IMPLEMENTING CHILDREN'S PARTICIPATION RIGHTS IN FAMILY LAW

AND

CHILD WELFARE COURT PROCEEDINGS

Literature Review

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Funded by the BC Office of the Representative for Children and Youth

November 2020

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EXECUTIVE SUMMARY

The United Nations Convention on the Rights of the Child (CRC) protects all aspects of a child's life and ensures that they are appropriately protected in economic, political, social, and legal environments. Children's entitlement to legal representation and to voice their best interests during court proceedings, form a necessary component of this overarching protection. Canada ratified the CRC in 1991, and yet many shortcomings remain to British Columbia's and Canada's approach to children's rights during legal proceedings.

This literature review addresses a number of gaps and barriers that exist in relation to Canada's management of children's legal representation. In particular, this review uses as its predominant framework a number of the procedural safeguards and guarantees enshrined in the UN Committee on the Rights of the Child's General Comments on the CRC. These safeguards and guarantees are designed to ensure the implementation of a child's best interests as a primary consideration during judicial proceedings and provide insight into children's fundamental role as rights-holders within the justice system. Building on previous research undertaken by the Hon. Donna Martinson, Q.C. and the Hon. Judge Rose Raven, Provincial Court of BC, in March 2020, this review aims to supplement valuable legal research on children's participation rights by illustrating the findings of academic and policy briefs on this topic.

In relation to gaps in the approach to children's participation, the literature review suggests that children's ability to participate in legal proceedings varies dramatically across Canada and there is an insufficiently unified approach to children's rights. There is little consistency in the *forms* of legal representation that are felt to best suit the particular rights and needs of children. Additionally, though the right to participate should apply to all contexts and cases, including high-conflict custody cases and those involving domestic violence, the literature indicates that children are too often kept removed from such proceedings. Finally, there is little evidence of legal representation for children from particularly vulnerable populations, who may have unique needs requiring an intersectional, individualised approach

Barriers to the process include the fact that the implementation of children's rights, especially their right to participation, is not an Access to Justice priority in Canada. They also include substantial shortages to government funding, a lack of focused education and training on the need for children's participation, and an approach grounded in paternalistic needs to *protect* children, rather than empowering them to speak to what serves their own best interests.

Recommendations include the need to coordinate approaches to legal participation throughout Canada through the appointment of a National Commissioner for Children and Youth (as is also recommended by the Canadian Bar Association), enhanced awareness of the importance of adequately funded programs that ensure children are represented in judicial proceedings, and a need for both children or youth *and* legal professionals to be appropriately educated and/or

trained on children's participation rights. The review closes by considering a number of options for appropriate legal reform in B.C., to allow children to express their views and seek legal advice throughout court processes.

A checklist of the safeguards and guarantees provided by the UN Committee on the Rights of the Child General Comments to the CRC, as authored by the Honourable Donna Martinson, Q.C., and the Honourable Judge Rose Raven is provided (see Appendix A), along with a Background Document on the UNCRC (see Appendix B). Appendix C contains the methodology used to research the literature used in the study. Appendix D contains an annotation template used to establish the predominant academic scholarship used in the literature review. Additional resources related to this topic may be found in the bibliography to the literature review.

I. INTRODUCTION

In 1991, Canada ratified the United Nations Convention on the Rights of the Child (hereinafter UNCRC or CRC), establishing that children' s political, cultural, social, legal, and health rights not only matter, but require enhanced recognition and governmental protection. Article 12 of the CRC recognises children's participation rights, including the right of children to form views that serve their best interests, and for those views to be heard and respected in a court of law. The literature on children's participation has moved beyond whether the child's rights (CR) approach is needed, to how best to *implement* a CR approach to legal proceedings. Both the literature and the law have emphasized that children's voices should be meaningfully incorporated without being overtaken by adult-focused ideas of children's best interests (Bendo & Mitchell, 2017; Birnbaum & Saini, 2012; Martinson & Tempesta, 2018; Tempesta, 2019).

Scholars and policymakers in Canada acknowledge that participation in legal proceedings can improve a child's skills and self-esteem, inform their decision-making, and benefit their short- and long-term well-being (Birnbaum & Saini, 2012; Tempesta, 2019). This is especially important in cases involving family violence, where children can express their views and have an impact on preventing, reporting and monitoring any violence that they face (Nielsen, 2020; Tempesta, 2019). Encouraging children's participation in proceedings involving abuse, neglect, or family violence may even enhance their safety, provided that the means of participation is conducted with a view to the child's needs and circumstances (Martinson & Tempesta, 2018).

The critical importance of legal representation for children forms a part of a broader approach to children's well-being that recognises their rights, personhood, and capacity to make decisions that affect their lives (Lovinsky & Gagne, 2015; Wong, 2020). However, while there is increasing recognition in the literature that children's voices should be heard, some scholars have argued that children's views should not necessarily be determinative in legal decision-making (Eekelaar, 2016; Henaghan, 2016; Long & Senson, 2019). They highlight the need for contextual approaches that consider the child's particular circumstances, age and maturity when determining the weight to be placed on children's views (Eekelaar, 2016; Henaghan, 2016; Horsfall, 2013; Martinson & Tempesta, 2018).

This report outlines some of the fundamental gaps and barriers to children's participation in family law and child welfare court proceedings in British Columbia (B.C.), Canada. It closes with recommendations for key legal and policy changes that would best serve children's interests and uphold the CRC principles.

II. GAPS IN CHILDREN'S PARTICIPATION IN COURT PROCESSES

A. <u>Who (Which Children) Has Participation Rights in B.C.?</u>

The starting point in the literature on children's legal participation rights relates to their mental capacity to engage with the process. Despite recognition that children are persons with their own legal rights, the question remains as to whether children of all ages and competencies possess a sufficiently well-reasoned, nuanced perspective on their own best interests. Tempesta and Martinson (2018) note that age is a reductive categorization of a child's development and cognitive function, emphasising the need to empower children to speak to their own needs, as well as the dangers of deferring to parents in high-risk legal proceedings, including custody proceedings and cases involving family violence. Grover (2015) argues that denying children's fundamental rights on the basis of a perceived, arbitrary age or maturity level fundamentally undermines the CRC framework and perpetuates a blanket standard that young people under the age of eighteen are unable to rationalise their *legal* interests in particular. In actuality, even extremely young children and those with intellectual disabilities benefit when granted autonomy with enhanced protections and support in decision-making (Saaltink et. al., 2012).

Children's ability to participate in legal proceedings in Canada varies widely across jurisdictions and is emphasised differently across different types of B.C. legislation. Within the B.C. context and consistent with the CRC's recommendations, the *Family Law Act* (FLA) underscores that parents, guardians, and other parties involved in family law processes must prioritize and act in the best interests of the child(ren) (Dundee, 2016). Section 37(1) of the FLA states that "[i]n making an agreement or order… respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only." The FLA further sets out required considerations for making best interest determinations including, but not limited to, the child's health, emotional well-being, and views. Other legislation at the provincial and national levels, such as the *Divorce Act* (s. 16), *Child, Family and Community Services Act* (CFCSA), *Adoption Act*, and *Law and Equity Act*, also emphasize the best interests of the child(ren) in family court proceedings (Dundee, 2016).

In the case law, *Gordon v. Goertz [1996] 2 SCR 27* outlines that the court's duty is to understand the best interests of children as unique to each child, and not a one-size-fits-all model (Birnbaum, 2017; Dundee, 2016). The best interests provisions in the FLA now codify *Robin v Filyk [1996] 28 BCLR (3d) 21*, which established that the best interests provision outweighs and is often in conflict with the tender years doctrine, assumptions of shared or equal parenting, and other legal presumptions.

At provincial and national levels, there has been some disconnect between children's best interests and their right to be heard (Birnbaum, 2017; Dundee, 2016). This results from concerns about potential harm to children and/or conceptions that removing children from litigation is in

their best interests (Dundee, 2016). However, research shows that greater harm is done by excluding children from family law proceedings, hindering their participation, and disempowering them (Bell, 2016; Birnbaum, 2017; Dundee, 2016). This has resulted in courts preferring "… to hear *about* children rather than *from* them until very lately" (Dundee, 2016, p. 9).

Within B.C., children are afforded the right to participate in family law proceedings: 1) as parties; 2) through their lawyers; 3) via expert assessment (e.g., section 211 assessments); 4) by way of hearsay; and 5) directly (e.g., witness, written statement, affidavit, judicial interview) (Birnbaum et al., 2013; Canadian Coalition on the Rights of Children, 2020; CBA, 2020). These rights are governed under the FLA and CFCSA, with some provisions related to age and capacity. Both the FLA and CFCSA set out considerations and guiding principles for family law hearings involving children's participation, which emphasize informality, civility, and a focus on the best interest of the children.

The B.C. child protection system is largely governed by the CFCSA. Children are not entitled to be a party of the protection proceedings under s. 39(1) of the CFCSA, however the court has the authority to make the child a party to any hearing under s. 39(4) of the CFCSA (Child Protection Project Committee, British Columbia Law Institute, 2020). While the CFCSA does refer to a child's right to express their views, the Act does not include provisions that directly incorporate a child's views in child protection proceedings (Child Protection Project Committee, BCLI, 2020). This contrasts with child protection legislation in other provinces, and the FLA in B.C., which contains provisions that expressly mention children's views such as s. 211 (Child Protection Project Committee, BCLI, 2020). The Child Protection Project Committee of the British Columbia Law Institute notes in their 2020 paper however, that these s. 211 reports often lack cultural relevance for Indigenous children.

Others have noted the potential for the CFCSA, in its current form, to incorporate children's views in child protection proceedings, especially those of Indigenous children who are overrepresented in the system. John (2016) notes that s. 39(4) of the CFCSA allows for the possibility of children's participation in child protection proceedings and recommends that the court exercise this authority to ensure children can be represented by an advocate or lawyer during the proceedings.

B. How Children Participate & Giving Due Weight to Their Views

Increasingly, the literature has focused on how best to incorporate children's views into legal proceedings that affect their well-being and future (Bala & Houston, 2015; Birnbaum & Saini, 2012; Birnbaum & Saini, 2013; Birnbaum, 2017; Tempesta, 2019). Studies have shown that children generally prefer early involvement in the decision-making process for custody and access decisions, even if they are not the final decision-makers (Birnbaum, 2017; Birnbaum &

Saini, 2012; Birnbaum & Saini, 2013) and that such participation "can reduce the negative effects of family breakdown" (Birnbaum, 2017, p. 148). As such, the best interests and empowerment of children is interconnected with appropriate legal participation (Bell, 2016). Consistent with these arguments, the Canadian Bar Association Child Rights Toolkit outlines the five step process for supporting and implementing children's participation, which act as guiding principles and are consistent with the CRC's recommendations: 1) "prepare the child;" 2) "hear the child's views:" 3) "assess the child's capacity;" 4) "give due weight to the child's views and explain the decision to the child;" and 5) "address the complaints, remedies, and redress: be accountable to the child" (para. 4; see also CRC GC no. 12, paras. 41-47).

At provincial and national levels, as well as within many international contexts, the best interests of children is regarded as a paramount consideration when making determinations related to children's legal participation (Archard, 2013; Birnbaum et al., 2013; Dowd, 2016; Eekelaar, 2016). Most scholars agree that children having a voice in family law proceedings is essential for determining – as well as being a key component of - children's best interests (Birnbaum, 2017; Dowd, 2016; Dundee, 2016; Eekelaar, 2016; Fernando, 2013). Nevertheless, there are opinions of dissent. For example, Archard (2013) suggests that children's welfare, participation, and best interests need to be "weighed against other considerations," such as the autonomy and rights of adults (p. 56). It must be noted that critiques such as Archard's are the minority within child right's scholarship, and most scholars support children's legal rights to participate as a component of their best interests (Grover, 2015). Taylor (2016) further suggests that reframing children's legal participation within the best interests framework actually *counters* adult-centric perspectives or those that prioritize adults' rights over those of the child(ren).

