers between the province's appointed Director of Child Welfare and the four Child and Family Services Authorities who oversee the Agencies providing front line protection services. The four CFS Authorities, namely the First Nations of Northern Manitoba Child and Family Services Authority, the General Authority, the Métis Authority, the Southern First Nations Network of Care are granted power through provincial legislation. *The Child and Family Services Authorities Act* and *The Child and Family Services Authorities Regulation*. While the stated mission of the AJI-CWI was "[t]o have a jointly coordinated child and family services system that recognizes the distinct rights and authorities of First Nations and Métis peoples and the general population to control and deliver their own child and family services province-wide; that is community-based; and reflects and incorporates the cultures of First Nations, Metis and the general population respectively"[35] the system is not without criticism. As recently as 2017, the Manitoba Legislative Review Committee final report states, "[a]though the CFS system may be devolved on paper, meaningful devolution (transfer) of resources and authority to Indigenous governments and communities has not been a reality."[36] This may be because while the CFS Authorities are "responsible for administering and providing for the delivery of child and family services"[37], the Minister is responsible setting the objectives and priorities for the provision those services.[38] One analysis of the accountability structure of the Manitoba CFS system post-devolution found:

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[33] Indigenous Affairs Canada. "Notices and requests related to An Act respecting First Nations, Inuit and Métis children, youth and families" accessed 20 June 2021: https://www.sac-isc.gc.ca/eng/1608565826510/1608565862367

[34] *See* Manitoba., A.C. Hamilton, and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba. Winnipeg, Man.: Public Inquiry into the Administration of Justice and Aboriginal People* (Manitoba, 1991), ch14.

[35] "Mission Statement" Aboriginal Justice Inquiry – Child Welfare Initiative. Accessed July 12, 2021. http://www.aji-cwi.mb.ca/eng/joint_management_committee_mission.html

[36] Government of Manitoba Report of the Legislative Review Committee. "Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth" (2018), 8

[37] The Child and Family Services Authorities Act, CCSM c C90, <https://canlii.ca/t/52kv7> retrieved on 2021-07-12 S17

[38] The Child and Family Services Authorities Act, CCSM c C90, <https://canlii.ca/t/52kv7> retrieved on 2021-07-12 S24

> *Prima facie*, the devolution of Indigenous child welfare in Manitoba seems to respond directly to Indigenous peoples' demands. The need for "community-based" child and family services is a recurring theme in both the vision and mission statements that justify the jurisdictional shifts. By framing the changes as such, the provincial government created a discourse of collaboration while successfully adopting many dominant Indigenous discourses, including that of autonomy, self-determination and accountability, and giving the appearance that the devolution would "return" children to the care of Indigenous communities thereby facilitating an inevitable turn towards self government.
>
> While this plan appears to directly meet the demands of Indigenous peoples by creating a real opportunity for horizontal accountability between the province and Indigenous agents, the manner in which the province devolved child welfare to Indigenous agents is consistent with in the concept of re-regulation. The appearance of giving up control benefits government as it is able to dissociate itself from responsibilities while sustaining no significant costs regarding its power as ultimate decisionmaker.[39]

Over time since devolution was initially instituted in Manitoba, there have been incremental changes made and announced commitments for change such as the review and redrafting of the legislation which was in progress when the above noted *An Act respecting First Nations, Inuit and Métis children, youth and families* was announced. The new federal legislation has the potential to change the landscape of child welfare considerably.

## 2.2 The Child Welfare / Child Protection Process

Generally, professionals drawn toward working in the child welfare field care deeply about the well-being of children and their families, and truly want to see the parents succeed and provide healthy homes for their children. But because of the negative history and long-lasting effects, the relationship between families and social workers is not always a constructive one. There are inherent power dynamics in the relationship, with the parents fully aware that their social worker has the authority to dictate terms and remove their children. Children whose families are involved with child welfare agencies are not immune to the fear response that is characteristically intrinsic to the process. While the concept of best interest of the child is the driving force behind the system, it must be acknowledged how that determination of best interest

[39] Fiona MacDonald and Karine Levasseur. "Accountability Insights from the Devolution of Indigenous Child Welfare in Manitoba: Accountability in Indigenous Child Welfare Devolution." *Canadian Public Administration* 57, No. 1 (2014): 107.

is influenced by "social attitudes, public policies, and shifting legal precedents."[40] A high profile inquiry or trial involving the death of a child in care, such as the Phoenix Sinclair inquiry in Manitoba, can have far reaching effects on the behaviour of social workers who may be following media coverage of their colleagues being blamed for their action or inaction.[41]

When a report of maltreatment, neglect or abuse is received by a CFS Agency, a social worker or peace officer who investigates the report has legislated authority to apprehend a child from the care of their parent(s) if they are found to be at imminent and serious risk. There is a requirement that a court hearing be held within a specific time frame, where the CFS Agency presents their justification for apprehension. This is the first opportunity for the parents to legally challenge the apprehension of their child. The child, who is not party to these proceedings is not usually in attendance. Before the next hearing, when a determination will be made by the court as to whether the child is in need of protection, a pretrial conference can take place where the CFS Agency represented by counsel and the parents counsel will present summaries of their case and evidence in order to obtain the opinion of the judge regarding the probable disposition should the case go to court.[42] This cross-over between the child welfare services of CFS workers and the child protection court proceedings is often confusing for families involved in the system with the administration of the court system maneuverable for lawyers, judges and court staff, it is overwhelming for parents and especially children.[43]

Since the *New Brunswick (Minister of Health and Community Services) v. G. (J.)* Supreme Cour*t* ruling in 1999, parents have the constitutional right under the *Charter* to legal counsel representation in child protection matters and if they are unable to afford a lawyer, provincial legal aid plans cover the costs[44]. Because of this precedent, parents are not left to try

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[40] Cheryl Regehr, Karima Kanani, Michael Saini, and Jesstina McFadden. *Essential Law for Social Work Practice in Canada* Third edition (Ontario: Oxford University Press, 2015), 90

[41] See: https://www.cbc.ca/news/canada/manitoba/phoenix-sinclair-inquiry-grills-dead-girl-s-social-worker-1.1321653; See also https://winnipeg.ctvnews.ca/testimony-reveals-workers-went-weeks-without-responding-to-concerns-about-danger-to-phoenix-sister-echo-1.1059392; See also https://www.aptnnews.ca/national-news/phoenix-sinclair-inquiry-probes-social-workers-actions/

[42] Cheryl Regehr, Karima Kanani, Michael Saini, and Jesstina McFadden. *Essential Law for Social Work Practice in Canada* Third edition (Ontario: Oxford University Press, 2015), 92

[43] Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil & Family Justice: A Roadmap for Change" (Ottawa, Canada: 2013), 7

[44] Cheryl Regehr, Karima Kanani, Michael Saini, and Jesstina McFadden. *Essential Law for Social Work Practice in Canada* Third edition (Ontario: Oxford University Press, 2015), 92

to comprehend the legal system process while trying to cope with having their children removed from their care.

2.3 Serious Psychological Effect

The experience for the child of being removed from their home and family to be placed with strangers is traumatic and frightening. Research shows that even for babies, the experience of losing contact with their parents is long lasting, in that "[l]oss affects young children in the same way that trauma does; it diminishes their trust in the world, their capacity to explore, and their capacity to regulate powerful emotions. The myth that babies forget and recover is false. In fact, their psychological development is shaped by early experience, both positive and negative.[45] Child welfare systems are designed to be risk adverse, therefore when faced with the decision of allowing a child to remain in a potentially neglectful or abusive home or apprehending them, the common belief is that removing them is in their best interest and ultimately less harmful, though research does not necessarily support this belief. The term 'harm of removal' is used to convey the negative effects inflicted on a child when separated from their family and recognizes that "[r]emoval and placement in foster care may have a worse impact on the child than neglect."[46] When faced with the decision, it is human nature to remove the child from the unhealthy environment and social workers "seem to focus on the maltreatment the child was subjected to by the caregiver and assume that the child will be relieved to escape his or her plight. Professionals seem to ignore that for the child the maltreating parents are the only parents he or she has, and that any separation, particularly if long and abrupt, will evoke strong and painful emotional reactions…it is essential to appreciate that strong negative reactions to separation can be expected not only when the child is separated from sensitive, nurturing parents but also from parents whose caregiving is much less optimal or even abusive."[47] While to the adult this process may seem like a "relatively quick, isolated, one-time event lasting only a matter of hours, this even is a significant turning point in children's lives and one that many

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[45] Shari F. Shink and Diane Baird "Fighting the Odds: Speaking for Infants and Toddlers in the Child Welfare System" in *Changing Lives Lawyers Fighting for Children*, ed. Lourdes M. Rosado (Illinois: American Bar Association: 2014), 9

[46] Rebecca Bonagura, "Redefining the Baseline: Reasonable Efforts, Family Preservation,and Parenting Foster Children in New York", *Columbia Journal of Gender and Law 18,* no. 1 (2008), 196

[47] Douglas F Goldsmith, David Oppenheim and Janine Wannlass. "Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care," *Juvenile & Family Court Journal 55*, No. 2 (2004): 6

children will relive over and over again in their minds".[48] Studies have shown that in the most extreme of cases, "the pain of separation from the caregiver is so great and the level of despair experienced by the children so extreme that they give up on the hope of ever having a secure and loving relationship."[49] Compounded with the anxiety and fear of being removed from their families, children are also often removed from their school, siblings, neighborhood or community, extended family and friends. In essence apprehending children into the child welfare system, at least for the first time, is cutting them off from everything they know. Consequences of the grief that accompanies this loss have been identified as "guilt, post-traumatic stress disorder, isolation, substance abuse, anxiety, low self-esteem, and despair"[50] and that "children who are removed may mourn the loss of their parents as much as if they had died."[51]

There are studies that report on the stigma of being a 'child in care' and 'foster kid', or a 'group care kid' that can severely impact children. Stigma is considered as "a social process involving identifying and discriminating against a person or group based upon a perception of difference…this may encompass adverse social judgement, exclusion and rejection. It follows that the internalization of stigma can result in feelings of shame and guilt, with long-term consequences." [52] One such study of how children in care manage stigma about being in the system, found that stigma resulted in "poor psychosocial outcomes for children in care; academically, socially and psychologically, with increased mental health problems."[53] Other studies refer to discrimination faced by children placed in alternative care arrangements which affect their access to "education, health and other social services. As a consequence, their life opportunities are considerably reduced compared to those of children growing up in their family environment."[54] Specific to Manitoba, various reports have concluded that children in care:

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[48] Monique B. Mitchell, *The Neglected Transition: Building a Relational Home for Children Entering Foster Care* (United Kingdom: Oxford University Press, 2016), 12

[49] Douglas F Goldsmith, David Oppenheim and Janine Wannlass. "Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care," *Juvenile & Family Court Journal 55*, No. 2 (2004): 6

[50] Monique B. Mitchell, *The Neglected Transition: Building a Relational Home for Children Entering Foster Care* (United Kingdom: Oxford University Press, 2016), 5

[51] Shanta Trivedi, "The Harm of Child Removal," *New York University Review of Law & Social Change 43* (2019), 532

[52] Diane Dansey, Danielle Shbero, and Mary John. "Keeping Secrets: How Children in Foster Care Manage Stigma." *Adoption & Fostering 43*, no. 1 (2019), 36

[53] Diane Dansey, Danielle Shbero, and Mary John. "Keeping Secrets: How Children in Foster Care Manage Stigma." *Adoption & Fostering 43*, no. 1 (2019), 36

[54] Nigel Cantwell and Anna Holzcheiter, *A Commentary on the United Nations Convention on the Rights of the Child. Article 20: Children Deprived of Their Family Environment,* (Leiden: Martinus Nijhoff Publisher, 2005), 6

- have poorer educational outcomes[55];
- experience higher hospitalization rates[56];
- are at greater risk of attempting or committing suicide[57];
- experience increased contact with the justice system[58]; and
- are at increased risk of homelessness[59]

In addition to the researchers and social scientists who have documented negative psychological effects of children being removed from their families, it has been noted in Canadian case law such as by Chief Judge Stuart in the Yukon Territorial Court who recognized the far reaching effects of removing a child from their families in stating, "[h]ow much harm to a child can be tolerated within a family before risking a different form of harm to a child when taken out of their home, away from friends and familiar environments? Removing a child from the care of a parent can be devastating to the child, parent and community."[60] Also recognizing that the disruption to the bonds of parent and child are both significantly impacted by removal, in a more recent decision by the Supreme Court of Canada, written by Justice L'Heureux-Dubé, "[t]he mutual bond of love and support between parents and their children is a crucial one and parents deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child."[61]

As will be argued further, it was found in the case of *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, that removing a person's child from their care has a serious and profound effect on the parent's psychological integrity:

> "The Minister's application to extend the original custody order threatened to restrict the appellant's right to security of the person guaranteed by s.7 of the Charter. This right protects both the physical and psychological integrity of the individual and this protection extends beyond the criminal law and can be engaged in child protection proceedings. For a restriction of security of the person

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[55] Marni Brownell, Mariette Chartier and Wendy Au. *The Educational Outcomes of Children in Care in Manitoba*. (Manitoba: Manitoba Centre for Health Policy, 2015)
[56] Marni Brownell, Carolyn De Coster, and Robert Penfold, *Manitoba Child Health Atlas Update*, (Manitoba: Manitoba Centre for Health Policy, 2008)
[57] Manitoba Advocate for Children and Youth., "Stop giving me a number and start giving me a person: How 22 girls illuminate the cracks in the Manitoba youth mental health and addiction system" (2020).
[58] Marni Brownell, Nathan Nickel, Lorna Turnbull, and Wendy Au, *The Overlap Between the Child Welfare and Youth Criminal Justice Systems.* (Manitoba: Manitoba Centre for Health Policy, 2020)
[59] Here and Now Winnipeg, *The Winnipeg Plan to End Youth Homelessness* (2016)
[60] In the Matter of R.A. 2002. YKTC 28 (CanLII), <http://canlii.ca/t/1cz05>, retrieved on 2020-04-02
[61] Winnipeg Child and Family Services v. K.L.W. (2000) S.C.H No 48 Winnipeg Child and Family Services v. K. L. W. [2000] 2 S.C.R. 519 para 72

> to be made out, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. State removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent. Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct. A combination of stigmatization, loss of privacy, and disruption of family life are sufficient to constitute a restriction of security of the person."[62]

So too does removing a child from their parent's care, have a serious and profound effect on the child's psychological integrity.