Consistent with Article 12 of the CRC, there is a growing acknowledgement and understanding that children have a right to, and important role in, decision-making post-separation (Birnbaum, 2017; Birnbaum et al., 2016). Within Canada and internationally, one option for increasing children's participation is through Views of the Child Reports (VCRs) which are used to include children's perspectives in family law and guardianship disputes. While VCRs are under-researched, Birnbaum's (2017) findings suggest that these reports are a means by which children's voices and perspectives can be included in family law proceedings and decision-making, contending that "children do have the capacity to express their views and opinions thoughtfully and reliably" (p. 152). VCRs are encouraged as a means of supplementing other forms of children's legal participation (e.g., legal representation, custody and access assessments, child-inclusive mediation, judicial interviews).

Legal representation is another form of children's legal participation. However, there is a divide in approaches to when children should have legal representation in family law cases. Martinson and Tempesta (2018), by applying a CR analysis which specifically incorporates the CRC, argue that legal representation should be available in all cases involving children's best interests, adding that it is particularly important in (but not limited to) complex, contentious family law

issues in which the Courts are formally assessing children's best interests. They do so by analysing several CRC Articles, and applying the eight safeguards recommended by the UN Committee on the Rights of the Child; obtaining children's views is only one of the eight safeguards. The eight safeguards include: 1) "prioritizing processes, avoiding unnecessary delay" (para. 93); 2) "obtaining children's views" (paras. 89-91); 3) "establishing relevant facts" (para. 92); 4) "using qualified professionals" (paras. 94-95); 5) "using appropriate judicial 'legal reasoning' in decisions which: apply child rights principles, including giving due with to the children's views; explain conclusions different from children's views; and which are provided without delay" (para. 97); 6) "providing mechanisms to revise or review decisions" (paras. 98); 7) "requiring governments to assess the impact of all laws and policies, including budget decisions, on children's well-being" (para. 99); and 8) "requiring all appropriate legal representation when children's best interests are being formally assessed by courts, and particularly when there is a potential conflict between the parties, which is not uncommon in contested cases involving parenting issues" (para. 96). Safeguard 8, dealing with budgets, means, they say, that rather than basing decisions on what money is available, steps should be taken by governments to prioritize budgeting for children's legal representation. This CR approach to legal representation, incorporating the CRC, is specifically part of the Mission Statement and Mandate of the B.C. Child and Youth Legal Centre.

With respect to Safeguard 8, legal representation, the B.C. Court of Appeal, in *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286, noted, in comments not necessary to the decision and therefore not binding (obiter), that while the English version of the UN Committee's comments refers to legal representation, the French version refers to "un conseil juridique", which "appears to indicate" that the level of representation contemplated is not a full right to counsel, but rather a right to have the benefit of legal advice. (Martinson & Jackson, 2019 at p. 63). Tempesta (2019 at pp. 30-31) respectfully suggests that, applying a teleological approach to the interpretation of the UNCRC, it is difficult to imagine that the Committee on the Rights of the Child intended children to have less than fulsome legal protection in judicial proceedings where their best interests are being assessed and where there is a conflict with a parent. Such an interpretation, she adds, is also inconsistent with the due process guarantees afforded to all persons under other human rights standards.

Those human rights standards include the fair trial and due process rights found in the *International Covenant on Civil and Political Rights*, which applies to children. Both the UN High Commissioner for Human Rights and the Human Rights Council support legal assistance, which includes representation in court, for children in all court proceedings, as being essential to those fair trial and due process rights. Those rights are captured in the safeguards and guarantees considered necessary by the UN Committee on the Right of the Child. The right to legal representation is considered to be implicit in Article 12 of the CRC. The underlying rationale is that, as the Supreme Court of Canada stated in *Michel v. Graydon* at para. 96, child rights are

meaningless without accessible means of enforcing them. (Martinson & Jackson, 2019 at pp. 59-61; Tempesta, 2019 at pp. 10-14; Bauman, 2017 at para. 22; Appendix B)

Martinson and Tempesta (2018) explain that legal representation is generally needed to uphold the core components of a CR approach. Lawyers have the necessary expertise to assess potential evidence on admissibility and reliability, to determine whether or not to conduct or include an expert assessment, to identify ways to challenge expert evidence, to ensure timely processes through case management skills and familiarity with court rules to prevent frivolous or vexatious court applications, and to ensure that courts consider all of the relevant legal issues through advocacy (Martinson & Tempesta, 2018).

While Bala and Birnbaum (2018) recognize that counsel plays a significant role in informing parties about the views of the child, presenting evidence at a pre-trial hearing and mediating parties in high conflict situations, they argue that legal representation for children is not always the best solution in all cases. They do so based on their considerable experience and research, but do not engage in a CR analysis. Due to the high costs of appointing a lawyer for children, they suggest that it is more appropriate to use VCRs and parenting assessments instead. According to this approach, legal representation is most appropriate in situations where both parents are unrepresented, or if there are issues involving the child's safety or family violence (Bala & Birnbaum, 2018).

There are also different views on the role of children's lawyers (Martinson & Tempesta, 2018; Tempesta, 2019). Several scholars have suggested independent legal representation fits most closely with the requirements of Article 12 of the CRC, and the lawyer should act as both an advisor and advocate in court proceedings (Martinson & Tempesta, 2018; Parkes, 2013; Tempesta, 2019). Martinson and Tempesta (2018) call this the "child advocate model" of legal representation, which is necessary to ensure confidentiality (as in a traditional lawyer-client relationship) and to ensure that the child's views are given due weight throughout the proceedings. This is the model used by B.C.'s Child and Youth Legal Centre. This model is distinct from other types of representation that often involve a non-legal representative, which can be problematic as they do not have the legal expertise required to test evidence, make legal arguments and ultimately ensure that children's legal rights are upheld (Tempesta, 2019). Bendo and Mitchell (2017) suggest that child advocates should avoid speaking on behalf of children, which can work to silence them.

Other models of legal representation for children include the guardian *ad litem* (GAL) and *amicus curiae* or "friend of the court" (Bala & Birnbaum, 2018; Lovinsky & Gagne, 2016; Martinson & Tempesta, 2018; Parkes, 2013; Tempesta, 2019). Scholars have raised concerns that these types of representatives may present children's views in legal proceedings but are generally not required to advocate on behalf of children in the same way as a traditional lawyer-client relationship (Parkes, 2013; Martinson & Tempesta, 2018; Tempesta, 2019). It is noteworthy that

the B.C. Family Advocate Model, used until the early 2000s, was based on the best interests guardian model, without the benefit of confidentiality, and with the lawyer standing in the shoes of the child and presenting the lawyer's views about best interests, not the child's. In that way it differed significantly from the model now used by the B.C. Child and Youth Legal Centre. At the same time, it had many benefits, most significantly that the Advocate provided a voice independent of parents and the parents' lawyers.

B.C. is one of two Canadian provinces without a provision for children's legal representation in child protection cases (John, 2016; Lovinsky, 2016). B.C. also does not have a separate government body that provides legal counsel to children, unlike in Alberta, Ontario and the Northwest Territories (Lovinsky, 2016). In B.C. family law, the legislation provides for discretion when appointing legal counsel, and includes factors to be considered when making an appointment, which are not available in other provinces, including Alberta and Ontario (Lovinsky, 2016). *Parens patriae* jurisdiction can also be used to appoint legal counsel for children, though not all courts have this jurisdiction, and it remains unclear when this type of order should be made (Lovinsky, 2016; Child Protection Project Committee, BCLI, 2020). Only superior courts have the *parens patriae* jurisdiction to appoint counsel for children due to their inherent powers as courts of equity (Child Protection Project Committee, BCLI, 2020). This is especially problematic for B.C. child protection cases, which are held in provincial court where the *parens patriae* jurisdiction is not available (Child Protection Project Committee, BCLI, 2020).

Other provinces have adopted different methods of incorporating children's views in the court process. Ontario, for example, has established the Office of the Children's Lawyer (OCL), which can provide court-appointed lawyers to represent children, including in child protection proceedings and alternative dispute resolution processes (Child Protection Project Committee, BCLI, 2020; Long & Senson, 2019; Martinson & Tempesta, 2018). Saskatchewan's child protection legislation enables judicial interviews, while Newfoundland and Labrador further sets out various ways to incorporate children's views in child protection proceedings, including judicial interviews, oral or written submissions from the child, or allowing the child to express their views in another way (Child Protection Project Committee, BCLI, 2020). Child protection legislation in Manitoba also contains provisions that direct a court to consider the child's views in child protection proceedings (Child Protection Project Committee, BCLI, 2020). In Manitoba, these provisions are not limited to children of a particular age, but children over 12 years of age are entitled to be advised of the child protection proceedings and shall be given the opportunity to express their views to the court (Child Protection Project Committee, BCLI, 2020).

A lack of legal assistance creates a significant access to justice issue for children navigating complex legal systems designed for adults and prevents children from upholding their rights in decisions that have significant psychological and logistical impacts on their lives, which may

have long-lasting effects that continue into adulthood (Martinson & Tempesta, 2018; Tempesta, 2019; Wong, 2020).

C. The Right to Participate Applies to All Children and therefore All Cases, including Family Violence

Research demonstrates that children's rights to participate and be heard should be privileged in family and child protection courts, even when the legal proceedings involve allegations of domestic violence and/or parental alienation (Birnbaum & Saini, 2013; Lehrmann, 2010; Macdonald, 2017; Martinson & Raven 2020a, 2020b; Morrison et al., 2020). Situated within the CRC participation framework, Martinson and Raven (2020a) demonstrate that children's participation – their right to be heard – in family court and child welfare hearings, as enshrined in Article 12, is one of the four general principles of the CRC, and is directly connected to the other principles. The second and third are their right to life and healthy development (Article 6) and to be free of discrimination of all kinds (Article 2). Participation is also inextricably linked to the fourth, giving primary (meaning raised over others if there is a conflict) consideration to their best interests, Article 3 (see also Morrison et al., 2020).

Further, Martinson and Raven (2020a) note that there are two participation rights found in Article 12, the right of children capable of expressing their own views to express them freely, and the right to have those views given due weight in all cases (s. 5.1.5). They refer to a B.C. Supreme Court decision, *N.J.K. v. R.W.F.*, 2011 BCSC 1666, and an Ontario Superior Court decision, *Medjuck v. Medjuck*, 2019 ONSC 3254, both of which say that the CRC does not make an exception for cases involving high conflict, including those dealing with domestic violence and parental alienation or both; most children are capable of forming their own views in these cases and the views should be allowed and weighed alongside other evidence.

Article 19 deals with children's right to be protected from violence of all kinds in their "homes." The UN Committee on the Rights of the Child is clear about the importance of participation in violence cases and states that the child's right to be heard has particular relevance in violence situations and the participation right commences with very young children who are particularly vulnerable to violence: General Comment 13, para. 63 (Martinson & Jackson 2019; Neilson, 2020; LEAF Divorce Act Brief, 2018). When dealing with child clients or witnesses, the intersection of Articles 3, 12 and 19 should be considered. For example, promoting children's participation and voice should be considered in tandem with the right to protection from harm and best interests of the child (Canadian Bar Association Child Rights Toolkit, *Freedom From all Forms of Violence*, 2017).

However, children are too often kept out of court processes in family violence cases. Concerns have been raised about decision-makers, including both lawyers and judges, minimizing the significance of violence, concluding that it is not related to post-separation parenting. They can

also ignore or minimize children's views about the existence of violence and its impact (LEAF Divorce Act Brief, 2018, CBA 2020, p. 18 and p. 26). In 2019, 352 family violence experts from around the world (including 52 from Canada) raised in a Collective Memo to the World Health Organization the issue of the discounting of the perspectives of children and the non-protection of children from parental abuse, in alienation cases (see Martinson & Jackson, 2019). Dr. Linda Neilson's work - especially her eBook published by CanLii (2020), *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* - has addressed the serious risk of harm caused by marginalizing or ignoring the views and preferences of children in family violence cases. She notes that scrutiny of Canadian family law cases reveals the silencing and ignoring of children's experiences and views, particularly when a parent claims parental alienation. This, she says, must change (6.5.1; see also Fidler & Bala, 2020).

In family violence cases, many children indicated that they should be able to make their own decisions regarding custody and access issues (Birnbaum & Saini, 2013). This finding is consistent with Martinson and Raven's (2020a) conclusion that "ALL children" with the capacity to form their own views have the right to express these views during legal proceedings, including family violence and alienation cases (s. 5.2.1). Promoting children's participation is considered a safeguard to ensure that children's rights are respected and their access to justice and best interests are advanced and protected during court processes. This safeguard interlinks with Morrison et al.'s (2020) finding that legal proceedings with domestic violence and potential parental manipulation pose a "significant and serious" threat to children's legal right to participation. As a result, child-centred reform is recommended to ensure children's rights are promoted in all legal proceedings (Morrison et al., 2020).

A real concern directly impacting children's participation rights is the potential to conflate high conflict and violence in court processes. The term high conflict is used to describe relationships that are "mired with conflict" with "pervasive negative exchanges" and a "hostile insecure emotional environment" (Anderson et al., 2010, p. 11). Conflict, which may be caused by one or both parents or guardians, should not be confused with violence, which is most often caused by the abuser. It can be dangerous to conflate conflict and family violence, as requirements that are appropriate in nonviolent, albeit conflictual, situations should differ from those that need to be put in place when an abused woman is involved in a divorce proceeding ("Bill C-78 Joint Brief," 2018). The same considerations apply to any abused spouse. Brown, findlay, Martinson, and Williams (2021) argue that the proper approach to reducing conflict is to first investigate whether there is family violence, and if so, whether the family violence creates a risk of present or future harm. Only if there is no current or future family violence risk should the objective of reducing conflict be considered. Proceeding otherwise masks the significance of family violence generally and prevents children from speaking about its existence, impact, and their views about the outcomes.

Brown, findlay, Martinson, and Williams (2021) discuss violence and its conflation with conflict as part of their analysis of the BCCA decision in *AB v. CD*, 2020 BCCA 11. They support the Court's conclusions that AB, a fourteen-year-old trans boy, has the right to make treatment decisions under the *Infants Act* and that he had the right to have legal counsel represent him as his advocate, throughout the court proceedings, though pro bono as public funding is not available. However, they respectfully suggest that aspects of the decision are incorrectly decided and are called into question by a later Supreme Court of Canada decision which emphasizes that children are full rights bearers: *Michel v. Graydon.* 2020 SCC 24. The authors question the Court of Appeal's conclusion, without analysis, that an intention to harm is required in a finding of psychological or emotional family violence against a child. A requirement of intent effectively nullifies the protection for a child against psychological family violence because a psychologically violent parent will always assert that they are proceeding in the best interests of their child. The proper analysis should continue to be focused on the impact of the violence on the child and requires the child's full participation. The authors also question the narrow analysis of the ability of a child to seek a best interests declaration under the FLA that the conduct of a parent or guardian amounts to family violence and to request a Protection Order. Applying the statutory interpretation principles reviewed in *Michel v. Graydon,* the authors argue that these conclusions are contrary to the scheme and objects of the legislation, its clear language, the social and historical context of violence against children, and the provisions of the UNCRC.

The literature has recognized that legal representation by an appointed lawyer for children is especially important in family violence cases (Bala & Birnbaum, 2018, Elrod, 2016; Lovinsky & Gagne, 2015; Martinson & Tempesta, 2018; Tempesta, 2019). Elrod (2016) notes that in cases with claims of parental alienation, it is not always clear whether the child's behaviour is due to manipulative behaviour from one parent or genuine estrangement due to domestic violence or other issues, and children can often be caught in the middle of this type of conflict. In these types of situations, a court-appointed lawyer for the child can be an appropriate way of ensuring children's views are meaningfully considered (Elrod, 2016). Elrod (2016) also recognizes that parental alienation claims have been used to counter allegations of abuse, and judges should carefully consider children's views through court-appointed lawyers in cases involving claims of parental alienation. Nichols (2014) contends that such legal representation must occur through providing independent representation for children to "ensure that their interests remain front and center" (p. 663).

Other issues arise when simultaneous court proceedings take place with respect to the same family, especially in cases involving family violence. In B.C., the operation of these proceedings in uncoordinated silos can create dangerous and conflicting outcomes, especially concerning children's safety (Martinson & Jackson, 2016). Coordination includes the making of similar decisions with regard to the child's participation in both court settings. Numerous challenges to children's effective participation also arise from this fragmented approach. They concluded that any reforms focused on family violence and the risk of harm must ensure that six overarching

family violence goals are met. The sixth goal focuses on children's legal rights, stating "that particular attention is paid to children's legal rights generally, and with respect to their rights to participate in all matters affecting them in particular" (Martinson & Jackson, 2015, p. 15).

Some scholars have suggested that judicial interviews should be available to children as a complementary form of participation even if the case involves allegations of domestic violence or parental alienation (Bala et al., 2013; Birnbaum & Saini, 2012; Martinson & Raven, 2020a). It can be especially important for children to feel that they have been able to speak directly to the judge. Despite these challenges to an adult's rights framework, there remain concerns that adult's rights and voices, chiefly those of fathers and predominantly in relation to claims of parental alienation, will obscure children's views in court (Macdonald, 2017). Martinson and Raven's (2020b) safeguards provide a potential remedy, as they place children's rights and best interests at the forefront of decision-making in these cases.

D. Applying the CRC and the UN Committee's General Comments of the Committee in Court Processes and in Decision Making – Generally

Canada's accession to the CRC denotes a willingness to protect and promote children's participation rights under Article 12. However, the implementation of Article 12 also requires enhanced provincial governance to ensure that the principles within the CRC are appropriately implemented. Children's legal right to have their views heard in judicial or administrative proceedings varies by jurisdiction, as well as across different areas of law. There is no oversight of the distinctions between different provincial mechanisms ensuring participation, meaning that children may be disadvantaged in their options to participate simply by virtue of their location. The principles in the CRC are also not consistently applied even within the same jurisdictions and areas of law, thus complicating the matter further (CBA, 2020, p. 25). Instead, different provinces have aimed for what the Canadian Bar Association refers to as 'technical compliance', whereby children's participatory rights are enshrined in domestic legislation, while allowing individual courts to determine the logistics of when children are consulted (Canadian Coalition on the Rights of Children, 2020; CBA, 2020; Waldock et. al., 2020).

Despite scholars exploring a broader range of mechanisms to incorporate children's views in legal proceedings, there is still little consensus as to which methods should be adopted as 'best practice' across Canada (Birnbaum, 2017; Tempesta, 2019). Some scholars have suggested that a combination of mechanisms would be most appropriate, such as using VCRs alongside other forms of children's legal participation, including legal representation, child-inclusive mediation, custody and access assessments, or judicial interviews with children (Birnbaum, 2017; Bala & Birnbaum, 2019; Bala & Houston, 2015). Some non-legal methods of children's participation have been challenged - including parenting assessments, which have not always effectively incorporated children's views and are often not critically examined by courts; and VCRs, which

can be tokenistic in presenting the child's views and lack safeguards for confidentiality, as report-writers are compellable as witnesses (Tempesta, 2019).

Nevertheless, there have been recent 'encouraging developments' to incorporate a more focused CR approach into court processes. Although orders for separate legal representation for children remain rare in B.C., Bala and Birnbaum (2018) praise the establishment of the Children and Youth Legal Centre in B.C., as well as B.C. 's increasing emphasis on VCRs. Furthermore, Martinson and Raven's (2020a) expanded safeguards for children ensure that an appropriate weight is placed on children's views and needs at every step of the legal process, in accordance with Canada's CRC obligations. Although there is some evidence to suggest that the B.C. legislature, lawyers, and judges are attuned to the need for a child's rights approach, more work is needed to ensure a comprehensive and consistent approach to children's participation is taken across courts and jurisdictions in Canada.

E. Considerations in Relation to Marginalised Populations in Canada

Securing the best interests of the child remains one of the core principles of the CRC, and the literature emphasises the overarching importance of this principle *throughout* the court process (CBA, 2020; Bala et. al., 2013; Bendo & Mitchell, 2017). This includes appropriate treatment and inclusion of children as legal participants at *all* phases of proceedings, engaging with children on more than one occasion during a court process, and implementing appropriate safeguards that guarantee children's legal rights (CBA, 2020; Martinson & Raven, 2020a).

Although procedural considerations for all children's voices should be a foundational concern for Canadian judges, some children will have additional needs that must be considered. Children's age, ethnicity, socio-economic status, and gender/gender identity (amongst other factors) all interact to shape their social identities and impact their day-to-day lives. The ways in which these factors merge is best understood through the concept of 'intersectionality' (Sandberg, 2015). Taking an intersectional approach to children's rights in a legal setting allows lawyers and judges to understand critical differences between seemingly homogenous groups. Though traditionally an intersectional approach is most commonly associated with structural victimisation and violence against already-vulnerable populations (Boyce, 2016; Burczycka & Conroy, 2018; Rotenberg, 2019), an intersectional approach must be taken to recognise overlapping oppressions experienced by children from different cultures and backgrounds. There is a growing recognition of the need for focused, individualised support for children's participation in family and welfare proceedings (Bala & Houston, 2015; Bala, 2016). However, more systematic research is needed to ensure that *all* children are given a voice within the legal system, regardless of their background or culture.

The paucity of literature focused specifically on legal participation rights for Indigenous children and other minority groups, indicates that challenging stereotypes continue to pervade the success

of a holistic approach to children's participation rights in refugee or immigration proceedings. Although recognition of the importance of this issue has grown over time, scholarship in this area shows that an intersectional approach to children's rights needs more emphasis to be fully realised (Bala & Houston, 2015; Hayes, 2013). The literature also lacks a focus on legal representation in the child protection system, in contrast with family law. At most, the literature looks at deficiencies that exist within child protection regimes overall and its impacts on Indigenous children who are overrepresented in the system - but does not go further in discussing the role of children's *participation* in these systems (Cleland, 2016; John, 2016).

There is also a comparatively diminished focus on the rights of refugee children to be represented during legal proceedings (Hayes, 2013; Martinson & Raven, 2020a; CBA, 2020). This may be the case because such children lack official status in Canada as permanent residents or citizens and thus are denied basic economic and social rights, as well as rights in a legal setting (Canadian Coalition on the Rights of Children, 2016). This is despite the fact that tests relating to children's best interests are enshrined in the *Immigration and Refugee Protection Act,* as well as the aforementioned legislation relating to children's welfare and safety within family units (CBA, 2020). Given the particular, intersecting vulnerabilities experienced by immigrant and refugee children entering Canada, this is a particularly egregious omission and may result in the silencing of the child in these settings. It is thus particularly important that more attention is drawn to the multifaceted oppressions and gaps that exist in relation to these populations, and that more assistance is provided to afford basic legal rights to these groups (Canadian Coalition on the Rights of Children, 2016; CBA, 2020; Martinson & Raven, 2020a, 2020b).

Scholarship focused on Indigenous children's rights, as well as the rights of refugee children, tend to concentrate on child poverty and welfare, rather than their active participation in legal proceedings (King et al., 2016). This may be the case for two predominant reasons. First, scholarship continues to focus on integrating Indigenous traditions, culture, and needs into 'Western' models of justice, rather than developing standalone models that fit the unique needs and requirements of Indigenous communities (Canadian Coalition on the Rights of Children, 2016). Second, this population is described as particularly vulnerable, meaning their fundamental needs require additional or different approaches, analyses, and supports (Canadian Coalition on the Rights of Children, 2016; Martinson & Raven, 2020a).