[62] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC) p49

# Chapter 3: Legal Obligations

## 3.1 *Parens Patriae*

The history of the *parens patriae* jurisdiction dates back to the fifteenth century in England where, "the rudiments of social responsibility for children began; the King became the guardian of children in need and, as a corollary to this power, he could compel parents to carry out their duties to their children; these duties were to maintain, educate and protect their 'prized possessions'."[63] The first use of the *parens patriae* jurisdiction in Canada was in 1893 when the Court, in *R. v. Gyrgall* stated, "[t]he court is placed in a position by reason of prerogative of the Crown to act as supreme parent of children and must exercise that jurisdiction in the manner in which a wise, affectionate and careful parent would act for the welfare of the child."[64] In the 1986 decision of *E (Mrs.)* v. *Eve*, the Supreme Court decision provided a 'genesis' of the *parens patriae* jurisdiction from England's courts to the Canadian perspective, summarizing:

> From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty…is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its *rationale* is obviously applicable to children, and following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under his wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country…The *parens patriae* jurisdiction is…founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".[65]

In the 1995 *B.(R) v. Children's Aid Society of Metropolitan Toronto* decision, the Supreme Court recognized the state's responsibility to intervene and protect children under its *parens patriae* jurisdiction in stating:

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[63] Liz Mitchell, "The Clinical/Judicial Interface in Legal Representation for Children," *Canadian Community Law Journal 7* (1984), 75
[64] Douglas J. Besharov, "Child Abuse and Neglect Law : a Canadian Perspective" (New York, N.Y: Published in collaboration with the Ontario Center for the Prevention of Child Abuse and the Ministry of Community and Social Services, Province of Ontario by the Child Welfare League of America, 1985), 363
[65] E. (Mrs.) v. Eve, 1986 CanLII 36 (SCC), [1986] 2 SCR 388, <https://canlii.ca/t/1ftqt>, retrieved on 2020-04-01) pp425-426

> The common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its *parens patriae* jurisdiction. This protection of a child's right to life and to health is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long as it also meets the requirements of fair procedure.[66]

Linking the p*arens patriae* jurisdiction to child welfare specifically, Justice L'Heureux-Dubé writing for the majority decision of the Supreme Court in *Winnipeg Child and Family Services v. K.L.W.* stated:

> Because children are vulnerable and cannot exercise their rights independently, particularly at a young age, and because child abuse and neglect have long-term effects that impact negatively both on the individual child and on society, the state has assumed both the duty and the power to intervene to protect children's welfare. This responsibility finds expression in the *parens patriae* jurisdiction of the common law courts.[67]

So long as the underlying principles of *parens patriae* are respected and exercised for the benefit of those in need of protection,[68] the jurisdiction to exercise it has no defined limits in case law.[69] Concerning specifically the appointment of counsel for children in child protection matters, if the provincial or territorial legislation does not provide for the appointment of counsel, the court can rely on its *parens patriae* jurisdiction to do so.[70] In *Wagner v. Melton*¸ the Northwest Territories Supreme Court wrote, in respect to children in custody and access proceedings, a list of guiding principles that have emerged:

> First, the most important question is whether or not appointing counsel to represent a child is in that child's best interests.
>
> Second, the court must be satisfied that the child can provide instructions to a lawyer. If the child cannot do so, then counsel should not be appointed and other methods of ascertaining the child's views must be explored.

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[66] B. (R.) v. Children's Aid Society of Metropolitan Toronto, 1995 CanLII 115 (SCC), [1995] 1 SCR 315, <https://canlii.ca/t/1frmh>, retrieved on 2021-03-17, p319

[67] Winnipeg Child and Family Services v. K.L.W. (2000) S.C.H No 48 Winnipeg Child and Family Services v. K. L. W. [2000] 2 S.C.R. 519, para 75

[68] E. (Mrs.) v. Eve, 1986 CanLII 36 (SCC), [1986] 2 SCR 388, <https://canlii.ca/t/1ftqt>, retrieved on 2021-03-19 p389

[69] Debra Lovinsky and Jessica Gagne, "Legal Representation of Children in Canada." (Ottawa: Department of Justice Canada: 2015), 39

[70] See Nicholas Bala and Claire Houston. "Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada." (Ottawa: Department of Justice Canada, 2015), 39; See also Debra Lovinsky and Jessica Gagne, "Legal Representation of Children in Canada." (Ottawa: Department of Justice Canada: 2015), 38

> Third, the court should exercise its discretion to appoint counsel sparingly and only where the adult litigants cannot adequately represent the child's views to the court.[71]

While it is true that currently "in many provinces, the parens patriae jurisdiction is the only way that counsel may be appointed to advocate on a child's behalf"[72] some courts maintain that it should be used sparingly.[73] Part of the reason is while the court has the authority to order that a child be represented, it does not have authority over the budget spending of the province or jurisdiction who would then be responsible for covering the expenses of the child's counsel.

3.2 Best Interest Consideration

The premise behind any child welfare proceeding is that actions taken must be in the best interest of the child. This is a widespread norm and is a principle of the *UNCRC* captured in Article 3(1): "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be primary consideration." Article 3(2) imposes the obligation to ensure domestic legislation and policy aligns with the *UNCRC:* "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." Article 3(3) imposes the obligation to make sure those providing service comply with the legislation and policy: "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."[74] The Committee on the Rights of the Child, which is the body of independent experts that monitors implementation of the *UNCRC* and issues statements on its implementation, stated that the best interest of the child concept is threefold as follows:

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[71] Wagner v. Melton, 2012 NWTSC 41 (CanLII), <http://canlii.ca/t/frmx9>, retrieved on 2020-04-01para 6-8
[72] Debra Lovinsky and Jessica Gagne, "Legal Representation of Children in Canada." (Ottawa: Department of Justice Canada: 2015), 7
[73] Wagner v. Melton, 2012 NWTSC 41 (CanLII), <http://canlii.ca/t/frmx9>, retrieved on 2020-04-01
[74] Convention on the Rights of the Child, GA Res 44/25, UNGAOR, No 49, U.N. Doc. A/44/49 (1989), Art 3

> (a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 4, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.
>
> (b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.
>
> (c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account.[75]

In the context of child welfare and protection matters then, the best interest of the child is a substantive right when immediate decisions are made for them, a legal principle to be considered through the child protection court process and a rule of procedure in which policy should consider all impacts on the child. The need for children to have counsel in situations where best interests are being determined was also addressed by the Committee where they stated, "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."[76] More recently the Committee stated in regard to judicial and administrative proceedings that children should have "access to subsidized or free legal services and other appropriate assistance."[77] It can be argued that if there was sufficient cause to apprehend a child and have them brought into the care of the state due to conflict, abuse or neglect, the potential for conflict between the parties in decisions regarding the child is undoubtedly present. A child who has been apprehended into, or is a ward of the state,

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[75] United Nations Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of a child to have his or her best interests taken as a primary consideration (art. 3, para. 1)** May 2013 CRC/C/GC/14, para 6
[76] United Nations Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of a child to have his or her best interests taken as a primary consideration (art. 3, para. 1)** May 2013 CRC/C/GC/14 para 96
[77] United Nations Committee on the Rights of the Child, General Comment No. 20 (2016) *On the Implementation of the Rights of the Child During Adolescence* 6 December 2016 CRC/C/GC/20 para 23

should not be expected to represent themselves without counsel in a judicial proceeding in order to have their voice heard, especially in a situation where both the state and the parent have legal representation. The Committee on the Rights of the Child have also stated that the representative for a child must exclusively represent "the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society)"[78] which supports the argument that the lawyer representing the State or the parents in child welfare proceedings can not also represent the interests of the child.

To varying degrees, the best interests of the child doctrine is also enshrined in child protection legislation across Canada, including the new federal legislation *An Act respecting First Nations, Inuit and Métis children, youth and families* which states the act "is to be administered in accordance with the principle of the best interest of the child" and that it must be the primary consideration in the provision of services provided.[79] It then lists eight factors to be considered when determining the best interests of an Indigenous child, the fifth of which is due weight to the child's views, which is aligned with Article 12 of the *UNCRC*. The legislation in Manitoba sets the best interest doctrine second to determining the need of protection. It goes on to state that in determining best interest, safety and security are to be the primary consideration. Sixth on a subsequent list of eight considerations is "the views and preferences of the child where they can reasonably be ascertained."[80]

The best interest principle has been linked to the right to be heard in Canadian case law. For example, in the Supreme Court case *A.C. v. Manitoba (Director of Child and Family Services),* Justice Abella wrote:

> 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. This is true not only when considering the child's best interests in the placement context, but also

[78] United Nations Committee on the Rights of the Child, General Comment No. 12 (2009) *The Right of the Child to be Heard* 1 July 2009 CRC/C/GC/12 para 37
[79] An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24, <http://canlii.ca/t/544xh>
[80] The Child and Family Services Act, CCSM c C80, http://canlii.ca/t/53n2r, s.2

> when deciding whether to accede to a child's wishes in medical treatment situations.[81]

The following year, Justice Martinson of the Supreme Court of Yukon wrote,

> A key premise of the legal rights to be heard found in the Convention is that hearing from children is in their best interests. Many children want to be heard and they understand the difference between having a say and making the decision. Hearing from them can lead to better decisions that have a greater chance of success. Not hearing from them can have short and long term adverse consequences for them.[82]

In child welfare cases, there are very often opposing views amongst the adults involved as to what is in the best interest of the children as best interest is influenced by a variety of factors including culture and is therefore conceptualized differently by different people. This begs the question of whose determination of best interest is in fact the 'best'? It is also unfortunate that given high workload demands and competing priorities in the child welfare system, workers may "take the path of least resistance, what is best for a child…can take a back seat to what is easier for the worker."[83] This highlights that hearing the youth's perspective about their own perceived best interest and giving that perspective due weight is very importantly part of contributing to their best interest. There is a protective, and often paternalistic, instinct for adults to assume they know what is in the best interests of a youth while making the very difficult decisions affecting their lives without seeking the youth's input. This has been recognized at an international level by UNICEF, in stating, "[d]ecisions affecting children's lives are taken within a wide range of institutions and by many different professions…Too often that power is exercised without appropriate reference to children's capacities. The tendency is to underestimate the capabilities of children and, in so doing, there is a failure both to respect the rights of children and to capitalize on the expertise and perspectives children can contribute."[84] This tendency towards underestimating the child's capabilities is problematic both legally and developmentally for the youth. Regarding the former, the Committee on the Rights of the Child has been clear in that an

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[81] A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30 (CanLII), [2009] 2 SCR 181, <https://canlii.ca/t/24432>, retrieved on 2021-03-17 p185

[82] G. (B.J.) v. G. (D.L.), 2010 YKSC 44 (CanLII), <http://canlii.ca/t/grssg>, retrieved on 2020-04-01) para 4

[83] Shari F. Shink and Diane Baird "Fighting the Odds: Speaking for Infants and Toddlers in the Child Welfare System" in *Changing Lives Lawyers Fighting for Children*, ed. Lourdes M. Rosado (Illinois: American Bar Association: 2014),.9

[84] Gerison Lansdown, *Evolving Capacities of the Child* (Florence, Italy: UNICEF Innocenti Research Centre, 2005), 60

"adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."[85] The noteworthy piece of this statement is *all* the rights under the *UNCRC*, including the right to be heard. This gives credence to the belief that the best interests cannot be determined without hearing the youths' perspective.

3.3 Right to Participation

Article 12 of the *UNCRC*, is considered a fundamental principle along with those of best interests of the child and non-discrimination, "in the sense that those principles play a decisive role in the implementation of all of the other rights."[86] The importance of the article is recognized internationally by UNICEF who, in a published guideline for child-friendly legal aid, stated of the above article, "[t]his is a vitally important right in the context of legal proceedings, where it is far too commonplace for authorities to make decisions that have significant and long-lasting impacts on children's lives without first listening to the children's own views."[87]Article 12(a) is as follows:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12(b) goes on to provide:

> 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 natural law.[88]

The Committee on the Rights of the Child has stated, "this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example…custody, care and adoption."[89] In the context of child protection proceedings, this article imposes an obligation on the Provinces and Territories, because Canada has ratified the agreement, to

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[85] United Nations Committee on the Rights of the Child, *General Comment No. 13 The Right of the Child to Freedom from All Forms of Violence.* CRC/C/GC/13 (April 2011), para 61
[86] Jean-François Noël, *The Convention on the Rights of the Child* (Ottawa: Department of Justice) last modified January 7, 2015 www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/crc-crde/conv2a.html
[87] UNICEF Ecaro, *Guidelines on Child Friendly Legal Aid* (2018), 17
[88] Convention on the Rights of the Child, GA Res 44/25, UNGAOR, No 49, U.N. Doc. A/44/49 (1989)
[89] United Nations Committee on the Rights of the Child, General Comment No. 12 (2009) *The right of the child to be heard* 1 July 2009 CRC/C/GC/12 para 12

"introduce the legal framework and mechanisms necessary to facilitate opportunities to express views and thereby support the active involvement of the child in all actions affecting them and to give due weight to those views once expressed. It is this additional obligation that differentiates article 12 and constitutes the full meaning of participation."[90] It is a sad reality in Canada that children in care continue to express that they feel their views are not being heard or considered in the decisions that affect their lives. This has been documented in numerous reports by a variety of authorities such as the Standing Senate Committee on Human Rights, provincial and territorial advocates and taskforces.[91]

Arguably, the best interest of the child cannot be determined without the child's participation to the degree that they are able. Bala and Houston have stated, that the best interest of the child and right to participation articles are "mutually reinforcing: the best interests of the child will be promoted where the views of the child are heard and considered. Conversely, denying a child the opportunity to be heard would seem to violate Article 3."[92] To put their argument into context, in order to not violate the obligation to ensure the best interest of the child is a primary consideration, the social welfare institutions, courts and legislative bodies must ensure appropriate mechanisms are in place for the child to participate fully according to their ability. Considering the extent to which a child has the right to participate:

> Article 12 views children as prospective and partial agents. That is, it sees them as on the road to becoming fully self-determining, autonomous persons…Children are not as yet full agents. We give the views of children *some* weight. But their views as to their own fate are not, as they are with adults, entirely determinative of the matter…We can better protect children if they are participants. Children will become better participants if we give their views weight. The world as a whole is better managed and the overall outcomes are better ones, if we allow children to have some say in what happens to them.[93]

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[90] Gerison Lansdowne, "Exploring the Meaning of Children's Participation" in *The Children's Senator: Landon Pearson and a Lifetime of Advocacy,* ed. Virginia Caputo (Quebec: McGill-Queen's University Press: 2020), 26
[91] See Standing Senate Committee on Human Rights, "Children: The Silenced Citizens" April 2001; Ontario Provincial Advocate for Children and Youth, "Searching for Home: Reimagining Residential Care", 2016; Saskatchewan Advocate for Children and Youth, "Shhh…Listen!! We Have Something to Say! Youth Voices from the North", December 2017; Children in Limbo Task Force, "Children at the Centre, Their Right to Truth and Voice", May 2019;
[92] Nicholas Bala and Claire Houston. "Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada." (Ottawa: Department of Justice Canada, 2015),
[93] David Archard, "Preface" in *Participation Rights of Children*, ed Fiona Ang, (Antwerpen: Intersentia, 2006), iii

The child's insight and opinion are essential in determining their best interest as they are the only ones who know the world from their point of view. As rights holders, they are entitled to have their opinion be given due weight, recognizing though that the right to participation does not equate to the right to self-determination.