III. BARRIERS/CHALLENGES TO CHILDREN'S PARTICIPATION IN COURT PROCESSES

A. Lack of availability of Government Funding for Participation Generally and for Legal Representation

One of the legal procedural safeguards required by the UN Committee on the Rights of the Child is the use of Child Rights Impact Assessments (CRIAs) by governments, as enshrined in General

Comment 14, paras. 35 and 99. This safeguard includes the requirement for governments to assess all government actions, including budget decisions, to ensure that the CRC's child rights approach is implemented. Thus, governments have an obligation under the CRC to provide adequate funding. However, research almost universally emphasizes that a shortage of funding is a barrier to ensuring that children's views are appropriately represented (Bendo & Mitchell, 2017; Byrne & Lundy, 2019; Collins, 2019; Parkes, 2013). B.C. has no funding for legal representation for children, in comparison with Ontario (CBA, 2020). A second concern relating to funding is that the existing B.C. FLA, s. 203 specifically makes the costs of a child's counsel the responsibility of the child's parents or guardians, not the government.

Although the literature is broad in scope when outlining possible CR mechanisms or options such as best interest assessments, guardian ad litem, and interviews between children and judges, there is insufficient clarity as to which approach would be fiscally efficient as well as beneficial to the child's best interests. For example, while child advocacy can be a promising method of incorporating children's views in legal proceedings, funding for their offices and operation can vary depending on partisan political influences (Bendo & Mitchell, 2017).

B. Lack of Education/Knowledge about a Child Rights Approach

There appears a pressing need for more education on child rights for judges, lawyers, mental health professionals and government ministries of justice. The UN Committee, in its last Concluding Observations (2012), found no systemic training on children's rights and the UNCRC for professional groups working for or with children. This continues to be an issue in 2020 (CBA, 2020). This lack of education and focused training for all parties can also cause some professionals not to understand the CRC's legal status in Canada – thinking, erroneously, that because it is not directly incorporated into most domestic legislation, it is not part of Canadian law - this is simply not the case.

C. Implementing Children's Rights, including Their Participation Rights has not been a Canadian Access to Justice Priority

Over the last eight years, the legal profession in Canada has engaged in important work focused on access to justice generally, with a focus on family law. Two national reports, *Reaching Equal Justice,* a CBA initiative, and *A Roadmap for Change*, led by the Supreme Court of Canada, were released in 2013. While these reports are important, the recommendations in them focus primarily on adults. Children's access to justice issues are, for the most part, considered by looking at how children benefit from a system that operates more effectively for adults. Yet, the driving force behind the creation of the CRC was the recognition that a separate, child rights approach is required, with the necessary safeguards (for example, see the comments in CBA, 2020, p. 15; and A Roadmap for Change; in *Children's legal rights in Canada under the United Nations Convention on Rights of the Child*, at pp. 51-56).

D. Paternalism/Protectionism vs. Empowerment

The Canadian Senate Standing Committee on Human Rights*, in Children: The Silenced Citizens,* described a protectionist approach as treating children as human 'becomings', not human beings. B.C. Chief Justice Robert Bauman has spoken about the importance of empowerment for children, not paternalism (Bauman, 2017).

Many people, including professionals working with or in relation to children, continue to take a protectionist approach to children, thinking that it is in the best interests of children to keep them, as much as possible, out of court processes (Martinson & Raven, 2020a). Changing this view requires a major shift in thinking: a paradigm shift where children are seen as people who have substantive rights and due process rights, as well as important contributions to make in decisions that affect them. The CBA Child Rights Toolkit contains a section on the issue of children's empowerment, called Life, Survival and Development (see also Martinson & Tempesta, 2018, pp. 163-164).

E. Reluctance to Enhance the Legal Status of the CRC by Direct Incorporation into Domestic Law

While the CRC has legal status in Canada, that status would be enhanced by the federal and provincial territorial governments specifically incorporating it into legislation. It is, for example, found in the preamble to the *Youth Criminal Justice Act*. Ontario also refers to it in the preamble to its child protection legislation, while most other provinces have not incorporated the CRC into legislation relating to children at all.

There is strong support for direct incorporation. The UN Committee recommended this in its 2012 Concluding Observations. The Canadian Bar Association has also passed a resolution supporting its incorporation. The CBA Alternative Report (2020) and the Senate Human Rights Committee, in *Children, the Silenced Citizens* (2007) both also recommend its incorporation.

IV. RECOMMENDATIONS RELEVANT TO CHILD PARTICIPATION IN FAMILY AND CHILD WELFARE COURT PROCESSES

A. National Commissioner for Children and Youth

Despite the Canadian federal government ratifying the UN CRC, provinces are inconsistent in how and when legal counsel is appointed for children (CBA, 2020; Child Projection Project Committee, BCLI, 2020; Lovinsky, 2016). Even within a province, there are often inconsistencies across different areas of law (Child Protection Project Committee, BCLI, 2020; Lovinsky, 2016). The literature also notes that current independent provincial and territorial Child Advocate and Representative Offices vary widely across provinces and are vulnerable to

funding and operational changes due to provincial restructuring and changes in political priorities (Bendo & Mitchell, 2017; CBA, 2020). For instance, Ontario's Provincial Advocate for Children and Youth was recently closed, and its investigative functions were transferred to the Ontario Ombudsman, which does not carry the same specialized approach towards children's rights as the Provincial Advocate for Children and Youth (CBA, 2020).

These issues can be addressed through a national plan across provinces to coordinate efforts and maintain consistency (Byrne & Lundy, 2019; CBA, 2020; Collins, 2019). The CBA recommends that the federal government develop an independent National Commissioner for Children and Youth reporting to both Houses of Parliament, with a statutory mandate to protect and promote human rights amongst children and youth in Canada, including their rights to participation, and to liaise with provincial, territorial and Indigenous counterparts to coordinate efforts of mutual concern and overlapping jurisdiction. The CBA further suggests that the National Commissioner should serve to coordinate and ensure consistency amongst independent child advocate offices across provinces and territories. Finally, the CBA emphasizes the importance of incorporating and protecting the rights and interests of Indigenous children and youth when developing a national policy on children's rights.

B. Effective Monitoring through Child Rights Impact Assessments (CRIAs), etc.

The literature has noted a specific need to monitor children's rights across Canada (Byrne & Lundy, 2019; Canadian Coalition for the Rights of Children, 2016; CBA, 2020; Collins, 2019). Options for effective monitoring include establishing regional institutions and a National Commissioner dedicated to regularly assessing children's rights, conducting ongoing child rights impact assessments, and ratifying the Third Optional Protocol to provide a communications procedure for children and youth to directly contact the UN CRC Committee regarding child rights complaints (Byrne & Lundy, 2019; Canadian Coalition for the Rights of Children, 2012; CBA, 2020; Collins, 2019).

Child Rights Impact Assessments (CRIAs) should inform the development of policy on children's rights, as well as aid in the assessment of the actual impacts of policies related to child rights (Byrne & Lundy, 2019; CBA, 2020). Following the UN CRC Committee's recommendations, the CBA (2020) notes that CRIAs should involve perspectives from various stakeholders, including children. Currently, CRIAs are not systematically used in decision-making across any provinces and territories other than New Brunswick and Saskatchewan (CBA, 2020). Given their key role in ensuring adherence to children's rights, CRIAs should receive adequate funding to function effectively (Martinson & Raven, 2020a).

C. Taking an Intersectional Approach to Children's Rights

In order to ensure that *all* children are granted the right to participate in legal proceedings in Canada, it is critical that all parties take an intersectional approach to understanding children's rights and needs (Martinson & Raven, 2020a). This means acknowledging the particular nuances of a child's circumstances and recognising that these may vary on a case-by-case basis. This also requires courts to recognise children's socio-economic status, gender identity and expression, and differing abilities, amongst other factors (Canadian Coalition on the Rights of Children, 2016; CBA, 2020; Martinson & Raven, 2020a, pp. 22-23). Upholding children's rights requires the creation of an environment in which all children feel empowered to participate in legal proceedings that affect them, regardless of their circumstances (CBA, 2020).

D. Enhanced Awareness and Training

Ensure Children are Appropriately Educated as to their Rights

As this literature review has established, there are various ways in which children's rights to participate in legal proceedings can be strengthened and preserved. To ensure sufficient attention and awareness is given to children's participation rights, all parties to legal proceedings involving children must be appropriately educated and trained (Canadian Coalition on the Rights of Children, 2016, p.9; CBA, 2020; Martinson & Jackson, 2016; Martinson & Raven, 2020a). To increase awareness on child rights, more information about court processes should be provided to children, particularly older children, so they can provide informed views and preferences during legal proceedings (Birnbaum & Saini, 2012; Byrne & Lundy, 2019; Paetsch et al., 2018). This could also be achieved by incorporating children's rights into school curriculums (Collins, 2019). A holistic, rights-based education would not only preserve the best interests of the child through the expression of their views but could also enable children to further realise their rights in other areas (CBA, 2020; Paetsch et al., 2018).

Education and Training for Legal Professionals

The Canadian legal system also requires specialised training of professionals working with children, including mental health professionals, lawyers, and judges (Bala & Birnbaum, 2019; Collins, 2019; Paetsch et al., 2018). This is particularly important for legal professionals working on cases involving parental alienation and/or family violence (Elrod, 2016; Martinson & Jackson, 2016). These types of cases require judges and mental health professionals who are experienced in discovering and addressing problems in the family, as there can be multiple reasons for a child refusing contact with a parent or guardian, including family violence that can continue to put the child at risk if left unaddressed in custody and access decisions (Elrod, 2016; Martinson & Tempesta, 2018).

Specific recommendations for children's legal counsel include: ensuring democratic communication, in which lawyers and child both share information about themselves to build

trust in preparation for proceedings; having lawyers inform children about the court process and what it means to have a lawyer represent them; having lawyers pose questions to children to better recognize how children understand the court process; and getting lawyers to emphasize flexibility in the child's options to share their views, not share them at all or change their instructions to the lawyer (Bala & Birnbaum, 2019; Koshan, 2020; Horsfall, 2013; Paetsch et al., 2018). Those working at family courts should receive specialised training on family violence and high-risk cases, which can have a substantial impact on children's rights (Koshan, 2020; Martinson & Raven, 2020a). From a scholastic perspective, much more research is needed to understand which of the many strategies implemented across Canada (and the world) might be most helpful to children's legal participation (Birnbaum & Saini, 2012). This requires ongoing cooperation and collaboration between the legal and academic communities, to guarantee specialised and sensitised approaches to this topic.

Seek Consultations with Judges Regarding Children's Participation

One of the most valuable ways in which judicial perspectives could be sought as to the level of education and training received across Canada, would be through an in-depth consultation that would identify fundamental flaws within the Canadian legal system (see Martinson & Jackson, 2016). Consultations should include members of the Indigenous legal community, who are best placed to speak to the needs of Indigenous children in Canada (CBA, 2020).

E. <u>Increasing Attention (and Resources) Must be Given to Children's Representation</u>

Academic scholarship and policy papers focused on children's rights to representation point to the need for increased funding from government sources, to provide consistent and dependable counsel for children (Bala & Birnbaum, 2019; Byrne & Lundy, 2019; Canadian Coalition for the Rights of Children, 2016; Collins, 2019). However, it is also notable that none of this literature provides specific guidance as to where extra funding should be sourced or how new programming may be implemented to maintain both efficient and effective legal assistance for children to facilitate the expression of their views in a legal setting. In particular, the CBA Alternative Report (2020) suggests that in B.C., absolutely no funding is set aside for children's representation (p. 33). This is particularly problematic in relation to immigrant, refugee, and Indigenous children (CBA, 2020). This may be the case for two reasons: 1) an overall lack of resources (particularly given the current local and international economic climate in the wake of Covid-19 - see Garlen, 2020); and/or 2) a lack of awareness at the federal level of the critical importance of this issue, and the 'domino effect' of reduced rights for vulnerable populations. As a result, it is recommended that policy organisations focused on this issue work to demonstrate whether and how additional funding can be allocated to children's legal representation. In New Zealand, for example, the *Family Court (Supporting Families in Court) Legislation Bill* forms part of a $62 million package that restores the right to legal representation at the start of a care of children dispute in the Family Court (Government of New Zealand, 2020, p. 1). Enhanced

attention and funding at the federal level can only benefit both those organisations focused on this area, as well as beneficiary populations.

F. Participation and Representation Generally

Protect and guarantee participation rights for children

Children's rights, participation, welfare, and best interests are unquestionably interlinked. Children are persons with their own legal rights and must be guaranteed the right to participate in guardianship and family law proceedings (Grover, 2015; Martinson & Tempesta, 2018). Children's rights to participate are in line with the UNCRC's recommendations and FLA's best interests provisions (Dundee, 2016), and work to safeguard and prioritize children's voices and preferences about their own well-being.

Implement an empowerment-based approach to participation and representation

Development and cognitive functioning should not prohibit children's participation in court proceedings, as this denies children their fundamental rights based on perceived functioning and undermines the UNCRC's recommendations (Grover, 2014; Martinson & Tempesta, 2018). Instead, an empowerment-based approach must be adopted and implemented that promotes, prioritizes, and ensures children's participation in guardianship and family law proceedings regardless of age or capacity. An empowerment-based approach would be child-centred and incorporate strategies that would ensure children's participation regardless of age and/or capacity, including legal representation, judicial interviewing, VCRs, and child-inclusive mediation.

Guarantee legal representation for all children and in all cases

From a child rights perspective, treating children as full rights bearers, (*Michel v. Graydon*, at para. 77) legal representation is a key form of children's participation which ensures that children's voices will be heard, and due weight will be given to their opinions (Tempesta, 2019). Legal representation should be provided in all cases involving children's interests in order to sufficiently fulfil requirements from Article 12 of the UNCRC, including the UN Committee on the Rights of the Child safeguards and guarantees, referred to above. (Elrod, 2016; Lovinsky & Gagne, 2015; Martinson & Tempesta, 2018; Tempesta, 2019). As such, it is necessary to provide legal representation to all children (who choose it after obtaining meaningful information and advice about it and other choices), in all cases, including high risk cases, in order to protect their rights and promote their best interests in guardianship and family law proceedings regardless of the level of risk, as well as fulfil the requirements outlined by the UNCRC (Birnhaum, 2017; Birnbaum et al., 2016; Martinson & Tempesta, 2018; Tempesta, 2019).

Legal representation as the government's responsibility

The majority of Canadian provinces have separate government bodies in place that provide legal counsel to children (Lovinsky, 2016). B.C. must also assume the responsibility for providing funding and personnel to secure legal representation for children in all guardianship and family law cases in order to adhere to the UNCRC's recommendations and FLA's best interest provisions, and to concur with the 2020 CBA report recommendations.

G. High Risk Legal Proceedings

Ensure children's participation in high-risk cases

High risk cases (e.g., high conflict, presence of violence, allegations of parental alienation) pose a threat to children's legal right to participation (Martinson & Raven, 2020b; Morrison et al., 2020). As such, safeguards must be put into place that ensure children's rights are respected and that their access to justice and best interests are advanced in high-risk cases.

Distinguish between high conflict and violence

The language used in high-risk cases must be clarified to delineate between high conflict cases and cases with the presence of violence to ensure the appropriate safeguards are put into place to protect and promote children's participation (Martinson & Raven, 2020a, 2020b; Brown, findlay, Martinson, & Williams, 2021).

Legal representation in high-risk cases

Children must be provided with legal representation to ensure that their best interests are at the forefront of decision-making in high-risk cases (Elrod, 2016; Lovinsky & Gagne, 2015; Martinson & Tempesta, 2018; Tempesta, 2019), which includes providing court appointed and funded lawyers to ensure that children's claims are meaningfully considered and given due weight (Elrod, 2016).

H. Law Reform

The Supreme Court of Canada, in *Michel v. Graydon*, which specifically deals with the B.C. *Family Law Act,* discusses principles that apply to the interpretation of statutes which directly bear on the role of the B.C. Legislature in upholding children's rights, including their participation rights. The concurring judgment states: (1) that the Legislature is presumed to take into account Canada's international obligations, which includes those found in the CRC (at para. 103); and (2) that the Legislature is taken to know the social and historical context in which it

makes its intention known (at para. 97). The literature, taking an approach consistent with these principles, suggests that the Legislature plays a critical role in implementing children's right to participate effectively in court processes. Though many important legislative, regulatory and policy steps have been taken, the literature identifies several others that are necessary to meet B.C.'s obligations to children in family law and child welfare processes. They include the specific incorporation of the CRC in both the FLA and the CFCSA, ensuring that both court processes incorporate procedural safeguards and guarantees, making sure that children in court processes are fully informed of their participatory rights and allowing children to apply for declarations relating to their best interests.

In addition, specific legislative changes and clarifications are necessary in the FLA and the CFCSA. For the FLA, these include a review of the following sections: s. 37(1) (b), views of the child; the s. 1 definition of family violence (to clarify that intent is not required); s. 203, dealing with legal representation; s. 199, dealing with conflict and family violence; and s. 37(2)(j), considering any other civil or criminal proceeding. For the CFCSA, amendments are required which provide the legal advice and representation children require throughout the processes, as well as specific provisions relating to hearing children's views.

Incorporation of the CRC

The literature has long supported specific incorporation of the CRC in all legislation relevant to children. It is particularly important in family law and child welfare cases but has not happened in B.C. (Brown, findlay, Martinson, & Williams, 2021; CBA 2020; Andreychuk & Fraser, 2007; UN Committee on the Rights of the Child Concluding Observations: Canada, 2012). An example of the effective incorporation is found in Ontario's *Child, Youth and Family Services Act*, 2017 (CBA, 2020).

Procedural Safeguards

The CRC was created by Article 43 of the CRC to implement it, by way of General Comments, and provide international standards that apply to the work that B.C. judges, lawyers and other professionals do in family law. They identify children's rights and the importance of legal guarantees and apply procedural safeguards in describing how to implement children's rights in judicial proceedings, which includes but is not limited to obtaining children's views and requiring all appropriate legal representation (see CRC General Comment 14, para 93). These guarantees and safeguards are not implemented in B.C. nor across Canada and should be implemented. (Brown, findlay, Martinson, & Williams, 2021; CBA 2020; Jackson & Martinson, 2019; Martinson & Tempesta, 2018; Martinson & Raven, 2020a)

Fully Informing Children about Participatory Rights

Children are often not informed about their participatory rights in family law and in child welfare proceedings. Yet the UN Committee General Comments conclude that receiving this information is essential to implementing participation rights. The CBA 2020 Report recommends that in all cases where courts formally assess children's best interests, children should be meaningfully informed about their participation rights, including their right to independent legal representation.

Applying for Declarations about Children's Best Interests

As noted above, the BCCA refused declaratory relief to a child in a family law proceeding. Brown, findlay, Martinson, and Williams (2021) recommend that the FLA be clarified to ensure that children can obtain a best interests declaration about their best interests in a family law proceeding, and similar relief should be available in the CFCSA.

Amendments to Specific Sections of the FLA

Views of the Child - s. 37(1)(b)

Brown, findlay, Martinson, and Williams (2021) recommend amending s. 37(1)(b) of the FLA to remove the words, "unless it is inappropriate to consider them" and to add the words, "and give those views due weight in accordance with their age and maturity." This would provide consistency with the 2019 *Divorce Act*, and the CRC.

Definition of Family Violence – s. 1

Brown, findlay, Martinson, and Williams (2021) also recommend that the definition of psychological or emotional violence be clarified to provide that it is the impact of psychological or emotional family violence, including impact on a child, not the intention of the abuser, that is relevant. This would make it clear that violence must be considered from the child's perspective if the child is the victim of psychological or emotional family violence.

Conflating Conflict and Family Violence

Section 199(1) of the FLA addresses both minimizing conflict and protecting children and parties from family violence. The section should be amended to make it clear that the object of reducing conflict cannot override the overarching obligation to ensure children's safety, security, and well-being (Brown, findlay, Martinson, & Williams, 2021).

Considering Other Civil or Criminal Proceedings – s. 37(2)(j)

The CBA 2020 report, when speaking about the relevant provision in the 2019 *Divorce Act*, recognizes the importance of stating that the objective of considering other proceedings is to both avoid conflicting orders and to coordinate proceedings. The 2019 Act also creates a duty upon judges to obtain such information. The FLA should be amended to conform with the new *Divorce Act* provision.

Amending s. 203 - Legal Representation

Section 203 inappropriately and significantly limits the ability of courts to appoint lawyers for children as required by the CRC and should be amended accordingly (Brown, findlay, Martinson, & Williams, 2021; Martinson & Tempesta, 2010).

Amendments to the CFCSA

The CFCSA should be amended to include express provisions and specific procedures that incorporate children's views in child protection proceedings, including an enabling provision for legal representation (Child Protection Project Committee, BCLI, 2020). According to the Child Protection Project Committee of the BCLI (2020), this clarification of the law is necessary to prevent children's views from being overlooked due to broad judicial interpretation under the CFCSA's current form. This enabling provision should include detailed options and factors to consider for incorporating children's views in child protection proceedings, while maintaining wide judicial discretion (Child Protection Project Committee, BCLI, 2020).

The CFCSA should also include a clear enabling provision for legal representation of children in child protection proceedings, which is currently missing from B.C. legislation, unlike most other provinces (Child Protection Project Committee, BCLI, 2020). Provisions for enabling legal representation for children should also clarify who should decide when appointing counsel is appropriate, factors to consider, how to determine appropriate capacity of the child and who should pay for the lawyer (Child Protection Project Committee, BCLI, 2020).

Finally, the BCLI Child Protection Project Committee (2020) notes that changes to the legislation are modest reforms and should exist alongside ministerial policies that are more flexible to changes and adequately funded programs to carry out children's legal participation.

REFERENCES

I. Academic & Grey Literature

Action Committee on Access to Justice in Civil and Family Matters. (2013). *Access to civil and family justice: A roadmap for change.* Retrieved November 22, 2020, from https://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf

Andreychuk, R., & Fraser, J. (2007). Children: The Silenced Citizens. Effective implementation of Canada's international obligations with respect to the rights of children. Final Report of the Standing Senate Committee on Human Rights. Retrieved November 22, 2020, from https://sencanada.ca/content/sen/Committee/391/huma/rep/rep10apr07-e.pdf

Anderson, S.R., Anderson, S.A., Palmer,K.L., Mutchler, M.S., &. Baker, L.K. (2010) Defining high conflict. *The American Journal of Family Therapy*, *39*(1), 11-27.

Archard, D. (2013). Children, adults, best interests and rights. *Medical Law International*, *13*(1), 55–74.

Bala, N. (2016). Canada's controversy over best interests and post-separation parenting. In E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (pp. 233-248). Cambridge University Press. doi:10.1017/9781316662977.015

Bala, N., Birnbaum, R., Cyr, F., & McColley, D. (2013). Children's voices in family court: Guidelines for judges meeting children. *Family Law Quarterly*, *47*(3), 379-408.