Canada has made some progress in acknowledging the right to participation with respect to the child welfare system, but removing systemic barriers in order to realize the right is still lacking.[94] In a recent book on the topic of committing to children's rights in Canada it was noted that "[w]hile progress in this area signifies some movement in the direction of children being regarded as right bearers, it falls far short of what is required if Canada is to enhance the voice of marginalized children requiring the care and support of the child welfare system."[95] The shortfall in realizing this right could also be a symptom of the federal or dualist legal system, which results in multiple different child welfare legal systems across the country, but it may simply be a symptom of the legal system generally as, "[c]hild participation rights tend to be more controversial than protection or provision rights since respecting participation rights often requires balancing competing rights, objectives, and concerns. It is subsequently problematic for law to codify participation rights through universally applicable mechanisms."[96] Overcoming the challenges of codifying children's participation into legal doctrine is essential because their participation and unique perspective offers a view that cannot be presented by their parents or social worker.

The varying degrees of inclusion for participation in the legislation illustrates the extent to which child welfare legislation across the country is fractured. Only legislation from Ontario and the Yukon speaks to the child's right to express their views and participate in decisions, though Quebec's legislation speaks to a necessity to give the child opportunity to present their views and British Columbia's legislation states the child's views must be taken into account. In

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[94] See Katherine Covell and R. Brian Howe, *The Challenge of Children's Rights for Canada* Second Edition (Waterloo, Ontario: Wilfrid Laurier University Press, 2018.), 135-6. See also Thomas Waldock, "Introduction: Children's Rights A Question of Status and Recognition" in *A Question of Commitment: The Status of Children in Canada*. eds.Thomas Waldock; Robert Brian Howe and Katherine Covell. (Ontario: Wilfrid Laurier University Press, 2020), 307-9

[95] Waldock, Thomas. 2020. "Child Welfare and the Status of Children Requiring Support and Care in *A Question of Commitment: The Status of Children in Canada*. eds.Thomas Waldock; Robert Brian Howe and Katherine Covell. (Ontario: Wilfrid Laurier University Press, 2020), 109

[96] Jan Hancock, "Participation Rights of the Child At the Crossroads of Citizenship" in *A Question of Commitment: The Status of Children in Canada*. eds.Thomas Waldock; Robert Brian Howe and Katherine Covell. (Ontario: Wilfrid Laurier University Press, 2020), 243

New Brunswick and Nova Scotia, the child's wishes, if they are capable of expressing them shall be given consideration by the court. Alberta's legislation includes that the child's opinion, if capable of expressing it should be taken into consideration when determining their best interest. In Prince Edward Island, the director is to explain the plan to the child and consider their views. Saskatchewan's legislation states that the child may be present and interviewed by the court if deemed in their best interest but does not speak to their views being considered. In Newfoundland & Labrador, the legislation states the judge shall meet with the child or receive written submission if the child requests it. The remaining provinces and territories identify the age of 12 in relation to having their views considered. In Manitoba, the judge may consider the child's views. Lastly in Northwest Territories and Nunavut the director shall interview the child and give the child the opportunity to consent to the plan, but the plan remains valid regardless of the child's consent.[97] Establishing an age at which the child is permitted to participate and share their views is not in line with the requirements of the *UNCRC* Article 12, which focuses on the ability of the child rather than an age which is somewhat arbitrary due to the various circumstances that lead to children's development, and arguably simply a bureaucratic tool easing the requirement to fully assess the ability of each child.

As will be explored in the next chapter, the differing applications of the participation rights of children across the county discussed in this chapter is problematic given that *Charter* rights are intended to be equally applied.

[97] See Appendix 1 for further detail on the provincial legislation

## Chapter 4: Charter Rights and Legal Representation

As the *Charter* dictates the actions of provincial and territorial governments, their legislation must comply with it. Section 7 of the *Charter* establishes that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[98] This language in the *Charter* begins with a carbon copy of Article 3 of the *Universal Declaration on Human Rights (UDHR)*, adopted some thirty-three years earlier, "[e]veryone has the right to life, liberty and security of person"[99] but takes it further to consider in what circumstances it would be constitutional to deprive a person of those rights through the principles of fundamental justice.

### 4.1 Legal Rights - Security of the Person

The security of the person interests for parents in child welfare proceedings have been acknowledged by the Supreme Court in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* where Justice Lamer explained in detail why the parent's *Charter* rights were threatened:

> The Minister's application to extend the original custody order threatened to restrict the appellant's right to security of the person guaranteed by s.7 of the Charter. This right protects both the physical and psychological integrity of the individual and this protection extends beyond the criminal law and can be engaged in child protection proceedings. For a restriction of security of the person to be made out, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. State removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent. Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting

[98] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <http://canlii.ca/t/ldsx> retrieved on 2020-03-26

[99] Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) Art 3

> from a loss of parental status is a particularly serious consequence of the state's conduct. A combination of stigmatization, loss of privacy, and disruption of family life are sufficient to constitute a restriction of security of the person.[100]

The psychological impacts of being brought into the child welfare system are vast and well documented for both the parents and the child as was discussed in Chapter 2. The children have often suffered toxic stress prior to the involvement of child welfare as "rates of children in care are an indication that effective home-based services are lacking for families in need, and that unacceptable living conditions, such as poor housing, poverty, poor parenting skills, and family dysfunction are not being addressed on a broader community or societal level."[101] Once apprehended, the child is then put into a confusing and unfamiliar system, often with unknown caregivers who are paid to care about their wellbeing. Often their placement is in a different location from their family residence resulting in being removed from their school setting and very commonly a break in school attendance for a period of time before being enrolled in a new school. Being labelled as a 'kid in care' can have further psychological impacts, it can come with the stigma of being a 'bad kid' or coming from a bad family. Furthermore, numerous studies document the discrimination children face when coming into care, showing that "children without parental care face wide-spread discrimination. First of all, discriminatory practices are often responsible for a child's placement in alternative care arrangements, as can be the case, for example, for Aboriginal children…[s]econd, once placed in institutions, these children see themselves confronted with widespread discrimination in terms of access to education, health and other social services. As a consequence, their life opportunities are considerably reduced compared to those of children growing in their family environment."[102] This complexity adds to the detrimental impact to their psychological wellbeing and is even more heightened when they feel unrepresented without a voice in what happens to them.

All of the above effects are compounded for children and most certainly the action taken by the state has had a serious and profound effect on the psychological integrity of the parent as well as the child. Therefore, the same analysis as was seen in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* regarding the parent could be made in regard to the

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[100] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC) p49

[101] Marni Brownell, Mariette Chartier and Wendy Au. *The Educational Outcomes of Children in Care in Manitoba*. (Manitoba: Manitoba Centre for Health Policy, 2015)

[102] Nigel Cantwell and Anna Holzcheiter, *A Commentary on the United Nations Convention on the Rights of the Child. Article 20: Children Deprived of Their Family Environment,* (Leiden: Martinus Nijhoff Publisher, 2005), 6

psychological integrity of the child involved in protection proceedings. A point argued in an article authored by a retired British Columbia Supreme Court judge and counsel with the Ontario Office of the Children's Lawyer, stated "there is no principled reason why the same analysis would not apply to the need for legal representation for the child since it is the child, more than anyone else, who is most directly and significantly affected by judicial decisions."[103] The Canadian Bar Association has similarly stated, in a document entitled *The Rights of Children in Child Protection Matter*s that the "Supreme Court of Canada has recognized that child protection proceedings engage not only a parent, but the child's, s. 7 interests under the Charter. As a result, interference in the parent-child relationship may only be justified if it is in accordance with the principles of fundamental justice."[104] The implications of the principles of fundamental justice will be discussed further below.

4.2 Legal Rights - Liberty

The Courts have interpreted the liberty interest broadly where liberty does not only mean freedom from being arbitrarily detained or physically restrained but also provides individuals with the autonomy to make decisions which are important and affect their life.[105] The outcome of the child welfare court proceedings affects matters of significant personal importance to the child's life which have far-reaching and long-lasting impacts. This was recognized in a report submitted to the Committee on the Rights of the Child by the Canadian Foundation for Children, Youth and the Law, which stated, "A key element of citizenship for all members of society is the right to make decisions about what is important in our lives. For children the most important areas include the child's family (or the state substitution for family), health, liberty (including the deprivation of liberty through youth criminal justice proceedings) and education."[106] The liberty interests then are closely tied with the right to participation and to have the child's views be given due weight.

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[103] Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," *Canadian Journal of Family Law* 31, no. 1 (2018): 196
[104] Canadian Bar Association. "The CBA Child's Rights Toolkit" Accessed April 5, 2021, http://cba.org.uml.idm.oclc.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit
[105] See R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30, <https://canlii.ca/t/1ftjt>, retrieved on 2021-03-17 p37-8; See also B. (R.) v. Children's Aid Society of Metropolitan Toronto, 1995 CanLII 115 (SCC), <http://canlii.ca/t/1frmh>, retrieved on 2020-04-02 p317
[106] Canadian Foundation for Children, Youth & the Law, "Children's Right to be Heard in Canadian Judicial and Administrative Proceedings" Submission for the Committee on the Rights of the Child General Day of Discussion (2013)

As is usually the case in child welfare proceedings, there is counsel representing the state and counsel representing the parents, without anyone representing the child. Put very clearly, "[w]ithout counsel, the youth is left simply to be a subject of the proceedings without having any real voice…her interests may not be represented by others such as the parent, the social worker, or a guardian ad litem simply because these parties have other interests to protect, in addition to those youth. However, when a youth has an attorney to represent her interests independently of those of the other parties, the court can have confidence that the youth's position is being presented and that the parties are not compromised by having to divide their loyalties."[107] This recognition that counsel for the state may have diverging interests from that of the child has not been widely recognized by the courts, but there have been a few cases such as in *T.L.F v. Saskatchewan*, where it was put before the court to determined if a seven month old child who had been apprehended should have his own legal representation. Justice Ryan-Foslie, then of the Saskatchewan Court of Queen's Bench stated, "[e]ach of the parties in this matter, including the Minster of Social Services, has their own agenda and interests to advance. None of those agendas or interests necessarily advance the rights of the child."[108] This judgement makes it apparent that given the liberty interests including the right to personal autonomy involved in child welfare proceedings, children must be represented by counsel to provide a safeguard from the potential worst case scenario when none of the parties to the proceedings are considering the views of the child. She went further to state,

> None of the parties can be relied upon to advance without prejudice the rights of T. Who then will advance T.'s constitutional rights?...Without the appointment of independent representation, I have grave doubts whether satisfactory evidence and argument would be provided to the court as to the rights of this child. Independent representation would ensure that T.'s special, individual interests would be identified and brought to the Court's attention. This is absolutely necessary in a Court action which will basically determine the course of T's. life.[109]

In child protection proceedings, if counsel for the parent is representing their interest, and counsel for the state is representing the interests of CFS agency there is no one advocating and

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[107] Jennifer K. Pokempner; Riya Saha Shah; Mark F. Houldin; Michael J. Dale, "Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters," Harvard Civil Rights-Civil Liberties Law Review 47, no. 2 (Summer 2012): 549
[108] T.L.F. (Re), 2001 SKQB 271 (CanLII), <http://canlii.ca/t/5h45>, para 14
[109] T.L.F. (Re), 2001 SKQB 271 (CanLII), <http://canlii.ca/t/5h45>, para 15

representing the interests of the child who "owe their allegiance only to the child, not the bureaucratic agencies charged with their care."[110] There is clear deprivation of the child's liberty interests guaranteed by section 7 of the Charter when they are not afforded the right to representation to effectively advocate for their personal autonomy. Because the outcome of the court proceedings will significantly alter their life and their ability to make decisions that are of fundamental personal importance to them, "legal procedural safeguards are critical in ensuring that children's rights are not overlooked or undermined. The need for legal representation for children when their best interests are being formally assessed by courts…is a critical means of actualizing the rights of children."[111] To reiterate, the liberty right guaranteed by the *Charter* is closely linked to the right to participation provided for in the *UNCRC*. The next chapter will discuss the considerations regarding the child's capacity to instruct their counsel and the type of role the lawyer can adopt to most adequately advocate for their clients position.

4.3 Legal Rights – Equality

Section 15 of the *Charter* provides the following rights:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[112]

Discrimination has been defined by Justice McIntyre of the Supreme Court of Canada as, "a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other

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[110] Shari F. Shink and Diane Baird "Fighting the Odds: Speaking for Infants and Toddlers in the Child Welfare System" in *Changing Lives Lawyers Fighting for Children*, ed. Lourdes M. Rosado (Illinois: American Bar Association: 2014), 9

[111] Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," *Canadian Journal of Family Law* 31, no. 1 (2018): p158

[112] Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. Article 15

members of society."[113] This is foundational and consistent with international legislation such as the *ICCPR*, which states that, "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[114] Every individual, including a child, has the right to equal protection under the *Charter* without discrimination.