Bala, N. & Birnbaum, R. (2018). Rethinking the role of lawyers for children: Child representation in Canadian family relationship cases. *Les Cahiers de droit*, *59*(4), 787–829. https://doi.org/10.7202/1055256ar

Bala, N., & Houston, C. (2016). Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada; Presented to the Family, Children and Youth Section, Department of Justice Canada August 31, 2015. Retrieved November 22, 2020, from https://www.justice.gc.ca/eng/rp-pr/other-autre/article12/index.html

Bauman, R. (2017). Why Access to Justice for Children Matters. CLE BC Access to Justice for Children: Child Rights in Action Conference. Retrieved November 25, 2020, from https://www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/Speech_Why_Access_to_Justice_for_Children_Matters.pdf

Bell, F. (2016). Barriers to empowering children in private family law proceedings. *International Journal of Law, Policy, and the Family*, *30*(3), 225–247.

Bendo, D., & Mitchell, R. C. (2017). The role of canada's child and youth advocates: A social constructionist approach. *The International Journal of Children's Rights*, *25*(2), 335.

Bill C-78 Joint Brief to the Parliamentary Committee, Luke’s Place Support and Resource Centre and the National Association of Women and the Law (NAWL). Retrieved November 22, 2020, from https://nawl.ca/bill-c-78/

Birnbaum, R. (2017). Views of the child reports: Hearing directly from children involved in post-separation disputes. *Social Inclusion*, *5*(3), 148-154.

Birnbaum, R., Bala, N., & Bertrand, L. (2013). Judicial interviews with children: Attitudes and practices of children's lawyers in Canada. *New Zealand Law Review*, *2013*(3), 465-482.

Birnbaum, R, Bala, N. & Boyd, J. P. (2016) The Canadian experience with views of the child reports: A valuable addition to the toolbox? *International Journal of Law, Policy and the Family, 30*(2), 158–178.

Birnbaum, R., & Saini, M. (2012). A qualitative synthesis of children’s participation in custody disputes. *Research on Social Work Practice*, *22*(4), 400-409. doi:10.1177/1049731512442985

Birnbaum, R., & Saini, M. (2013). A scoping review of qualitative studies about children experiencing parental separation. *Childhood*, *I*(2), 260-282.

Boyce, J. (2016). *Victimization of Aboriginal people in Canada, 2014*. Juristat. Statistics Canada Catalogue no. 85-002-X. Retrieved November 22, 2020, from, https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm

Brown, Trudi Q.C., findlay, barbara Q.C., Martinson, The Hon. Donna, & Williams, Suzanne, *When children (really) have rights: Implications of the SCC’s Michel v. Grayson for B.C. legislation and jurisprudence, 2021,* forthcoming.

Burczycka, M. & Conroy, S. (2018). *Family violence in Canada: A statistical profile, 2016*. Juristat, Statistics Canada, Catalogue no. 85-002-X.

Byrne, B., & Lundy, L. (2019). Children’s rights-cased childhood policy: A six-p framework. *The International Journal of Human Rights*, *23*(3), 357–373. https://doi.org/10.1080/13642987.2018.1558977

Canadian Bar Association. (n.d.) *Canadian Bar Association Child Rights Toolkit*. Retrieved November 22, 2020, from https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit

Canadian Bar Association (2020). *Alternative report to the UN Committee on the Rights of the Child*. Retrieved November 22, 2020, from https://www.cba.org/CMSPages/GetFile.aspx?guid=fdb96dc7-35e0-4b6d-8918-40ba6607582a

Canadian Coalition on the Rights of Children (2012). *Right in principle, right in practice: Implementation of the Convention on the Rights of the Child in Canada*. Retrieved November 22, 2020, from http://rightsofchildren.ca/wp-content/uploads/2016/01/CCRC-report-on-rights-of-children-in-Canada.pdf

Child Protection Project Committee, British Columbia Law Institute. (2020). *Consultation paper on modernizing the Child, Family and Community Service Act* (Rep.). British Columbia Law Institute. Retrieved November 22, 2020, from https://www.bcli.org/publication/consultation-paper-on-modernizing-the-child-family-and-community-service-act-2

Cleland, A. (2016). A long lesson in humility? The inability of child care law to promote the well-being of children. In E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (pp. 131-146). Cambridge University Press. doi:10.1017/9781316662977.009

Collective Memo of Concern to: World Health Organization about "Parental Alienation". (2019). Retrieved November 22, 2020, from http://www.learningtoendabuse.ca/collective-memo-of-concern-to-WHO-about-parental-alienation.html

Collins, T. M. (2019). The general measures of implementation: Opportunities for progress with children's rights, *The International Journal of Human Rights*, *23*(3), 338-356. doi: 10.1080/13642987.2018.1558976

Dowd, N. (2016). A developmental equality model for the best interests of children. In E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (pp. 112-130). Cambridge University Press.

Dundee, M. (2016). Children's rights and participation in family law (BC). Presented at the Continuing Legal Education Society of BC (CLEBC) Program, Assessments & Interventions: The Intersection of Family Law and Psychology, March 11, 2016, Vancouver. Retrieved November 22, 2020, from https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/Toolkits/ChildRights/Dundee-ChildrensRightsandParticipation.pdf

Eekelaar, J. (2016). Two dimensions of the best interests principle: Decisions about children and decisions affecting children. In E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (pp. 99-111). Cambridge University Press.

Elrod, L. (2016). The best interests of the child when there is conflict about contact. In E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (pp. 265-279). Cambridge University Press. doi:10.1017/9781316662977.017

Fernando, M. (2013). How can we best listen to children in family law proceedings? *New Zealand Law Review*, *3*, 387–407.

Fernando, M. (2014). Family law proceedings and the child's right to be heard in Australia, the United Kingdom, New Zealand, and Canada. *Family Court Review*, *52*(1), 46–59.

Fidler, B. J., & Bala, N. (2020). Guest editors' introduction to the 2020 special issue on parent–child contact problems: Concepts, controversies & conundrums. *Family Court Review*, *58*(2), 265–269.

Garlen, J. (2020, November 22). Julie C. Garlen: World Children's Day a good reminder that young people deserve to be heard during COVID-19. Retrieved November 22, 2020, from https://theprovince.com/opinion/op-ed/julie-c-garlen-world-childrens-day-a-good-reminder-that-young-people-deserve-to-be-heard-during-covid-19

Government of New Zealand (2020). *Budget 2020: Summary for stakeholders*. Retrieved November 22, 2020, from https://www.justice.govt.nz/assets/Documents/Publications/15-May-2020-Summary-of-Justice-Budget-Initiatives-for-Stakeholders-FINAL-.pdf

Grover, S. C. (2014). *Children defending their human rights under the CRC communications procedure* (2nd ed.). Springer Berlin / Heidelberg.

Hayes, D. (2013, August 17). Program helps 'unaccompanied minors' navigate Canada's refugee process. Retrieved November 22, 2020, from https://www.thestar.com/news/insight/2013/08/17/program_helps_unaccompanied_minors_navigate_canadas_refugee_process.html

Henaghan, M. (2016). Final appeal courts and Article 3 of the United Nations Convention on the Rights of the Child: What do the best interests of the particular child have to do with it? In E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (pp. 81-96). Cambridge University Press. doi:10.1017/9781316662977.006

Horsfall, B. (2013). Breathing life into children's participation: Empirical observations of lawyer-child relations in child protection proceedings. *New Zealand Law Review*, (3), 429-444.

John, E., Grand Chief (2016). Indigenous resilience, connectedness and reunification: From root causes to root solutions: A report on Indigenous child welfare in British Columbia: Final report of special advisor Grand Chief Ed John. Victoria, B.C: Ministry of Children and Family Development. Retrieved November 21, 2020, from http://fns.bc.ca/wp-content/uploads/2017/01/Final-Report-of-Grand-Chief-Ed-John-re-Indig-Child-Welfare-in-BC-November-2016.pdf

Koshan, J., & Oh, I. (2020, March 20). "Extraordinarily difficult": Parenting time and the rights of children in cases involving family violence [web blog]. Retrieved from https://ablawg.ca/2020/03/20/extraordinarily-difficult-parenting-time-and-the-rights-of-children-in-cases-involving-family-violence/.

LEAF (Women's Legal Education and Action Fund) (2018), Bill C-78, Brief to the Parliamentary Committee, November 2018. Retrieved November 21, 2020, from https://www.leaf.ca/wp-content/uploads/2018/11/LEAF-Brief-on-BILL-C-78-.pdf

Lehrmann, D. H. (2010). Advancing children's rights to be heard and protected: The model representation of children in abuse, neglect, and custody proceedings act. *Behavioural Sciences & the Law*, *28*(4), 463–479. https://doi.org/10.1002/bsl.943

Long, J., & Senson, P. (2019). 2018: A (mostly) positive year for advancing children's rights in Ontario. *Canadian Family Law Quarterly*, *38*(2), 185-218.

Lovinsky, D., & Canada. (2016). Legal representation of children in Canada. Ottawa: Department of Justice Canada/Ministère de la justice Canada eBook Collection. Retrieved November 21, 2020, from http://publications.gc.ca/collections/collection_2016/jus/J2-422-2016-eng.pdf

Lovinsky, D., & Gagne, J. (2015). *Legal representation of children in Canada*. Children and Youth Section, & Canadian Government eBook Collection Ottawa: Department of Justice Canada.

Macdonald, G. S. (2016). Domestic violence and private family court proceedings. *Violence Against Women*, *22*(7), 832–852. https://doi.org/10.1177/1077801215612600

Macdonald, G. S. (2017). Hearing children's voices? Including children's perspectives on their experiences of domestic violence in welfare reports prepared for the English courts in private family law proceedings. *Child Abuse & Neglect*, *65*, 1–13. https://doi.org/10.1016/j.chiabu.2016.12.013

Martinson, D. & Jackson, M. (2015). *Risk of future harm research project – Summary of findings and conclusions.* The FREDA Centre for Research on Violence Against Women and Children. Retrieved November 21, 2020, from https://fredacentre.com/wp-content/uploads/The-Hon-D-Martinson-and-Dr-M-Jackson-Risk-of-Future-Harm-Family-Violence-and-Information-Sharing-Between-Family-and-Criminal-Courts-15-11-12.pdf

Martinson, D., & Jackson, M. (2016). *Risk of future harm: Family violence and information sharing between family and criminal courts.* The FREDA Centre for Research on Violence Against Women and Children. Retrieved November 21, 2020, from https://fredacentre.com/wp-content/uploads/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016-1.pdf

Martinson, D., & Jackson, M. (2019). *Family violence and parenting assessments: Laws, skills, and social Context*. Canadian Bar Association, B.C. Branch Children's Law Section Report Launch Marking National Child Day November 20, 2019. Retrieved November 22, 2020, from https://fredacentre.com/wp-content/uploads/Martinson.-Jackson-Family-Violence-and-Parenting-Assessments-Report-Highlights-and-Report-Brief-1.pdf.

Martinson, D., & Raven, R. (2020a). *Implementing children's participation in family court cases: View of the child and beyond.* Access to Justice for Children 2020: Best Interests of the Child Paper 5.1. Continuing Legal Education Society of British Columbia. Retrieved November 22, 2020, from https://1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/ImplementingChildrensParticipationinFamily.pdf

Martinson, D., & Raven, R. (2020b). Practical guide/checklist: Implementing child rights safeguards and guarantees in court processes (Companion to Implementing Children's Participation in Family Court Cases: View of the Child and Beyond.) Access to Justice for Children 2020: Best Interests of the Child Handout 5.2. Continuing Legal Education Society of British Columbia. Retrieved November 22, 2020, from

https://1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/ImplementingChildrensParticipationinFamily-Handout.pdf

Martinson, D., & Tempesta, C. E. (2018). Young people as humans in family court processes: A child rights approach to legal representation. *Canadian Journal of Family Law*, *31*(1), 151-197.