The Supreme Court of Canada ruling in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* established that parents have a constitutional right to representation given that the "combination of stigmatization, loss of privacy, and disruption of family life are sufficient to constitute a restriction of security of the person."[115] Arguably, the children who are the subjects of court processes in child welfare matters are equally entitled under Section 15 to equal protection and benefit of being represented by counsel. Section 15 was discussed by three of the justices in the *New Brunswick (Minister of Health and Community Services) v. G. (J.)* case, which reads, "[b]efore turning to the analysis of the s. 7 rights implicated and the principles of fundamental justice, I would emphasize that this case also implicates issues of equality, guaranteed by s.15 of the *Charter.* These equality interests should be considered in interpreting the scope and content of the interpretation of the rights guaranteed by s.7. This Court has recognized the important influence of the equality guarantee on the other rights in the *Charter.*"[116] Therefore, an argument can be made that because section 15 established equal protection and benefit without discrimination based on age, if an adult parent has been found to be entitled to legal representation because of their section 7 rights, then children should be equally entitled to legal representation.

4.4 Principles of Fundamental Justice

Recognizing then that the security of the person and liberty interests have been infringed upon in child protection processes, the question becomes was the infringement in accordance

[113] Andrews v. Law Society of British Columbia, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, <https://canlii.ca/t/1ft8q>, retrieved on 2021-04-14 para 18
[114] United Nations International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UNGAOR, 21st Sess, Supp No 16 UN Doc. A/6316 (1966), Art 26
[115] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC) p49
[116] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC) p99

with the principles of fundamental justice. Canadian case law has established three criteria that a principle of fundamental justice must meet:

> First, it must be a legal principle...Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice…The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.[117]

The principles of fundamental justice include the right to a fair hearing, as Justice Steel, writing for the Manitoba Court of Appeal explained, "[t]here is no freestanding "right to counsel" protected by the *Charter*. Instead, the *Charter* recognizes the right of a person to receive a fair hearing when confronted by the state, which, in some cases, will require the assistance of counsel. In those cases where a court decides that a person requires the assistance of a lawyer to ensure a fair hearing, a limited right to state-funded counsel arises under s. 7 of the *Charter*."[118] The Supreme Court, in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* extended this notion to child protection matters where Justice Lamer, writing for the majority stated of the restriction to the parent's Section 7 rights:

> This restriction would not have been in accordance with the principles of fundamental justice were the appellant unrepresented by counsel at the custody hearing. Section 7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children….Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's s. 7 right to security of the person.[119]

Importantly, the ruling notes that both the appellant's and her child's section 7 rights were being threatened in stating, "not only is the parent's right to security at stake, the child's is as well. Since the best interests of the child are presumed to be with the parent, the child's psychological

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[117] Canadian Foundation for Children Youth and the Law v Canada (Attourney General) 2004 SCC 4) para113
[118] Winnipeg Child and Family Services v. A. (J.) et al., 2003 MBCA 154 (CanLII), <https://canlii.ca/t/1g4d2>, retrieved on 2021-03-20 para 34
[119] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC) p49

integrity and wellbeing may be seriously affected by the interference with the parent-child relationship."[120] This is a point that has been relied upon in a number of cases since, such as in the Yukon *Matter of R.*A in 2002 case, where Chief Judge Stuart referenced the G.(J) ruling:

> The right of children to receive the level of care that serves their best interests and their right to enjoy a relationship with their natural parents are related and protected by s. 7. Any state intervention with those rights must accord with the principles of fundamental justice. In deciding what option advances the best interests of a child, it is not just physical care that is considered but, as important, are the emotional, spiritual and intellectual needs of a child. The best interests of a child are defined by the arrangement that maximizes the development of all these aspects of a child. In G.(J.), supra, the Supreme Court of Canada noted that when the infringement of s. 7 rights are not physical, the "impugned state action must have a serious and profound effect on a person's psychological integrity" (G.(J.), supra, at para. 60). Removing a child from the natural family has such an effect on a child's psychological integrity[121]

The jurisprudence in Canada has shown then, that the security of the person interest is engaged when children are deprived of their natural families in child welfare matters. Further, such deprivation is not in accordance with fundamental justice because of the ratification of the international principles noted in the *CRC*, which include the belief that "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."[122] What follows is a natural deduction that given the impacts to psychological integrity and the enormity of the interest at stake for children, legal representation is a principle of fundamental justice for children in child protection matters.

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[120] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC) para76
[121] In the Matter of R.A., 2002 YKTC 28 (CanLII), <http://canlii.ca/t/1cz05>, retrieved on 2020-04-02 para 167
[122] United Nations Committee on the Rights of the Child, *General Comment No. 14 on the right of a child to have his or her best interests taken as a primary consideration (art. 3, para. 1)** 29 May 2013 CRC/C/GC/14 para 96

## Chapter 5: Capacity to Instruct: The Child / Counsel Relationship

There is a general tendency to assume that children less than a certain age do not possess the capacity to instruct counsel, though there is research that contradicts this assumption.[123] In 'The Challenge of Children's Rights for Canada', Covell and Howe provide a brief synopsis:

> Researchers find that when children are asked appropriate questions in appropriate settings, they can provide detailed and accurate information. The two key questions addressed in the competency research are at what age are children able to reliably give testimony, and what are the best interview strategies for eliciting accurate accounts of events, including how deception can be identified. It is rare in Canada for children younger than age five to give their views in any legal proceedings. However, there is evidence that by age three children can provide accurate testimony…. Other researchers have found that children as young as age four who have lived in out-of-home care for some time are able to provide vivid and accurate details about their experiences at home prior to being taken into care. Overall, the data suggest that once children are verbal, their participation rights should be respected, and their voices heard.[124]

A number of factors, other than age, have been put forward in consideration of determining the capacity to instruct. Some positions are simply that if the child has the ability to communicate their views, they have the capacity to instruct their counsel. The Law Society of Upper Canada, in a 1981 report put forward:

> A child may be deemed to have capacity where the child is mature and responsible enough to accept the consequences of his or her acts and decisions and can express a preference as to its resolution… One of the factors in making this decision would be the ability of the child to accept *rationally* the advice he or she is receiving. If the child stubbornly, without reason refuses to accept the advice of counsel, it may be that the child lacks the maturity to properly instruct counsel.[125]

The Canadian Bar Association's position on capacity of a child client to instruct is that:

> A specific test of capacity depending on a particular context is familiar to the legal profession. For example, determining when a person has the capacity to make a will, stand trial, give evidence, or refuse or consent to medical treatment

[123] See Dawn Watkins; Effie Lai-Chong Law; Joanna Barwick; Elee Kirk, "Exploring Children's Understanding of Law in Their Everyday Lives," Legal Studies. The Journal of the Society of Legal Scholars. 38, no. 1 (March 2018): 59-78 p59 & p77

[124] Katherine Covell Robert Brian Howe, and J. C Blokhuis. *The Challenge of Children's Rights for Canada* Second edition. (Ontario: Wilfrid Laurier University Press, 2018), 140-1

[125] Rhonda Bessner, "The Voice of the Child in Divorce, Custody and Access Proceedings" (Ottawa: Department of Justice Canada, 2002), 27

> each has a different test for capacity. Assessing a young person's capacity entails the same potential diversity and process. As with adults, if the issue being determined for a child involves a decision in which life hangs in the balance, the test for capacity to make that decision is likely to have a much higher threshold than the test of capacity to open a bank account or to choose what school to attend. A review of tests of capacity in various contexts invariably show that an element of understanding is required.[126]

While the ability of a child to instruct their counsel is an important one for the lawyer to consider, it is irrelevant to the determination of whether they are entitled to be represented. The child welfare system is inherently part of the legal system governed by the various provincial and territorial acts and because of that, "children need trained legal advocates to hold the state and other parties accountable. The nature of our judicial system relies upon licensed attorneys to enforce and protect our legal rights. That is no less true for the youngest of children who are at the center of these proceedings and are the most unable to understand or advocate for their own rights."[127] It is a safe assumption that the majority of parents who find themselves involved in a child protection case do not have full knowledge of the court process that follows their child's apprehension from their home. It is the role of their counsel to inform them of the process and seek well informed instruction, otherwise they would be unable to advocate for their rights and position. The same could be argued for the child-counsel relationship in that it is the responsibility of the lawyer to explain in an age-appropriate way to their client so as to help them understand in order to participate.

There are three distinct types of representation that a lawyer can adopt when representing a child in a child protection matter before the courts. These are *amicus curiae* or friend of the court, *guardian ad litem* or litigation guardian, and traditional lawyer or advocate. There are strong opinions as to which role a lawyer should adopt depending on one's view of the purpose of the representation, such as is stated in the Children's Rights Toolkit:

> From a child rights perspective, only a lawyer who acts as a child's advocate is fully respecting a young person's rights. The court is the client of any lawyer who takes a 'friend of the court' (*amicus curiae*) role; an adult person standing-in for the child is the client of a lawyer acting as a litigation guardian (*guardian ad*

[126] Canadian Bar Association. "The CBA Child's Rights Toolkit" Accessed April 5, 2021, http://cba.org.uml.idm.oclc.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit
[127] Lisa Kelly and Alicia Levezu, "Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children," *Family Law Quarterly 50*, no. 3 (Fall 2016): 386

> *litem*); and a lawyer who advocates only for the best interests of the child arguably has no client at all.[128]

Each of these has a distinct purpose and role in the court processes and the role a lawyer adopts will depend on the circumstances and the capacity of the child.

### 5.1 *Amicus Cuirae*

The *amicus curiae* is considered neutral and an intermediary between the parties to the proceeding, they present the court with the child's view but cannot present a position on the child's best interest. Even though the *amicus curiae* may be a lawyer, there is no confidentiality in place such as that afforded with traditional counsel. They should ensure the child understands the court process but cannot provide advice to the child.[129]

This role is not commonly adopted by lawyers, unless directly appointed to do so by the court, as "lawyers representing children generally view themselves as having a role to advocate a position, based either on the child's views or the lawyer's assessment of the child's interests."[130] The use of the *amicus curiae* role has been criticized in that it simply presents evidence and does not adequately protect the legal rights of the children throughout the process and adopting another role can do more to benefit the child.[131]

### 5.2 *Guardian ad litem*

The *guardian ad litem,* or best interest guardian stands in place of the child in court[132] and presents their own opinion on what is best for the child.[133] The *guardian ad litem* is required to present to the court relevant information and evidence related to their interpretation of the

[128] Canadian Bar Association. "The CBA Child's Rights Toolkit" Accessed April 5, 2021, http://cba.org.uml.idm.oclc.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit
[129] T.L.F. (Re), 2001 SKQB 271 (CanLII), <http://canlii.ca/t/5h45>para24
[130] Nicholas Bala, Rachel Birnbaum and Lorne Bertrand, "Controversy about the Role of Children's Lawyers: Advocate or Best Interests Guardian Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers," *Family Court Review 51*, no. 4 (October 2013): 683
[131] See Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," *Canadian Journal of Family Law* 31, no. 1 (2018): 186. See also Nicholas Bala. 2015. "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings." Alberta Law Review 43 (4): 845-870 p849
[132] Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," *Canadian Journal of Family Law* 31, no. 1 (2018):
[133] T.L.F. (Re), 2001 SKQB 271 (CanLII), http://canlii.ca/t/5h45 para28

child’s best interest,[134] and not be “bound by the child’s expressed preferences.”[135] Some child welfare legislation specifically states a *guardian ad litem* is to be appointed to represent a child rather than legal counsel which may be the most practical approach in representing a child who is too young or incapable of instructing counsel. It is the policy of the Ontario Office of the Children’s Lawyer to adopt this role as counsel for children in that they advise the court on the child’s position but may argue for a different position if they believe it better serves the best interests of the child.[136]

The *guardian ad litem* role has been criticized, arguing that “[t]he role undermines the child’s participation rights as envisioned by the *Convention*, replacing the child’s voice with that of the guardian. It also arguably inappropriately usurps the role of the judge, since the guardian makes recommendations on the ultimate issue the judge must decide – what is in the best interests of the child.”[137] Also it is argued that “ if counsel for the child is not advocating based on the child's expressed wishes, the child is without effective representation in proceedings that will profoundly affect the child's life.”[138] Further, to adequately assess a child’s best interest it takes a considerable amount of education and training in fields such as child development, healthy family relationships, addictions and domestic abuse issues and conflict resolution, in addition to understanding the family dynamics and individual perceptions of those involved. Therefore, given the legal focus of the training and education obtained by a lawyer, it is questionable if it gives them the expertise to provide a robust evaluation of the best interest of a child in a protection matter.

### 5.3 Child’s Legal Advocate

The traditional role of a lawyer as an advocate is not a neutral position but rather provides advice to the child and is confidential between the child and their counsel. They represent the child in court the same as counsel would for any adult client including their rights, interests and

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[134] Rachel Birnbaum & Nicholas Bala, "Child's Perspective on Legal Representation: Young Adults Report on Their Experiences with Child Lawyers" *Canadian Journal of Family Law 25* no.1 (2009), 42

[135] American Bar Association, “Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases” (February 5, 1996) S.A-2

[136] Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings." *Alberta Law Review 43*, no. 4 (2015): 858

[137] Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," *Canadian Journal of Family Law* 31, no. 1 (2018): 186

[138] Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings." *Alberta Law Review 43*, no. 4 (2015): 849

their wishes regardless of whether the lawyer believes it to be in the child's best interest.[139] The Alberta Law Society Code and the Quebec Court of Appeal both maintain that counsel should adopt the legal advocate role so long as the child is capable to provide clear instruction.[140]

Commendations of the lawyer as advocate role have been that, "only a child advocate provides the child with the opportunity to meaningfully and effectively participate in the process by confidentially obtaining information and providing advice aimed at allowing the child to make informed choices; ensuring that the court has evidence and legal arguments relevant to the child's position; and providing the safeguards required to maximize the possibility of an outcome that is fair and just, including access to appeal processes."[141] The legal advocate role, it would seem, is the role that most respects the child's right to participate and have their opinion afforded its due weight provided that the child is able to instruct counsel.

[139] See T.L.F. (Re), 2001 SKQB 271 (CanLII), <https://canlii.ca/t/5h45>, retrieved on 2021-03-17 para 29. See also, Michelle Fernando, "How Can We Best Listen to Children in Family Law Proceedings," *New Zealand Law Review . 3* (2013):397. See also, Rachel Birnbaum and Nicholas Bala, "Child's Perspective on Legal Representation: Young Adults Report on Their Experiences with Child Lawyers," *Canadian Journal of Family Law 25*, no.1 (2009), 43
[140] See Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings." *Alberta Law Review 43* no. 4 (2015): 954-5 & 859.
[141] Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," *Canadian Journal of Family Law* 31, no. 1 (2018): 186

# Chapter 6: Representation for Children in Protection Matters

Legal representation for youth in criminal law proceedings is well established in Canada, and the "ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada's legal system."[142] However, children are not afforded this same protection and representation in child welfare proceedings. Child welfare legislation is a provincial/territorial responsibility and the degree to which children are considered a party to the proceedings with right to representation varies across the country. Though most of the provincial/territorial child welfare legislation includes provisions for hearing from the child, a scan of all jurisdictions in Canada (see Appendix 1) shows that the right to be represented by counsel at the proceedings is inconsistent and lacking.

## 6.1 Jurisdictional Comparison

There are two jurisdictions, namely British Columbia and Newfoundland and Labrador, whose legislation does not contemplate representation for the child at all. The Yukon legislation states that the Official Guardian has the exclusive right to determine whether independent representation is required based on listed factors to consider and notes that it will be paid for by the territory. Similarly in New Brunswick, the responsibility lies with the Minister of Social Development to takes whatever step are necessary to ensure the interests and concerns of the child are represented which can include the appointment of counsel. Where that Minister is party to the proceeding it is up to the Court to advise the Attorney-General when it is their opinion, based on determinative factors listed in the act, that counsel should be made available to represent a child's interests and concerns.[143]

In four provinces the court may determine whether independent representation is called for. Among these is Prince Edward Island which has no qualifiers established in legislation and only states that the court may order counsel and it would be at the expense of the ministry. The remaining three, Alberta, Manitoba, and Ontario list qualifiers for the court to consider. The right to counsel in Saskatchewan is outside of the child welfare legislation and is found in the *Public Guardian and Trustee Act* which allows the Court upon certain qualifiers to "direct that the child

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[142] Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," *Canadian Journal of Family Law* 31, no. 1 (2018): 154

[143] Family Services Act, SNB 1980, c F-2.2, <http://canlii.ca/t/51vk7> retrieved on 2020-03-26 s.7

be represented by a lawyer if the court is satisfied that the interests or views of the child would not otherwise be adequately represented."[144] These pieces of legislation which leave the discretion to the court arguably remain in the paternalistic view of children's rights in that it effectively restricts the child's right to participate.[145]

The language in the Quebec and Nunavut legislation is more robust than other jurisdictions in that it establishes that the courts must in the former and shall in the latter, ensure a child is represented by their own counsel provided that the child's interests differ from their parents and it is deemed in the best interest of the child to be represented. Only legislation from Northwest Territories and Nova Scotia speaks to a child who is able to express their preferences being entitled to counsel, though the legislation in Nova Scotia places the responsibility of requesting counsel solely on the child once over the age of sixteen. It also specifies that children over the age of sixteen as a party to the proceeding are entitled to their own representation but if younger and deemed a party, a *guardian ad litem* is to be appointment for them.

While not applicable to Canadian jurisprudence, it is relevant to consider other nations' legislation and jurisprudence. Referred to as the "modern era of legal representation of children in child welfare cases,"[146] the federal United States Congress passed the 1974 *Child Abuse Prevention and Treatment Act* which requires individual states to provide a *guardian ad litem* for children in child protection cases. While the act does allow a person who is not a lawyer to be the *guardian ad litem,* many states now routinely appoint lawyers.[147] The American Bar Association's *Standards of Practice for Lawyers Who Represent Child in Abuse and Neglect Cases* recognizes that "[a]ll children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues."[148] Within the document, there is a list of when the standards would apply which are, "when a lawyer is appointed for a child in any legal action based on: (a) a petition filed for protection of a child; (b) a request to a court to change legal custody, visitation, or guardianship based on

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[144] Public Guardian and Trustee Act, SS 1983, c P-36.3, <http://canlii.ca/t/53gqc> retrieved on 2020-03-31 s.6.3
[145] See Jan Hancock, "Participation Rights of the Child At the Crossroads of Citizenship" in *A Question of Commitment: The Status of Children in Canada*. eds.Thomas Waldock; Robert Brian Howe and Katherine Covell. (Ontario: Wilfrid Laurier University Press, 2020), 248
[146] Donald N. Duquette and Julian Darwall, "Child Representation in America: Progress Report from the National Quality Improvement Center," *Family Law Quarterly 46*, no. 1 (Spring 2012): 88
[147] Debra H Lehrmann, "Advancing children's rights to be heard and protected: The model representation of children in abuse, neglect, and custody proceedings act," *Behavioral Sciences & the Law 28*, no. 4 (July/August 2010): 446
[148] American Bar Association, "Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases" (February 5, 1996)

allegations of child abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights."[149] It is remarkable that a country which has not signed on to acknowledge children's rights by way of ratifying the *UNCRC*, has a national standard of legal representation for children in child protection matters that far exceeds that of Canada.

6.2 Argument For Children's Guaranteed Representation

According to international law, in administrative or judicial proceedings the right to be heard should include being represented equally to others involved in the proceeding. The need for youth to have counsel in situations where their best interests are being determined has been addressed by the Committee on the Rights of the Child. In *General Comment on the Right of a Child to Have His or Her Best Interests Taken as Primary Consideration* they stated, "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."[150] This need to ensure that the child's representative is solely representing the child has been acknowledged in the context of federal law in the United States, whereby states are required to provide representation in that:

> Without counsel, the youth is left simply to be a subject of the proceedings without having any real voice… However, when a youth has an attorney to represent her interests independently of those of the other parties, the court can have confidence that the youth's position is being presented and that the parties are not compromised by having to divide their loyalties.
>
> The rights and sometimes the interests of children are frequently jeopardized in court proceedings because the best interests of a child are determined without resort to an independent advocate for the child. Courts may fail to perceive children will be affected by the outcome of the litigation, or that potential conflicts between the interests of the children and the interests of other parties require that the child have separate counsel. Too often the judge assumes the child's interests are adequately protected by [the child welfare agency]. This

[149] American Bar Association, "Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases" (February 5, 1996)
[150] United Nations Committee on the Rights of the Child, *General Comment No. 14 On the Right of a Child to Have His or Her Best Interests Taken as a Primary Consideration*, CRC/C/GC/14 (29 May 2013): para 96

> position is undermined when, as here, [the child welfare agency] is challenged and as such it becomes an interested party, the source of the inquiry.[151]

Similarly the Committee on the Rights of the child has stated that the representative for the youth must exclusively represent "the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society)"[152] which could be relied on to counter an argument that the lawyer representing the State in child welfare proceedings can also represent the interests of the youth.

While Canada, due to the federal or dualist legal system, has not incorporated international human rights instruments into domestic law directly, they do have impact to how the courts assess cases that are applicable. In a case where the appellant relied on the *UNCRC* in their arguments, Justice Groberman writing for the British Columbia Court of Appeal stated:

> It is well settled that Canada's 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[153]

As discussed in Chapter 1 and put very clearly by the Canadian Bar Association table, language in the international instruments such as the *UNCRC* is complementary and consistent with language and intent of the *Charter*. Of significance for the argument being presented here is Article 12 of the *UNCRC*, which assures that children are provided the opportunity to be heard in judicial and administrative matters that affect them and Section 7 of the *Charter*, which assures that individuals' life, liberty and security of person are not restricted except in accordance with the principles of fundamental justice.

It was established by the Supreme Court of Canada in the 1999 *New Brunswick (Minister of Health and Community Services) v. G. (J.)* decision that security of the person interests are engaged when State action seriously interferes with a person's psychological integrity:

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[151] Jennifer K. Pokempner; Riya Saha Shah; Mark F. Houldin; Michael J. Dale, "Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matte" *Harvard Civil Rights-Civil Liberties Law Review 47*, no. 2 (Summer 2012): 549-550

[152] United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009) The Right of the Child to be Heard*, CRC/C/GC/12 (1 July 2009): para 37

[153] J.E.S.D. v. Y.E.P., 2018 BCCA 286 (CanLII), <https://canlii.ca/t/ht00l>, retrieved on 2021-03-17 para 32

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety…direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere.[154]

As discussed in Chapter 2, the emotional and psychological impacts of removing a child from their parents and apprehending them into the child welfare system are vast and can include separation and attachment disorders, trauma response and post-traumatic stress disorder.[155] The equivalent impact to children was recognized in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*

> The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.[156]

This impact was also recognized by the Territorial Court of Yukon in stating, "the Supreme Court of Canada noted that when the infringement of s. 7 rights are not physical, the 'impugned state action must have a serious and profound effect on a person's psychological integrity'…Removing a child from the natural family has such an effect on a child's psychological integrity."[157] Compounded in Canadian context where there is a significant over-representation of Indigenous children and families involved in the child welfare system, is the historical impacts of the Residential School System and the Sixty's Scoop whereby Indigenous children were removed from their families, and the intergenerational effects of those policies still

[154] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC)) para 60
[155] *See* Shanta Trivedi, "The Harm of Child Removal.", *New York University Review of Law & Social Change 43* (2019): 523-580; *See also* Vivek Sankaran, "Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care", *University of Pennsylvania Journal of Law and Social Change 19* (2016): 207-37; *See also* Joseph J. Doyle Jr., "Child Protection and Child Outcomes: Measuring the Effects of Foster Care," *American. Economic Review 97* (2007): 1583.
[156] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC)) para 76
[157] In the Matter of R.A. 2002. YKTC 28 (CanLII), <http://canlii.ca/t/1cz05>, retrieved on 2020-04-02) para 167

being felt today.[158] Specific to Manitoba, the child welfare Legislative Review Committee noted in their 2018 final report relating to the fact that almost ninety percent of children in care today are Indigenous, that the "causes are deeply rooted in a legacy of colonial practices and policies, such as the legacy of the residential school system and the 60's Scoop. These practices separated children from parents, family, community, culture and language and have been clearly linked to high rates of substance abuse, violence and poverty within Indigenous communities, perpetuating the cycle of children being removed from their familial homes."[159] Given the historical impact that resonates still today, there is arguably a direct correlation between a child's psychological integrity and the actions taken to remove them from their family through the powers afforded to the CFS agencies via provincial legislation.

Some courts acknowledge a child's right to representation, such as the Quebec Court of Appeal which wrote in 2002, "[i]t is unnecessary, for the purposes of this appeal, to trace the evolution of the practice of allowing independent representation of children in custody and access disputes. Suffice it to say that the right to representation is now well established in Quebec as it is throughout Canada and many other jurisdictions."[160] This begs the question, if right to representation in custody and access disputes between parents is well established, why would children whose parent is essentially in a custody dispute with the state not also be entitled to the same right? That same year, the Territorial Court of the Yukon wrote a strong opinion on the issue of children in care of the state and their right to representation (emphasis added):

> In dealing with the social context surrounding the constitutional rights of a child, we cannot overlook the lessons learned from erroneously assuming institutions always protect a child's best interests. The history of care provided by mission schools, orphanages, correction facilities, and foster homes contains ample tragic examples of why the best interests of children cannot be left to the exclusive discretion of an institution.[161]
>
> A child may seek an outcome different from what their parents or the department may seek. **To deny a child the capacity of an independent voice in proceedings set to determine their best interests violates the fundamental principles of justice. Section 7 protections cannot wait until a child is old enough to advise counsel.** Child advocates can raise issues on behalf of young children that neither

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[158] *See* Fraser O'Neill "Hidden Burdens: a Review of Intergenerational, Historical and Complex Trauma, Implications for Indigenous Families." *Journal of Child & Adolescent Trauma 11* no.2 (2016): 173–86

[159] Government of Manitoba Report of the Legislative Review Committee. "Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth" (2018), 1

[160] F.(M.) c. L.(J.), 2002 CanLII 36783 (QC CA), <https://canlii.ca/t/1dj6m>, retrieved on 2021-02-15 para23

[161] In the Matter of R.A. 2002. YKTC 28 (CanLII), <http://canlii.ca/t/1cz05>, retrieved on 2020-04-02) para 130

> the department nor parent raise. In order for the court to fully assess the best interests of children, child advocates will be necessary in all phases of child protection hearings, and especially in permanent hearings. As the ink begins to set early in child protection proceedings, the need for a separate voice for a child begins when the status of a child in temporary care is being considered. A child's rights and interests are different and need to be separately protected.[162]

> While battles within child protection proceedings are waged between parents and the state, the central issue is not what rights parents or government may have, but rather what will serve the best interests of the child. It is the right of a child to be afforded the care that best serves her interests that forces a family and the state to account for their care. The right of a child to security of the person cannot be subsumed to the rights of parents nor to the rights of the state…The extent, nature and duration of state intervention must always be based on the best interests test.[163]

The Yukon Superior Court stated in its 2010 decision for *G. (B.J) v. G. (D.L)*, "[s]eparate legal representation for children is an effective way of making sure that the participation of children is meaningful."[164] This ruling has been relied upon thirty times since in both child welfare and custody proceedings. Other courts have recognized that representation by counsel is in line with the values of the *Charter* such as the 2010 *Nova Scotia (Community Services) v. T.C.* decision:

> When assessing a child's best interests, the court must consider the child's wishes where ascertainable… Representation by counsel is consistent with our Charter values and the need to balance a child's maturity with restrictions on Charter Rights… In addition, such an interpretation of the law is consistent with Canada's obligations under the *United Nations Convention on the Rights of the Child.*[165]

Offices tasked with advocating for children involved in the child welfare system have also acknowledged the *Charter* implications. One such report noting the lack of counsel for children in Saskatchewan noted:

> One of the unfair consequences is that children do not have access to legal representation in child welfare cases unless the Court of Queen's Bench is the applicable court and then only if it chooses to exercise its general jurisdiction and appoints legal counsel. In Provincial Court, the situation is even more serious, as judges hearing child welfare cases do not have the jurisdiction to appoint counsel

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[162] In the Matter of R.A. 2002. YKTC 28 (CanLII), <http://canlii.ca/t/1cz05>, retrieved on 2020-04-02) para 168
[163] In the Matter of R.A. 2002. YKTC 28 (CanLII), <http://canlii.ca/t/1cz05>, retrieved on 2020-04-02 par a171
[164] G. (B.J.) v. G. (D.L.), 2010 YKSC 44 (CanLII), <http://canlii.ca/t/grssg>, retrieved on 2020-04-01 para34
[165] Nova Scotia (Community Services) v. T. C., 2010 NSSC 69 (CanLII), <https://canlii.ca/t/289gc>, retrieved on 2021-03-17 para 41