Morrison, F., Tisdall, E., Kay, M., & Callaghan, J. E. M. (2020). Manipulation and domestic abuse in contested contact – Threats to children's participation rights. *Family Court Review*, *58*(2), 403–416. https://doi.org/10.1111/fcre.12479

Neilson, L. (2020). *Responding to domestic violence in family law, civil protection & child protection cases,* (2nd ed.). CanLiiDocs. Retrieved November 22, 2020, from http://www.canlii.org/t/ng

Nichols, A. M. (2014). Toward a child-centred approach to evaluating claims of alienation in high-conflict custody disputes. *Michigan Law Review, 112*(4), 663-88.

Paetsch, J. J., Bertrand, L. D., & Boyd, J-E. (2018). Children's participation in justice processes: Survey of Justices of Alberta's Court of Queen's Bench. *Canadian Research Institute for Law and the Family*. doi:10.11575/prism/32896

Parkes, A. (2013). *Children and international human rights law*. Routledge, London. https://doi.org/10.4324/9780203797808

Rotenberg, C. (2019). Police-reported violent crimes against young women and girls in Canada's Provincial North and Territories. *Juristat.* Statistics Canada. Catalogue no. 85-002-X.

Saaltink, R., MacKinnon, G., Owen, F., & Tardif-Williams, C. (2012). Protection, participation and protection through participation: Young people with intellectual disabilities and decision making in the family context. *Journal of Intellectual Disability Research*, *56*(11), 1076–1086.

Taylor, N. (2016). Relocation disputes following parental separation: Determining the best interests of the child. In E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (pp. 280-292). Cambridge University Press. doi:10.1017/9781316662977.018

Tempesta, C. (2019). *Legal representation as a critical aspect of the realization of the child's right to be heard* [LLM Thesis]. Advanced International Child Rights Studies, Leiden University, the Netherlands.

United Nations Office of the High Commissioner for Human Rights. (2012). *UN Treaty Body Database: Concluding Observations (CRC).* Retrieved November 21, 2020, from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5

Waldock, T., Howe, R. B., & Covell, K. (2020). *A question of commitment: The status of children in Canada* (2nd ed.). Wilfrid Laurier University Press. http://muse.jhu.edu/book/74092/

Wong, J. (2020, November 20). B.C. courts deny child her own lawyer in 18-year divorce case: 'I just felt totally silenced'. Retrieved November 22, 2020, from https://nationalpost.com/news/canada/i-just-felt-totally-silenced-b-c-courts-deny-child-her-own-lawyer-in-18-year-divorce-case

II. Legislation

Adoption Act [RSBC 1996] CHAPTER 5

Child, Family and Community Service Act [RSBC 1996] CHAPTER 46

Child, Youth and Family Services Act, S.O. 2017, c. 14, Sched. 1

Divorce Act (R.S.C., 1985, c. 3 (2nd Supp.))

Family Law Act [SBC 2011] CHAPTER 25

Family Court (Supporting Families in Court) Legislation Bill, Government Bill, 255—1

Immigration and Refugee Protection Act (S.C. 2001, c. 27)

International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

Law and Equity Act [RSBC 1996] CHAPTER 253

United Nations Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with article 49.

Youth Criminal Justice Act (S.C. 2002, c. 1)

III. Case Law

AB v. CD, 2020 BCCA 11

Gordon v. Goertz, [1996] 2 SCR 27

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

Medjuck v. Medjuck, 2019 ONSC 3254

Michel v. Graydon. 2020 SCC 24

N.J.K. v. R.W.F., 2011 BCSC 1666

Robin v Filyk [1996] 28 BCLR (3d) 21

APPENDIX A: SAFEGUARDS/GUARANTEES CHECKLIST

PRACTICAL GUIDE/CHECKLIST: IMPLEMENTING CHILD RIGHTS SAFEGUARDS AND GUARANTEES IN COURT PROCESSES

The Honorable. Donna Martinson Q.C. and The Honorable Rose Raven

Note: This Guide is Complementary to Martinson and Raven's Paper, Implementing Children's Participation Rights in Family Court Processes: Views of the Child and Beyond. The Paper contains additional information and all supporting references.

<u>SAFEGUARD ONE: PRIORITIZE COURT PROCEEDINGS AND AVOID UNNECESSARY DELAY</u>

WITHIN THE FAMILY LAW PROCEEDING

- ☐ Use all the tools at your disposal to ensure, to the greatest extent possible, timely, cost effective proceedings.
- ☐ Consider requesting one judge for all the court proceedings, where appropriate.

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

- ☐ Determine whether there are criminal, child protection, or immigration proceedings relating to the same family under:
  - ☐ s. 37(2)(j) of the *FLA* or
  - ☐ s. 16(3) and 7.8 of the new Divorce Act, when it comes into force.
- ☐ If yes,
  - ☐ Obtain relevant information including court orders
  - ☐ Consider steps to coordinate the proceedings to
    - ☐ avoid conflicting outcomes and unreasonable delay, and
    - ☐ to prevent the child from participating repeatedly.

<u>SAFEGUARD TWO: OBTAINING THE VIEWS OF THE CHILD – WHO AND HOW</u>

WHO – WHICH CHILDREN?

- ☐ ALL children who are capable of forming their own views, can express their views, including cases involving allegations of violence and/or alienation.
- ☐ Facilitate providing the child with information and advice about their choices and potential consequences so the child to choose whether to participate.
- ☐ In deciding capacity consider that:
  - ☐ The capacity required to be heard should be a low one – focusing primarily on cognitive capacity; other factors should generally be considered when deciding the weight to be attached to the views.
  - ☐ There is a presumption of capacity

- ☐ There should be no age limits and capacity must be assessed on a case-by-case basis.

HOW TO OBTAIN CHILDREN'S VIEWS

Methods:

- ☐ Full s. 211 *FLA* reports.
- ☐ Evaluative views of the child reports prepared by a mental health professional: s. 211(1)(b) *FLA*
- ☐ Non-evaluative views of the child reports prepared by a mental health professional or another trained person, including lawyers: ss. 37(2)(b),202 and 224
- ☐ Facilitated through legal representation (the lawyer cannot "give evidence" about a child's views but can state a position) based on s. 201 (generally or adding the child as a party) or s. 203, *FLA* (see also legal advice/ representation, below)
- ☐ Judicial interviews (which can be in addition to other methods – see "Judicial Interviews", below)
- ☐ More generally s. 202, *FLA* gives the Court a broad discretion to admit hearsay and give other direction it considers appropriate about how the "child's evidence" is received. This could include the affidavit evidence of the parties.

Choosing the Method

- ☐ Consider that the child has the right to be heard in judicial proceedings "either directly or through a representative or an appropriate body".
- ☐ Consider the UN Committee on the Rights of the Child recommendation that
  - ☐ the child should have a choice about how to participate, and,
  - ☐ wherever possible the child must be given the opportunity to be directly heard in any proceeding and to be advised of that option
  - ☐ Take steps to ensure that proceedings are accessible and child appropriate.

Timing – When to Obtain Children's Views

- ☐ Consider that participation should begin early in the process and should form part of the decision-making processes at Family Case Conferences, Judicial Case Conferences or other judicial settlement meetings, as well as motions and trials.
- ☐ Remember that
  - ☐ participation is a process, not a momentary act.
  - ☐ children should not be interviewed too often forensically, especially with respect to traumatic matters.

CHILDREN'S PARTICIPATION THROUGH A JUDICIAL INTERVIEW.

- ☐ Consider requesting/facilitating a judicial interview, in addition to or instead of other methods, particularly if the child wishes to meet with the Judge at
  - o A Family Case Conference/Judicial Case Conference; or
  - o Hearing/Trial.
  - ☐ Note that the purpose of a judicial interview is NOT to gather evidence or to have a child provide information about a factual matter. Instead, it can:
    - ☐ enable children to be more involved and connected with the proceedings

- ☐ ensure that the judge has understood the views and feelings of the child, and
- ☐ ensure that child understands the judge's task and the nature of the court process.

SAFEGUARD THREE: ESTABLISHING RELEVANT FACTS INCLUDING THOSE RELEVANT TO THE CHILD'S VIEWS

ESTABLISHING RELEVANT FACTS

- ☐ Consider how the decision-maker, whether a judge, mediatory, arbitrator or otherwise, will obtain ALL facts necessary to determine the child's best interests, as described in domestic law and the UN Convention on the Rights of the Child.

ESTABLISHING FACTS RELEVANT TO AND SUPPORTING THE CHILD'S VIEWS

- ☐ Take steps to ensure that, during arbitrations, mediations, judicial hearings and the like, that the decision maker has the information necessary to give due weight to/take seriously the child views.

SAFEGUARD FOUR: THE NEED FOR QUALIFIED PROFESSIONALS

- ☐ When deciding whether to obtain a s. 211 FLA Parenting Assessment
  - ☐ Be clear about its purpose, given its cost, intrusive nature, and the time it takes. What does it add to what is known?
  - ☐ Determine what specific professional qualifications are required, including:
    - ☐ expertise in matters related to child and adolescent development
    - ☐ specific expertise about the nature, prevalence and potential consequences of family violence on the child's present and future safety, security and well-being.

SAFEGUARD FIVE: JUDICIAL AND OTHER DECISION MAKING (LEGAL REASONING) - INCLUDING HOW TO ASSESS THE WEIGHT TO BE ATTACHED TO A CHILD'S VIEWS

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

- ☐ Consider each of these directions from the UN Committee on the Rights of the Child:
  - ☐ The views of the child must be seriously considered when the child is capable of forming their own view.
  - ☐ If the child is capable of forming her/his/their own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue.
  - ☐ Age alone cannot determine the significance of a child's views as their level of understanding are not uniformly linked to their biological age. A child's development can be affected by information, experience, environment, social and cultural expectations, and levels of support.
  - ☐ Maturity refers to the ability to understand and assess the implications of a particular matter:

- ☐ Maturity in the context of Article 12 is the capacity to express views on issues in a reasonable and independent manner.
    - ☐ Consider the impact on the child, the greater the impact of the outcome on the child's life, the more relevant the appropriate assessment of the maturity of that child.
- ☐ Consider the evolving capacity of the child and the direction and guidance from parents.
- ☐ Review the summary of relevant case law found in our paper. Note that:
  - ☐ If a child is forming a view in a reasonable and independent manner, the views must be considered a significant factor. (BCSC)
  - ☐ Article 12 of the Convention applies, and children's views are an important factor. They are though only one of many factors and are not determinative. (BCCA)
  - ☐ As children gain maturity their wishes become proportionately more important. (BCCA)
  - ☐ Circumstances will exist when the child's wishes do not conform to what is in his or her best interests. (BCCA)
  - ☐ Children are sometimes incapable of identifying what is in their own best interests (BCCA)

THE ACTUAL DECISION – EXPLAINED AND PROVIDED WITHOUT DELAY

- ☐ Advocate/make submissions on behalf of the child to ensure that decisions are explained, and that they state explicitly:
  - ☐ The factual circumstances regarding the child relied upon.
  - ☐ The best interests elements that have been found relevant and how they have been weighted.
  - ☐ The relevant child rights legal principles and how they have been applied.
  - ☐ The reasons, clearly stated, for the decision, if it differs from the views of the child.
- ☐ Take steps, including making submissions, to ensure that the decision is provided in a timely manner, considering the significant impact of the decision on the child's life.
- ☐ Take steps to ensure that the child is informed about the outcome, and how the child's views were taken seriously.

SAFEGUARD SIX: THE CHILD'S RIGHT TO HAVE THE DECISION REVIEWED FOR CORRECTNESS AND APPEALED IF APPROPRIATE

- ☐ Take steps to ensure that the child
  - ☐ knows about the right to appeal,
  - ☐ is given advice about the likelihood of success
- ☐ Consider that the UN Committee on the Rights of the Child states appeal/review procedures should be accessible to the child or the child's representative.