> for children, even where they are of the view that such representation would be beneficial.
>
> This checkerboard approach to independent child representation is fundamentally unfair and arguably leads to unequal treatment under the law contrary to Sections 7 and 15 of the *The Canadian Charter of Rights and Freedoms*. There is, for example, the potential violation of these Charter provisions, where there is interference with the child's physical and psychological security of the person, through the denial of the procedural protections of party status and independent legal representation. [166]

Recognizing that children are equally entitled to a fair hearing, in *A.R. v Alberta (Child, Youth and Family Enhancement Act, Director* the Court of Appeal of Alberta, relying on *New Brunswick (Minister of Health and Community Services) v. G. (J.),* found:

> The Supreme Court has affirmed that the proceedings effecting removal of a child from a parent's care implicate the parent's rights under section 7 of the Charter to life, liberty and security of the person…The parent is therefore entitled to a fair hearing, which in turn requires that he or she have "an opportunity to present his or her case effectively"…The law affords this opportunity not only for the parent's sake, but also for the child's.[167]

Though not directly applicable to jurisprudence in Canada, it is noteworthy to acknowledge in the United States it is now widely recognized that children have a constitutional right to legal counsel in child welfare matters:

> A meaningful constitutional right to counsel in juvenile justice and child welfare matters is a civil rights issue as well as a child and family well-being issue. Proceeding without representation puts youth at risk for poor outcomes in the justice and child welfare systems…It increases the chances that the state will coercively intervene beyond what is necessary to address the problem that brought youth to the system's attention. It fails to give them a voice in matters affecting their lives… Given the liberty interests at stake in these proceedings, youth must have meaningful access to counsel to provide a safeguard from the worst consequences of these systems.[168]

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[166] Saskatchewan Advocate for Children and Youth, "A Breach of Trust" (2009): 63

[167] A.R. v Alberta (Child, Youth and Family Enhancement Act, Director, 2014 ABCA 148 (CanLII), <https://canlii.ca/t/g6pdd>, retrieved on 2021-03-17) para 16

[168] Jennifer K. Pokempner; Riya Saha Shah; Mark F. Houldin; Michael J. Dale, "Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters," Harvard Civil Rights-Civil Liberties Law Review 47, no. 2 (Summer 2012): 530

Acknowledging then that, though not incorporated into domestic law directly, the *UNCRC* has been interpreted by the Committee on the Rights of the Child, its governing body, as requiring youth to have legal counsel in judicial and administrative proceedings where their best interests are being considered. According to Canadian jurisprudence, courts should not breach international obligations, so should therefore be ensuring children have counsel in protection matters before the court, further acknowledging that the *Charter* does not automatically provide for counsel in every court proceeding but does when the actions of the state interfere with one's security of the person interests guaranteed by Section 7. As discussed above in chapter two, the psychological impacts of removing a child from one's family has been acknowledged in academia as well as in jurisprudence such as *In the Matter of R.A.; Winnipeg Child and Family Services v. K.L.W.;* and *New Brunswick (Minister of Health and Community Services) v. G. (J.).* Therefore, denying children counsel through the legal proceedings is a violation of fundamental justice and a denial of their guaranteed human rights.

## 6.3 Counter Arguments

A common opposition to providing counsel to children is questioning whether the child has the ability to instruct counsel, such as in *Children's Aid Society of London and Middlesex v. A.C.* The Ontario Supreme Court noted that "legal representation is not generally desirable if the child is too young to express his or her views and preferences and otherwise instruct counsel."[169] Similarly in *Wagner v. Melton,* the Northwest Territories Supreme Court noted "the court should exercise its discretion to appoint counsel sparingly and only where the adult litigants cannot adequately represent the child's views to the court."[170] The issue of a child being too young to adequately give instruction was addressed in Chapter 5 and could be resolved through the appointment of an *amicus curiae* or *guardian ad litem*. When seen through a human rights lens, the issues of whether the adult litigants can represent the child's views is irrelevant because the child still has the right to participate in the process, and to ensure their rights are adequately protected requires that they be represented by counsel.

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[169] Children's Aid Society of London and Middlesex v. A.C., 2013 ONSC 1870 para 13

[170] Wagner v. Melton, 2012 NWTSC 41 (CanLII), <http://canlii.ca/t/frmx9>, retrieved on 2020-04-01 para8

Another argument against counsel for children is if every child was provided with state funded counsel to represent them in child protection matters, there would be additional and potentially burdensome costs to the state. This has been noted in *Children's Aid Society of London and Middlesex v. A.C*, where Justice Marshman stated, "[i]t is a waste of scarce resources to appoint legal representation to children who cannot adequately give instruction."[171] The reference to scarce resources in a decision is problematic, as "cost cannot be a reason to withhold procedural protections that are identified as necessary to protect an important constitutional right or to prevent its violation. While it will obviously cost money to provide counsel, the child's interest is great enough and the risk of error is great enough, to overcome any governmental interest to the contrary."[172] The issue was also discussed in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* regarding a provincial policy of not providing state-funded counsel being a justification of limiting the right:

> Assuming…that the objective of this policy – controlling legal aid expenditures – is pressing and substantial, that the policy is rationally connected to that objective, and that it constitutes a minimal impairment of s.7, the deleterious effects of the policy far outweigh the salutary effects of any potential budgetary savings. The proposed budgetary savings are minimal and the additional cost of providing state-funded counsel in these circumstances is insufficient to constitute a justification within the meaning of s.1 of the Charter.[173]

The financial costs associated with providing children with counsel is a political or budgetary issue and not one for the courts to consider as "case law suggests that cost should not be a factor of constitutional consequence."[174] This is consistent with the Committee on the Rights of the Child General Comment No. 19 focused on the public budgeting for the realization on children's rights. This general comment confirms the obligation of state parties to undertake all appropriate measures per Article 4 of the *UNCRC,* including that:

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[171] Children's Aid Society of London and Middlesex v. A.C., 2013 ONSC 1870 para 13

[172] Jennifer K. Pokempner; Riya Saha Shah; Mark F. Houldin; Michael J. Dale, "Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters," Harvard Civil Rights-Civil Liberties Law Review 47, no. 2 (Summer 2012): 553

Note: While this statement was made in the context of American courts, the relevance in the Canadian context is analogous

[173] New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC) p51

[174] Jennifer K. Pokempner; Riya Saha Shah; Mark F. Houldin; Michael J. Dale, "Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters," Harvard Civil Rights-Civil Liberties Law Review 47, no. 2 (Summer 2012): 553

> Laws and policies are in place to support resource mobilization, budget allocation and spending to realize children's rights;
>
> Sufficient public resources are mobilized, allocated and utilized effectively to fully implement approved legislation, policies, programmes and budgets; and
>
> Budgets are systematically planned, enacted, implemented and account for at the national and subnational levels of the State, in a manner that ensure the realization of children's rights[175]

Further analysis of Article 4 makes clear the position of the Committee on the Rights of the Child "it is important to distinguish between the inability of a State Party to comply with its obligations compared to its unwillingness to do so. A State which is unwilling to use the maximum of its available resources for the realization of a certain right is in violation of its obligations towards the realization of that right."[176] While outside the scope of this research, the observations could be made that the overall cost of bringing children into the care of the state for lengthy periods, potentially until they reach the age of majority, would likely surpass the cost of providing them with counsel at the onset to ensure their participation is included in the determination of their best interest, which very well may be to provide supports to their family in order to facilitate a return home.

[175] United Nations Committee on the Rights of the Child, *General Comment No. 19 (2016) on Public Budgeting for the Realization on Children's Rights (art. 4)* 20 July2016 CRC/C/GC/19para 21
[176] Mervat Rishmawi, *A Commentary on the United Nations Convention on the Rights of the Child. Article 4: The Nature of States Parties' Obligations* (Leiden: Martinus Nijhoff Publisher, 2005): 29

# Chapter 7: Existing Legal Services for Children in Care

Legal services for children in care vary across Canada. Notably Northwest Territories, Ontario and Prince Edward Island have, to varying degrees, dedicated bodies within their government structures to oversee the representation of children. Both Alberta and Saskatchewan maintain rosters of private practice lawyers and funds from within government budgets. There is an organization in British Columbia, not linked to government funding, that maintains a roster of lawyers. Each of these will be discussed in turn. Three of these children's law offices are operated within the purview of the Public Trustee, two within other areas in the province's department of Justice, and one is housed within the provincial advocate's office, but all are publicly funded. The remaining provinces and territories have no offices or programs dedicated to providing legal representation for children.

## 7.1 Northwest Territories: Office of the Children's Lawyer

In November 2011, the Northwest Territories Department of Justice, acknowledging that "very few jurisdictions in Canada have a system to offer independent counsel to children in legal proceedings affecting them to ensure their voices are heard,"[177] announced the opening of their Office of the Children's Lawyer. Working under the Public Trustee, the office maintains a staff lawyer and a roster of private practice lawyers to represent children. The court can make an order for a child of any age to be represented and children over the age of 16 can request it for themselves.[178]

In the most recent annual report, the increasing recognition of the need for the services was discussed:

> Demand for legal representation for children and youth continues to increase, particularly with regard to child protection matters. There is greater recognition on the part of stakeholders (the Director of Child and Family Services, family lawyers, parents and particularly the courts) that early involvement of the Office of the Children's Lawyer in these high conflict matters usually will serve to decrease conflict and promote an early resolution. At the same time, children and youth are provided with a real opportunity to voice their own views and preferences with respect to outstanding issues, something that is not otherwise

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[177] Government of the Northwest Territories Newsroom, "Office of the Children's Lawyer" accessed May 1, 2021, http://www.gov.nt.ca/en/newsroom/office-childrens-lawyer

[178] Government of the Northwest Territories Justice, "Children's Lawyer" accessed May 1, 2021, http://www.justice.gov.nt.ca/en/childrens-lawyer/

> usually made available to them. The overall result, it is felt, is increased satisfaction with the litigation process by all family members, including children and youth, more sustainable settlements, and reduced demands on the legal system in general.[179]

It is difficult to assess the cost of the program and number of child clients as the statistics are combined in the reporting with the rest of the legal aid services in the territory.

## 7.2 Ontario: Office of the Children's Lawyer

The Office of the Children's Lawyer operating as a law office under the Ministry of the Attorney General may be the most robust office providing legal services to children in Canada and is definitely the oldest. According to a previous annual update, the office began in 1826, "when the Lord Chancellor of Upper Canada appointed a leading member of the legal Bar to be "guardian ad litem" of children to represent their interests in court."[180] Though the office was not formally recognized until 1881 as the Office of the Official Guardian, and in 1995 the name changed to the current iteration.

When the court orders that legal representation be provided in child protection cases the Office becomes involved and assigns a lawyer. Child protection matters make up 47% of their cases annually, in addition to property rights, estate/trustee, civil and custody cases.[181] According to the most recent annual report posted on the public website, the budget for the office is 40.9 million, presumably an approximate 19.2 million towards child protection matters based on the percentage of cases. They have lawyers on staff as well as access to over 500 private practice lawyers throughout the province.

## 7.3 Prince Edward Island: Office of the Children's Lawyer

The Office of the Children's Lawyer, within the Department of Justice and Public Safety, opened in 2017 to "legally represent children whose families are experiencing separation or

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[179] Government of the Northwest Territories, "Legal Aid Commission of the Northwest Territories Annual Report" (2019-2020): 13

[180] Ontario Ministry of the Attorney General, "Office of the Children's Lawyer 2014-2015 Annual Update" (July 2015) accessed May 1, 2021 http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/ocl_annual/OCL_annual_report_2015.html

[181] Ontario Ministry of the Attorney General, "Office of the Children's Lawyer 2014-2015 Annual Update" (July 2015) accessed May 1, 2021 http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/ocl_annual/OCL_annual_report_2015.html

divorce or are infringing upon their children's best interests due to parental conflict,[182] and represents children," in cases where proceedings have commenced in court under the *Divorce Act* and the *Custody Jurisdiction and Enforcement Act*. Children in need of representation are referred by the court, parents, family members, professionals working with children, and community groups."[183] While the court may order legal representation for a youth who is 12 years of age or older, child protection cases are clearly not the focus of the position.

7.4 Yukon: Public Guardian and Trustee

In child protection matters, the Public Guardian and Trustee acts as Official Guardian under the *Child and Family Services Act* and has the exclusive right to determine whether a child receives independent representation in child protection matters.[184] Services are provided by a private practice lawyer and funded by the Regulatory Services budget of the Department of Justice.[185] Not a lot of information exists publicly about the services, which is understandable given the territory reports only 95 children in care.[186]

7.5 Alberta: Legal Representation for Children and Youth program

Established in 2006 under the umbrella of the Office of the Child and Youth Advocates office, the Legal Representation for Children and Youth program was created to oversee the administrative appointment of lawyers for children receiving services under the Child, Youth and Family Enhancement Act or the Protection of Sexually Exploited Children Act.[187] The program appoints from a roster of private practice lawyers to represent children receiving services from the two above noted Acts, sets service standards and pays for the services provided. According to the program's policy manual, the program was born out of a recommendation from the

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[182] Prince Edward Island, "Giving children a voice in the legal system" updated April 12, 2017 http://www.princeedwardisland.ca/en/news/giving-children-voice-legal-system
[183] Prince Edward Island, "Children's Lawyer in demand during first 100 days" updated October 4, 2017 http://www.princeedwardisland.ca/en/news/childrens-lawyer-demand-during-first-100-days
[184] Public Guardian and Trustee Act, SY 2003, c 21, Sch C, <https://canlii.ca/t/551pv> retrieved on 2021-05-01, S4(1)(b)
[185] Yukon Department of Justice, "Budget, Main Estimates" accessed May 1, 2021, http://yukon.ca/sites/yukon.ca/files/fin/fin-2020-21-budget-main-estimates-justice.pdf s15-10
[186] Yukon Child and Family Services, "Child and Family Services Act 2017-18 Annual Report" (April 2020), accessed May 1, 2021 http://yukon.ca/sites/yukon.ca/files/cfsa_annual_report_2017-19_final.pdf
[187] Office of the Child and Youth Advocate Alberta, "Legal Representation for Children and Youth Policy Manual" (April 1, 2021) https://www.ocya.alberta.ca/wp-content/uploads/2014/08/20210401-LRCY-Policy-Manual-Final.pdf, 10

Children's Lawyer Working Committee to "create a child-friendly service of appointing lawyers to children and youth involved in child protection proceedings."[188]

The comprehensive policy manual states that the lawyers are to adopt a role of instructional advocacy, and where this is not possible, to "fully examine the child's interests and entitlements and to present evidence and act in accordance with a position that honours the most favourable outcome for the child. Counsel will no longer chose to take a best interests or an amicus curiae role."[189] The annual report explains that wherever possible, "the lawyers meet with and take direction from their young client. When the young person cannot provide direction, the lawyer examines their rights and interests and submits a position to the court. At court, the judge considers the submissions from all involved parties: the caseworker, the parents, and the child. The judge then makes a decision based on what is in the child's best interest."[190]

At the end of the 2019/20 fiscal year, there were 64 lawyers on the roster and during that year there were a total of 2,361 appointments made to represent children – 41% of them teenagers; 26% were between the ages of six and eleven and 33% were younger than five years of age. [191]

While the 4.9-million-dollar a year program is publicised as a success in its annual report, website and policy manual, the reach of the services has been criticized, such as in a 2014 article by Dr. Nicholas Bala, a professor and lawyer who has written extensively on the topic of children's rights and representation: "[w]hile the government of Alberta is spending significant sums on child representation, primarily through Legal Aid, there is still not a well organized child representation program in the province, and significantly less is being spent on legal representation for children on a per capita basis than in some other provinces, like Ontario."[192] To be fair, the number of appointments listed in the program's annual report that year was

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[188] Office of the Child and Youth Advocate Alberta, "Legal Representation for Children and Youth Policy Manual" (April 1, 2021) http://www.ocya.alberta.ca/wp-content/uploads/2014/08/20210401-LRCY-Policy-Manual-Final.pdf, 10

[189] Office of the Child and Youth Advocate Alberta, "Legal Representation for Children and Youth Policy Manual" (April 1, 2021) http://www.ocya.alberta.ca/wp-content/uploads/2014/08/20210401-LRCY-Policy-Manual-Final.pdf, 65

[190] Office of the Child and Youth Advocate Alberta, "Annual Report 2019-2020", http://www.ocya.alberta.ca/wp-content/uploads/2018/11/2019%E2%80%932020-OCYA-Annual-Report.pdf,, 33

[191] https://www.ocya.alberta.ca/wp-content/uploads/2018/11/2019%E2%80%932020-OCYA-Annual-Report.pdf ,35

[192] Nicholas Bala. "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings." *Alberta Law Review 43* no. 4 (2015) 847

1,177[193] so perhaps improvements have been made to the organization of representation for children in Alberta since.

7.6 Saskatchewan: Counsel for Children Program

In February 2009, the Saskatchewan Advocate for Children and Youth released an investigative report that discussed, among other things, the issue of access to justice for children in care. The last two recommendations listed were:

> That the Minister of Social Services immediately introduce proposed amendments to *The Child and Family Services* Act authorizing judges at all Court levels in Saskatchewan to appoint independent legal representation for children in child welfare proceedings. (Access to Justice Principles 06-10841)
>
> That the Ministers of Social Services and Justice, in collaboration with relevant stakeholders, immediately develop, fund and implement a legal program, with sufficient training and administrative oversight, that would provide children with access to independent legal representation in child welfare proceedings. (Access to Justice Principles 06-10844.)[194]

Towards the end of 2009, the Saskatchewan government announced a review of the child welfare system in the province. The report of that review was released a year later in November 2010, and noted a similar recommendation to the Advocates above, which was:

> Ensure the court system works better for families: minimize the number of child welfare cases that go before the courts, move cases to resolution more quickly, and ensure that families, children and youth have accessible legal advice.
>
> The court system must work better for families involved with the child welfare system. To achieve this, we urge the Government to build on emerging best practices by increasing mediation, diversion, use of Elders, and group conferencing mechanisms to resolve family services matters outside court. An important step will be establishing an Aboriginal court worker program to enhance legal resources for children, youth, and families. It will be necessary to make legislative changes to ensure that children and youth who require legal representation have access to those services.[195]

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[193] https://www.ocya.alberta.ca/wp-content/uploads/2014/07/AnnRpt_2013-2014.pdf p20
[194] Saskatchewan Children's Advocate Office, "A Breach of Trust" (2009) https://www.saskadvocate.ca/sites/default/files/pdfs/reports/090225_CAO_FHOC_Report.pdf , 76
[195] Saskatchewan Child Welfare Review Panel Report, "For the Good of Our Children and Youth" (2010); 40

In 2014, under the auspices of the Public Guardian and Trustee, the Counsel for Children program was created to appoint of lawyers for children involved in child protection matters. The Innovation Division of the Department of Justice is responsible for oversight and support to the program.[196] As noted in the Chapter 6 jurisdictional scan above, the Saskatchewan legislation states that the Public Guardian and Trustee may appoint legal counsel after considering:

> (a) any difference between the interests or views of the child and the interests or views of the parties to the protection hearing;
>
> (b) the nature of the protection hearing, including the seriousness and complexity of the issues;
>
> (c) the ability of the child to express his or her interests or views; and
>
> (d) the views of the child regarding representation.

The policy manual for the program instructs that counsel appointments are to assume an instructional advocacy role unless the child is unable to express their opinion and goes on to list situations which may prevent this type of representation: the child is preverbal; the child has easily apparent low cognitive functioning; the child has mental impairment due to illness or intoxication; and/or inability to understand the role of a lawyer and the concept of privilege.[197]

In the 2017/18 fiscal year, the Public Trustee and Guardian provided services to 175 youth through the Counsel for Children program.[198] The cost of the program is reported in conjunction with other family justice services in the province's public accounts so it is difficult to ascertain how much this specific program is currently costing. Being a relatively new program there is not much by way of analysis of the program's impact, but it has been noted to go further than other provinces in facilitating access to counsel for children.[199]

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[196] Government of Saskatchewan, "Ministry of Correction and Policing; Ministry of Justice and Attorney General Annual Report for 2019-20"
[197] Government of Saskatchewan, "Counsel for Children and Youth Policy Manual" (2016): 14
[198] Government of Saskatchewan, "Ministry of Justice and Attorney General, "Office of the Public Trustee Annual Report for 2017-18", 7
[199] Bala, Nicholas, and Rachel Birnbam. 2018. "Rethinking the Role of Lawyers for Children: Child Representation in Canadian Family Relationship Cases." Les Cahiers de droit, 59 (4), 787–829. p803

7.7 British Columbia: Child and Youth Legal Centre

The Law Foundation of British Columbia and Law Foundation of Ontario have sponsored the Child and Youth Legal Centre, a program through the Society for Children and Youth of BC which houses three lawyers to advocate on behalf of vulnerable children and youth.[200] This program does not appear to be connected in any way to the provincial government. According to its most recently published annual report, it provided legal services to 750 youth in 2019 within a budget of $690,405 sourced from grants and donations.[201] Though outside the scope of the analysis for this current research, it is a commendable program worth noting. It exists outside of the Office of the Representative for Children and Youth, who has legislated powers in relation to children in care but acting as legal counsel is not one.

[200] Society for Children and Youth of BC, "About Us", accessed May 1, 2021: https://www.scyofbc.org/about-us/
[201] Society for Children and Youth of BC, "2019 Annual Report » http://www.scyofbc.org/wp-content/uploads/2020/12/SCY-2019-Annual-Report.pdf

# Conclusion

## From a Children's Right's Approach

Children's rights are not always at the forefront of policy development given the pressures and lobbying of adult members of society who hold the power of the vote. In discussing the need for an independent institution for children's rights at a federal level it was reflected that "[i]n reality, children are not always a priority for governments, especially if the electorate wants other issues addressed. Without the vote, it is difficult for children to make themselves heard. As a result, children are not considered a priority in policy development and analysis; any assessment of how government policy might impact on children happens more by chance than by design."[202] Therefore, the promotion of children's rights often falls to those groups willing to apply pressure on behalf of children. One such person in Canada is Cindy Blackstock, a strong advocate for the rights of Indigenous children who wrote that "children's rights only become real when children, youth and adults work together to realize them."[203] If not to promote and support a child's rights framework on its own merits alone, it is valuable to consider that the children of today will be the adults of tomorrow so to take a child's rights approach honouring the children's right to participate is preparing them for a future of decision making. One social scientist refers to this as the 'politics of childhood', and explains it as:

> a framework for addressing children's issues which links the macro-concerns of childhood with the micro-cultures of children. It recognizes the potential contribution of children, *as* children, as active participants in community life. In this context, the politics of childhood advocates the age-appropriate inclusion of children in social policy, planning and programming. Through the development of inclusionary and participatory practices, we can nurture the capacities of children as political actors in the present and cultivate their potential as contributors to society[204]

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[202] Theresa. M. Hunter, "Canadian Child and Youth Advocates' Roles in Supporting Children's Rights," in *A Question of Commitment: The Status of Children in Canada*, eds.Thomas Waldock; Robert Brian Howe and Katherine Covell. (Ontario: Wilfrid Laurier University Press, 2020), 269

[203] Cindy Blackstock, Muriel Bamblett, and Carlina Black, "Indigenous Ontology, International Law and the Application of the Convention to the over-Representation of Indigenous Children in Out of Home Care in Canada and Australia," *Child Abuse & Neglect* 110, no.1 (2020): 9

[204] Sheila Martineau, "Reconstructing Childhood: Toward a Praxis of Inclusion," in *Governing Childhood*, ed. Anne McGillivray (Vermont: Dartmouth Publishing Company, 1997), 225

Nationally there is interest at the federal level for the promotion of the rights of children, with *Bill S-210: An Act to Establish the Office of the Commissioner for Children and Youth in Canada* making its way through the Senate[205]. This Act, introduced by Senator Moodie in June 2020 and reintroduced in fall 2020 is currently going through the second reading. It notes a comprehensive mandate for the Commissioner including to evaluate and report on government actions, advocate for the well-being of children and engage with youth to elevate their voice.[206] An independent Commissioner for Children in Canada is not a new concept and has been identified as a recommendation by the United Nations since Canada ratified the *UNCRC*. It was also a recommendation of the 2007 Standing Senate Committee on Human Rights report noted in chapter one above titled, *Children: the Silenced Citizens: Effective Implementation of Canada's International Obligations with Respect to the Rights of Children.* More recently, the final report of the *National Inquiry into Missing and Murdered Indigenous Women and Girls Call for Justice* number 12.9 included a call for the establishment of a National Child and Youth Commissioner.[207] The Commissioner for Children and Youth, once established, could go a long way towards children experiencing the rights they are entitled to, including children involved in the child welfare system.

A Way Forward for Manitoba

Adding to the complexity of Manitoba's child welfare system discussed in Chapter 2.1, is the implications and impacts from the new federal legislation, *An Act respecting First Nations, Inuit and Métis children, youth and families*[208] whereby Indigenous Governing Bodies will enact law identifying other bodies to have oversight to the services provided to Indigenous children which may or may not impact the existing Child and Family Services Authorities and Agencies mandates. As Indigenous Governing Bodies have not yet drafted legislation in Manitoba, it is not possible to postulate at this point what the impacts may be. Regardless of the body overseeing the child welfare mandate, it will still be inherently part of an administrative or legal system and

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[205] LEGISinfo - Senate Public Bill S-210 (43-2). Parliament of Canada. Accessed June 21, 2021. https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10873559&View=0.
[206] "Children and Youth Commissioner," Senator Rosemary Moodie. Accessed June 21, 2021. https://senmoodie.sencanada.ca/en/children-and-youth-commissioner/
[207] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.* Canada (2019)
[208] An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24, <http://canlii.ca/t/544xh>

therefore it is this writer's view that the children impacted will continue to possess the right to their own legal representation. This is in line with a children's rights approach which "would see proper coordination among distinct jurisdictions so as to develop comprehensive and consistent child participation rights and to ensure legal representation to children involved in administrative proceedings."[209] When the child must be apprehended into care after prevention and family enhancement services fail is when they should be appointed with legal counsel to represent them through the court or administrative process.

The suggestion could be made that, similar to Alberta, a law office for children be housed within the Manitoba Advocate for Children and Youth (MACY) office, though I would not agree. While MACY has a strong voice in the province and expanded legislation to advocate for all children and to make recommendations to government department, it is not intended to provide legal representation of individual children. The government needs MACY to have an outside view to identify and make broad recommendations on the systemic issues and barriers that are not visible from those working within the government structure. If it were legally representing children, that outside view could be diminished as it would then be part of the broader system rather than outside.

Based upon my own professional experience and judgment, and on the research laid out in the preceding pages, I suggest that the 'Made in Manitoba' approach would be to establish an independent office under the auspices of Legal Aid Manitoba which has been a legislated program since 1971. It operates at arms length from government and is funded by the province, the federal government, the law society and through fees paid by clients. The precedent of having an independent office under Legal Aid Manitoba was established with the Public Interest Law Centre which handle cases that affect groups of citizens rather than individuals.[210] I propose that the office of the children's lawyer, should operate similar to Legal Aid Manitoba in that there should be a mix of lawyers on staff and lawyers in private practices willing to represent children in welfare cases. Ideally having a physical office with staff on site would allow for youth to have the opportunity to drop-in to the office at their convenience and time of readiness to discuss their legal needs in a non-intimidating and child friendly environment. In alignment

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[209] Jan Hancock, "Participation Rights of the Child At the Crossroads of Citizenship," in *A Question of Commitment: The Status of Children in Canada,* eds.Thomas Waldock; Robert Brian Howe and Katherine Covell (Ontario: Wilfrid Laurier University Press, 2020), 248

[210] "History," Legal Aid Manitoba. Accessed July 12, 2021 https://www.legalaid.mb.ca/lam/legal-aid-manitoba/

with Legal Aid Manitoba, funding for the program would need to be a mix of federal and provincial dollars. In the creation of a law office that represents them it is crucial that, like listening and giving due weight to their voice in the cases that impact them, the voices and perspectives of children in and from care be sought throughout development of the office.

I have argued that a child has a right to their own legal representation in child welfare court processes. Not only is there potential that the court process and outcome may seriously interfere with their psychological integrity, but there is also the potential to impact matters of significant personal importance to their life. This right is established in international law through obligations of the *United Nations Convention on the Rights of the Child* and through case law under to the *Canadian Charter of Rights and Freedoms* but is in relatively few provincial and territorial jurisdictions' child welfare legislation across Canada. Given the multitude of stakeholders in the child welfare systems who may have decision-making capabilities over children's lives, to meet our legal obligations towards children, it is imperative to ensure that policies are put in place to hear the voice of the child, to ensure they have counsel to guide them through and to give due weight to their input.