SAFEGUARD SEVEN: KEEPING GOVERNMENTS ACCOUNTABLE TO MAKE DECISIONS IN CHILDREN'S BEST INTERESTS

- ☐ Be aware that a child rights approach requires governments to do Child Rights Impact Assessments, with input from children, for all government decisions, including

budget decisions.

- ☐ Consider advocating:
  - ☐ Broadly, for increased funding to ensure that all child rights under the Convention are realized
  - ☐ When appropriate for increased government funding for independent legal representation for a child.

SAFEGUARD EIGHT: MAKING SURE THAT CHILDREN HAVE ALL APPROPRIATE LEGAL REPRESENTATION WHEN THEIR BEST INTERESTS ARE BEING FORMALLY ASSESSED BY COURTS

PURPOSE OF LEGAL REPRESENTATION FOR CHILDREN

Legal Information

- ☐ Consider the following legal information which would benefits children in court processes:
  - ☐ their legal rights generally.
  - ☐ their rights to participate and the choices available.
  - ☐ the way the court processes work; and
  - ☐ the role of judges

Legal Advice

- ☐ Consider the following benefits of a lawyer providing legal advice relevant to the child's specific circumstances. The advice could include
  - ☐ Considering the child's views and advising on how they will be taken into account
  - ☐ Advising the child about options for presenting their views and the merits of each in the child's circumstances
  - ☐ Exploring relevant facts generally and those supporting the child's views,
  - ☐ Advising the child generally on potential court processes, including settlement discussions, and potential outcomes, including the advantages and disadvantages of each.

Legal Representation in Court Proceedings

- ☐ Consider that if the lawyer providing information and advice outside the court process cannot participate in settlement discussion or contested hearings/trials, the child's rights identified by that advice cannot be implemented.
- ☐ Consider the following benefits a lawyer can provide to a child, consistent with a child rights approach to their best interests:
  - ☐ A lawyer can be very helpful in facilitating a resolution during settlement discussions of all kinds.
  - ☐ At a contested hearing/trial the lawyer can participate on the child's behalf:
    - ☐ in the presentation and testing of evidence.
    - ☐ with respect to s. 211 parenting assessments: (a) in the decision about whether one is necessary; (b) if it is, the qualifications of the expert and the method used; (c) its admissibility; and (d) the appropriateness

of a critique report.
- in guarding against unreasonable delay; and
- by advancing and protecting children's rights during final submissions, including
  - submissions on the relevant law,
  - how the child's views are weighed, and
  - the weight to be given to the parenting assessment in the context of all of the evidence.

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

HOW TO INVOLVE A LAWYER IN COURT PROCEEDINGS

- Consider that B.C. courts can order that a child have legal counsel based on ss. 201 or s. 203 of the *Family Law Act.* Consider the following benefits and challenges with respect to each:

  S. 203 *FLA*
  - Section 203(1) gives the court authority to appoint a lawyer to represent the interests of a child in the proceeding if the court is satisfied that (a) the degree of conflict between the parties is so severe that is significantly impairs the capacity of the parties to act in the best interests of the child, and (b) it is necessary to protect in the best interests of the child.
  - The right provided by the legislature under this section is limited and has been narrowly applied by the B.C. Supreme Court, supported by the B.C.C.A.
  - Arguably it is intended to allow the appointment of a lawyer at the judge's initiative when the Court feels a case meets this narrow test.

  S. 201(2)(b) *FLA*
  - There is an emerging view that s. 201(2)(b) can be used to provide the child with participation rights including independent legal representation.
  - Section 201(1) states that a child has the capacity to make, conduct or defend a proceeding under the Act without a litigation guardian if the child is 16 years or older, a spouse or a parent. Subsection 2 states that there is nothing in the section which prevents a court if the court considers it appropriate, from:

    (b) allowing a child who is not described in subsection 1 [that is, a child under the age of 16] to make, conduct or defend a proceeding under this act without a litigation guardian.
  - Therefore, subject to the judge's discretion:
    - A child has the right to be involved in making, conducting or defending ANY family law proceeding, which includes those relating to guardianship, parenting arrangements, contact, child support and parental cross-border child abduction.

- The right is not limited to specific issues within a proceeding but applies to all issues.
- As a participant in the proceedings the child is entitled to independent legal representation.

APPENDIX B: BACKGROUND DOCUMENT ON THE UNCRC

UN COMMITTEE ON THE RIGHTS OF THE CHILD GENERAL COMMENT 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)

In General Comment 14, under a section called "Implementation: assessing and determining the child's best interests" the Committee states that two steps should be followed to assess children's best interests. The first involves giving the best interests of the child concrete content within the specific factual context of the case (s. 46(a)). Second, to do so, "follow a procedure that ensures legal guarantees and proper application of the right". (s. 46(b)). The best interests determination, it says, describes the "formal process, with strict procedural safeguards designed to determine the child's best interests on the basis of the best interests assessment." (s. 47)).

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

General Comment 14

Part V. Implementation: assessing and determining the child's best interests
B. Procedural safeguards to guarantee the implementation of the child's best interests

(a) Right of the child to express his or her own views

89. A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests. Such communication should include informing children about the process and possible sustainable solutions and services, as well as collecting information from children and seeking their views.

90. Where the child wishes to express his or her views and where this right is fulfilled through a representative, the latter's obligation is to communicate accurately the views of the child. In situations where the child's views are in conflict with those of his or her representative, a procedure should be established to allow the child to approach an authority to establish a separate representation for the child (e.g. a guardian ad litem), if necessary.

91. The procedure for assessing and determining the best interests of children as a group is, to some extent, different from that regarding an individual child. When the interests of a large number of children are at stake, Government institutions must find ways to hear the views of a representative sample of children and give due consideration to their opinions CRC/C/GC/14 19 when planning measures or making legislative decisions which directly or indirectly concern the group, in order to ensure that all categories of children are covered. There are many examples of how to do this, including children's hearings, children's parliaments, children-led organizations, children's unions or other representative bodies, discussions at school, social networking websites, etc.

(b) Establishment of facts

92. Facts and information relevant to a particular case must be obtained by well-trained professionals in order to draw up all the elements necessary for the best-interests assessment. This could involve interviewing persons close to the child, other people who are in contact with the child on a daily basis, witnesses to certain incidents, among others. Information and data gathered must be verified and analysed prior to being used in the child's or children's best-interests assessment.

(c) Time perception

93. The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible. The timing of the decision should, as far as possible, correspond to the child's perception of how it can benefit him or her, and the decisions taken should be reviewed at reasonable intervals as the child develops and his or her capacity to express his or her views evolves. All decisions on care, treatment, placement and other measures concerning the child must be reviewed periodically in terms of his or her perception of time, and his or her evolving capacities and development (art. 25).

(d) Qualified professionals

94. Children are a diverse group, with each having his or her own characteristics and needs that can only be adequately assessed by professionals who have expertise in matters related to child and adolescent development. This is why the formal assessment process should be carried out in a friendly and safe atmosphere by professionals trained in, inter alia, child psychology, child development and other relevant human and social development fields, who have experience working with children and who will consider the information received in an objective manner. As far as possible, a multidisciplinary team of professionals should be involved in assessing the child's best interests.

95. The assessment of the consequences of alternative solutions must be based on general knowledge (i.e. in the areas of law, sociology, education, social work, psychology, health, etc.) of the likely consequences of each possible solution for the child, given his or her individual characteristics and past experience.

(e) Legal representation 96.

The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision. CRC/C/GC/14 20.

(f) Legal reasoning

97. In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry

greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to be outweigh the other considerations. Account must be taken of those circumstances in which the best interests of the child must be the paramount consideration (see paragraph 38 above).

(g) Mechanisms to review or revise decisions

98. States should establish mechanisms within their legal systems to appeal or revise decisions concerning children when a decision seems not to be in accordance with the appropriate procedure of assessing and determining the child's or children's best interests. There should always be the possibility to request a review or to appeal such a decision at the national level. Mechanisms should be made known to the child and be accessible by him or her directly or by his or her legal representative, if it is considered that the procedural safeguards had not been respected, the facts are wrong, the best-interests assessment had not been adequately carried out or that competing considerations had been given too much weight. The reviewing body must look into all these aspects.

(h) Child-rights impact assessment (CRIA)

99. As mentioned above, the adoption of all measures of implementation should also follow a procedure that ensures that the child's best interests are a primary consideration. The child-rights impact assessment (CRIA) can predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affect children and the enjoyment of their rights and should complement ongoing monitoring and evaluation of the impact of measures on children's rights. CRIA needs to be built into Government processes at all levels and as early as possible in the development of policy and other general measures in order to ensure good governance for children's rights. Different methodologies and practices may be developed when undertaking CRIA. At a minimum, they must use the Convention and its Optional Protocols as a framework, in particular ensuring that the assessments are underpinned by the general principles and have special regard for the differentiated impact of the measure(s) under consideration on children. The impact assessment itself could be based on input from children, civil society and experts, as well as from relevant Government departments, academic research and experiences General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, paras. 78-81. CRC/C/GC/14 documented in the country or elsewhere. The analysis should result in recommendations for amendments, alternatives and improvements and be made publicly available.

APPENDIX C: METHODOLOGY

The goal of this systematic literature review was to synthesize research related to children's legal participation in court proceedings (e.g., family law cases, custody/access determinations), especially in the presence of conflict and/or violence. This literature review was guided by the Safeguards checklist (see Appendix A) and UNCRC (see Appendix B) and consisted of four key phases: 1) the development of the literature search framework, including identification of key search terms and parameters; 2) the literature search itself; 3) annotations of sources that were identified as highly relevant to this research; and 4) literature analysis and write-up.

This systematic literature review has an intentional scope that limited the search to documents spanning 2012 – November 2020 and written in English. However, discretion was used to include key or foundational works that were published prior to 2012. A wide range of academic and grey literature** sources were included, such as peer reviewed journal articles, reports, government documents, and legislation.

The researchers began by developing lists of search terms relevant to the identified focus of this research and guided by the Safeguards document. Each search term combination was run through official databases (e.g., ProQuest, Simon Fraser University library, University of British Columbia library) and other search engines (e.g., Google) to capture relevant academic and grey literature. This search resulted in the identification of over 100 potentially relevant sources, which reviewed and ranked based on relevance to the research foci (i.e., 1 for most relevant, 2 for potentially relevant, and 3 for non-relevant). The sources ranked 1/most relevant were selected for inclusion, read, annotated (see Appendix D for annotation template), analysed, and integrated into this report (see references list for full list of sources).

The term **grey literature refers to **research or information** that is either unpublished or has been published or produced in a non-commercial form. Examples of **grey literature** include: community-based materials, government reports, evaluations. policy statements and issues papers.

APPENDIX D: ANNOTATION TEMPLATE

Consider the following questions for the annotations:

1. *What is (are) the research question(s)/what does this study set out to do?*
2. *What are the key concepts for this study/article/report?*
3. *What theoretical framework(s) and/or models are used in the study/article/report?*
4. *What methodology is used in the study/article/report?*
5. *What are the key insights/arguments?*
6. *What are the results/conclusions of the study/article/report?*
7. *What are the core finding(s) of this study/article/report?*
8. *What are the recommendations (if any)?*
9. *How does the publication relate to other literature in the field of interest, according to its themes?*
10. *What are the strengths and weaknesses of the research/report?*
11. *After proceeding in this exercise, can you begin to identify the key themes and debates in the literature?*
12. *What appears to you to be missing from the literature (gaps)?*

General template for annotations:

Using the following template (based on the answers to the above 12 questions), create your annotated bibliography entry:

This article focuses on ___________. It uses _______perspectives/frameworks and assesses _____________. The data for this study are drawn from _______________. The core findings are that ____________. Specific recommendations or findings for ___________ include__________. The links to other literature in the field are ______________. The strengths of this article/report are _______; however, the weaknesses include _________. Other unique aspects or contributions of this study include_____________.