Appendix 1: Right to Participation in Child Protection Legislation

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| Alberta | 2(1) If a child is in need of intervention, a court, an Appeal Panel and all persons who exercise any authority or make any decision under this Act relating to the child must do so in the best interests of the child and must consider the following as well as any other relevant matter:<br>(b) if the child is capable of forming an opinion, the child's opinion should be taken into account; |
| British Columbia | (3) If the child is 12 years of age or over, the director must before agreeing to the plan of care<br>(a) explain the plan of care to the child, and<br>(b) take the child's views into account. |
| Manitoba | 2(2) In any proceeding under this Act, a child 12 years of age or more is entitled to be advised of the proceedings and of their possible implications for the child and shall be given an opportunity to make his or her views and preferences known to a judge or master making a decision in the proceedings.<br><br>2(3) In any court proceeding under this Act, a judge or master who is satisfied that a child less than 12 years of age is able to understand the nature of the proceedings and is of the opinion that it would not be harmful to the child, may consider the views and preferences of the child. |
| New Brunswick | 6(1) In the exercise of any authority under this Act given to any person to make a decision that affects a child, the child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him, shall be given consideration in determining his interests and concerns, and the interests and concerns of the child shall be given consideration as distinct interests and concerns, separate from those of any other person. |

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| | 6(2) Where the wishes of a child have not been or cannot be expressed or the child is incapable of understanding the nature of the choices that may be available to him, the Minister shall make every effort to identify the child's interests and concerns and shall give consideration to them as distinct interests and concerns separate from those of any other person.<br><br>6(3) A person who is authorized under this Act to make a decision that affects a child may, in order to comply with subsection (1), consult directly with the child, in which case he shall do so in camera unless he determines that to do so would not be in the best interests of the child; and in consulting with the child in camera the person may exclude any person, including any party to a proceeding and his counsel, from participating in or observing the consultation.<br><br>6(4) In any matter or proceeding under this Act affecting a child, whether before a court or any person having authority to make a decision that affects a child, the child has the right to be heard either on his own behalf or through his parent or another responsible spokesman.<br><br>6(5) In any proceeding under this Act the court may waive any requirement that the child appear before the court where it is of the opinion that it would be in the best interests of the child to do so and the court is satisfied that the interests and concerns of the child with respect to the matter before the court will not be thereby prejudiced. |
| Newfoundland and Labrador | 56 Where a child who is the subject of a proceeding under this Act requests that his or her views be known at the proceeding, a judge shall<br>(a) meet with the child with or without the other parties and their legal counsel;<br>(b) permit the child to testify at the proceeding;<br>(c) consider written material submitted by the child; or<br>(d) allow the child to express his or her views in some other way. |

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| Northwest Territories | (2) Where a child referred to in subsection (1) has signature of child attained 12 years of age,<br>(a) before entering into an agreement under subsection (1), the Director shall interview the child in order to ascertain the child's views on the services to support and assist the family to care for the child; and<br>(b) the child may consent to and sign the agreement referred to in subsection (1) but the agreement is valid whether or not the child consents to or signs the agreement. |
| Nova Scotia | (2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:<br>(j) the child's views and wishes, if they can be reasonably ascertained; |
| Nunavut | (2) Where a child referred to in subsection (1) has attained the age of 12 years,<br>(a) before entering into an agreement under subsection (1), the Director shall interview the child in order to ascertain the child's views on the services to support and assist the family to care for the child; and<br>(b) the child may consent to and sign the agreement referred to in subsection (1) but the agreement is valid whether or not the child consents to or signs the agreement. |
| Ontario | 3 Every child and young person receiving services under this Act has the following rights:<br>1.To express their own views freely and safely about matters that affect them.<br>2.To be engaged through an honest and respectful dialogue about how and why decisions affecting them are made and to have their views given due weight, in accordance with their age and maturity.<br>3. To be consulted on the nature of the services provided or to be provided to them, to participate in decisions about the services provided or to be provided to them and to be advised of the decisions made in respect of those services. |

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| | 4. To raise concerns or recommend changes with respect to the services provided or to be provided to them without interference or fear of coercion, discrimination or reprisal and to receive a response to their concerns or recommended changes.<br>5. To be informed, in language suitable to their understanding, of their rights under this Part. |
| Prince Edward Island | 16 (3) Notwithstanding any other provision of this section, where a child is 12 years old or more, a plan of care shall not be effective unless (a) the plan of care has been explained to the child in a manner appropriate to the child; and (b) the Director has considered the views of the child. |
| Quebec | 2.4. Every person having responsibilities towards a child under this Act, and every person called upon to make decisions with respect to a child under this Act shall, in their interventions, take into account the necessity (4)of giving the child and the child's parents an opportunity to present their points of view, express their concerns and be heard at the appropriate time during the intervention; |
| Saskatchewan | Child may be heard 29(1) At a protection hearing, the court may, if it considers it to be in the best interests of a child who is the subject of the hearing, order that the child be:<br>(a) served with notice of the hearing within the time and in the manner considered appropriate by the court and permitted to be present at the hearing or any part of it; or<br>(b) brought before the court and interviewed by the court. (2) Notwithstanding that a child receives notice pursuant to clause (1)(a) and may be represented by a lawyer, the child is not a party to the protection hearing. |
| Yukon | 88(1) A child in the care or custody of a director has the following rights (e) to participate in, and express their views according to their abilities about, significant decisions affecting them, including development and review of their case plan; |

Appendix 2: Right to Counsel in Child Protection Legislation

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| Alberta | Legal representative<br>112(1) If an application is made for a supervision order, a private guardianship order or a temporary or permanent guardianship order, or a child is the subject of a supervision order or a temporary or permanent guardianship order or a permanent guardianship agreement, and the child is not represented by a lawyer in a proceeding under Part 1, Division 3, 4 or 5, the Court may direct that the child be represented by a lawyer if<br>(a) the child, the guardian of the child or a director requests the Court to do so, and<br>(b) the Court is satisfied that the interests or views of the child would not be otherwise adequately represented.<br>(2) If the Court directs that a child be represented by a lawyer pursuant to subsection (1),<br>(a) it shall refer the child to the Child and Youth Advocate.<br>(b) repealed 2008 c31 s50.<br>(3) If a referral is made under subsection (2), the Child and Youth Advocate shall appoint or cause to be appointed a lawyer to represent the child.<br>(4) If a referral is made under subsection (2), the Court may make an order directing that the costs of the lawyer be paid by the child, the guardian of the child or a director or apportioned among all or any of them, having regard to the means of the child and the guardian. |
| British Columbia | 70 (1) Children in care have the following rights: (m)to privacy during discussions with a lawyer, the representative or a person employed or retained by the representative under the Representative for Children and Youth Act, the Ombudsperson, a member of the Legislative Assembly or a member of Parliament;<br>(*does not state they have the right to counsel – but that they have the right to privacy during discussions with one)* |

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| Manitoba | Counsel for child<br>34(2) In the case of the child who is the subject of the hearing, a judge or master may order that legal counsel be appointed to represent the interests of the child and, if the child is 12 years of age or older, may order that the child have the right to instruct the legal counsel.<br><br>Factors affecting need for counsel for child<br>34(3) In making an order under subsection (2), the judge or master shall consider all relevant matters including,<br>(a) any difference in the view of the child and the views of the other parties to the hearing;<br>(b) any difference in the interests of the child and the interests of the other parties to the hearing;<br>(c) the nature of the hearing, including the seriousness and complexity of the issues and whether the agency is requesting that the child be removed from the home;<br>(d) the capacity of the child to express his or her views to the court;<br>(e) the views of the child regarding separate representation, where such views can reasonably be ascertained; and<br>(f) the presence of parents or guardians at the hearing. |
| New Brunswick | Role of Minister in custody proceedings<br>7 In any proceeding with respect to the custody of a child, whether under this or any other Act, the court shall,<br>(a) if the Minister is not a party to the proceeding, advise the Minister of the proceeding, in which case the Minister may intervene in the proceeding and may take whatever steps he considers necessary to ensure that the interests and concerns of the child are properly represented separate from those of any other person, including the appointment of counsel or a responsible spokesman to assist in the representation of the interests and concerns of the child, and |

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| | (b) where the Minister is a party to the proceeding and the court is of the opinion that the interests and concerns of the child should be represented by counsel or by a responsible spokesman, advise the Attorney-General that in his opinion counsel or a responsible spokesman should be made available to assist in the representation of the child's interests and concerns.<br><br>Appointment of counsel<br>7.1(1)The court shall consider the following in order to determine whether counsel should be made available under paragraph 7(b):<br>(a) whether the child is 12 years of age or older;<br>(b) whether the child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him or her, have been given consideration in determining his or her interests and concerns;<br>(c) whether the Minister has been able to identify the child's interests and concerns;<br>(d) whether the interests and concerns of the child and those of the Minister differ;<br>(e) whether counsel is better able to identify the child's interests and concerns; and<br>(f) any other factors the court considers relevant.<br><br>7.1(2)Upon advising the Attorney General that counsel should be made available under paragraph 7(b), the court shall provide the reasons justifying the decision. |
| Newfoundland and Labrador | *Does not contemplate counsel for a child* |
| Northwest Territories | 3.1. (1) The following persons are entitled to be informed of the right to be represented by legal counsel throughout the child protection process: (a) a parent or person having lawful custody or actual care of a child; (b) a child |

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| | who is able to express his or her views and preferences respecting decisions affecting him or her |
| Nova Scotia | Child as party and appointment of guardian<br>37 (1) A child who is sixteen years of age or more is a party to a proceeding unless the court otherwise orders and, if a party, is, upon the request of the child, entitled to counsel for the purposes of a proceeding.<br><br>(2) A child who is twelve years of age or more shall receive notice of a proceeding and, upon request by the child at any stage of the proceeding, the court may order that the child be made a party to the proceeding, where the court determines that such status is desirable to protect the child's interests.<br><br>(2A) Where the court orders that a child under sixteen years of age be made a party to a proceeding, the court shall appoint a guardian ad litem for the child.<br><br>(3) Upon the application of a party or on its own motion, the court may, at any stage of a proceeding, order that a guardian ad litem be appointed for a child who is the subject of the proceeding and, where the child is not a party to the proceeding, that the child be made a party to the proceeding, if the court determines that such a guardian is desirable to protect the child's interests and, where the child is sixteen years of age or more, that the child is not capable of instructing counsel.<br><br>(4) Where a child is represented by counsel or a guardian ad litem pursuant to this Section, the Minister shall in accordance with the regulations, pay the reasonable fees and disbursements of the counsel or guardian as the case may be, including the reasonable fees and disbursements of counsel for the guardian |
| Nunavut | Counsel for child |

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| | 86. (1) The court shall ensure that a child who is the subject of a hearing before the court is represented by counsel independent of his or her parents where it appears to the court that<br>(a) the interests of the child and the child's parents are in conflict; or<br>(b) it would be in the best interests of the child to be represented by his or her own counsel.<br><br>Payment of fees, disbursements and expenses<br>(2) The court may require the parents of the child to pay the fees, disbursements and expenses of counsel referred to in subsection (1) and shall specify in the order the proportion or amounts of the fees, disbursements and expenses that each parent is required to pay |
| Ontario | Consent order: special requirements<br>99 Where a child is brought before the court on consent as described in clause 74 (2) (n), the court shall, before making an order under section 101 or 102 that would remove the child from the parent's care and custody,<br>(a) ask whether,<br>(i) the society has offered the parent and child services that would enable the child to remain with the parent, and<br>(ii) the parent and, where the child is 12 or older, the child, has consulted independent legal counsel in connection with the consent; and<br>(b) be satisfied that,<br>(i) the parent and, where the child is 12 or older, the child, understands the nature and consequences of the consent,<br>(ii) every consent is voluntary, and<br>(iii) the parent and, where the child is 12 or older, the child, consents to the order being sought.<br><br>74(2) A child is in need of protection where, (n) the child's parent is unable to care for the child and the child is brought before the court with |

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| | the parent's consent and, where the child is 12 or older, with the child's consent, for the matter to be dealt with under this Part |
| Prince Edward Island | 34. Explanation to child, counsel (1) Where the Director has made an application pursuant to section 29, and the child who is the subject of the proceedings is at least 12 years old and apparently capable of understanding the circumstances, (a) the Director shall explain, to the degree that the child can understand, the nature of the proceedings and their possible implications to the child; and (b) the court may order that the child be represented by counsel at the expense of the Director. |
| Quebec | 80. Where the tribunal establishes that the interests of the child are opposed to those of his parents, it must see that an advocate is specifically assigned to counsel and represent the child and that he does not act, at the same time, as counsel or attorney for the parents. |
| Saskatchewan | Child may be heard 29(1) At a protection hearing, the court may, if it considers it to be in the best interests of a child who is the subject of the hearing, order that the child be:<br>(a) served with notice of the hearing within the time and in the manner considered appropriate by the court and permitted to be present at the hearing or any part of it; or<br>(b) brought before the court and interviewed by the court.<br><br>(2) Notwithstanding that a child receives notice pursuant to clause (1)(a) and may be represented by a lawyer, the child is not a party to the protection hearing. |
| Yukon | Separate representation of children<br>76(1) For the purposes of an application made or proposed by any person to a judge under this Part, the official guardian has the exclusive right to determine whether a child requires the appointment of a guardian, or separate representation by a lawyer or any other person, that will be paid for at public expense chargeable to the Government of Yukon's consolidated revenue fund. |

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| | (2) The official guardian may act as guardian for the proceeding or appoint a guardian for the proceeding for a child needing separate representation.<br><br>(3) When determining whether separate representation or the appointment of a guardian for the proceeding for the child at public expense is required, the official guardian (a) shall consider advice or recommendations from the judge or from any party to the application; and (b) shall consider (i) the ability of the child to comprehend the application, (ii) whether there exists a conflict between the interests of the child and the interests of any party to the application and, if so, the nature of the conflict, and (iii) whether the parties to the application will put or are putting before the judge the relevant evidence in respect of the interests of the child that can reasonably be adduced.<br><br>(4) If the official guardian believes that separate representation of a child is required and is best achieved by the appointment of a person other than a lawyer, the official guardian may appoint that other person.<br><br>(5) An official guardian who acts as or appoints a guardian for the proceeding shall as soon as practicable inform the parents and the child, if the child is of sufficient age and understanding to comprehend the appointment |

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