



## UN Committee on the Rights of the Child – Pre-Session: October 8, 2020 Update to the CBA Section Alternative Report

This is an update to the Alternative Report prepared by the Canadian Bar Association Child and Youth Law Section (CBA Section) in February 2020.<sup>i</sup> It focuses on recent cases and events, including the COVID-19 pandemic, relating to the cluster of rights described in the CBA Section's Alternative Report.

- On June 16, 2020, Senator Rosemary Moodie introduced Private Members Bill S-217,<sup>ii</sup> *An Act to establish the Office of the Commissioner for Children and Youth in Canada*. The Senator identified three main areas of action for the Commissioner: acting as an independent officer of Parliament who will hold Parliament accountable on its obligations for the well-being of Canadian children and youth and to ensure that their rights are respected, collaborating with various levels of government and communities to work on behalf of children and youth and advocate for their needs, and elevating the voice of children and youth in political discourse. The Bill died when Parliament prorogued in summer 2020, and was reintroduced on September 30, 2020 as Bill S-210.<sup>iii</sup> We urge Parliament to pass the Bill.
- Amendments to Canada's *Divorce Act* in Bill C-78 received Royal Assent in June 2019 and were scheduled to come into effect in July 2020. This has been delayed. In June 2020, the government announced that coming into force would be deferred to March 1, 2021 due to the COVID-19 pandemic. The delay was attributed to provincial and territorial governments needing more time to amend their own laws and regulations to ensure consistency with the amended Act.
- The pandemic has had many negative impacts on the best interests of the child and child participation and representation:
  - COVID-19 created challenges for the operations of the courts, tribunals and family justice system. In-person interviews by Immigration Refugee and Citizenship Canada inside Canada were suspended. As a result, refugee applications were not referred to the Refugee Protection Division of the Immigration and Refugee Board for months. Work permits and refugee identification documents required to secure lodging and school registrations were unduly delayed, jeopardizing children's access to shelter and education. Hearings and in-person court attendances were halted for several months and many courts heard only urgent family law matters remotely. This resulted in lengthy delays in many matters involving children, contrary to their best interests.
  - In custody/access disputes, concerns about parents disregarding previous orders or agreements for parenting time because of fears related to COVID-19 were deemed urgent and adjudicated. These decisions establish that it is inconsistent with a child's best interests to interfere with their time with a parent unless there is cogent evidence this contact would be dangerous for the child. (See, for example, *Ribeiro v. Wright*,<sup>iv</sup> an early and oft-cited COVID-19 decision.) For example, fear that a parent does not take physical distancing "seriously enough" or that a parent is a front-line medical professional has been generally deemed insufficient to curtail parent-child contact.
  - The situation for children and youth in the child protection system has been problematic. As of March 31, 2020, in-person supervised and unsupervised contact with family members for children in alternative care was suspended by child welfare agencies in all but three provinces and territories, with some jurisdictions allowing exemptions for extenuating circumstances.<sup>v</sup> Indigenous and Black children, who are over-represented in the child welfare system, are disproportionately affected by these restrictions.

- Limited connections to family and communities is particularly concerning for Indigenous children “who have already been deeply harmed by inequalities in public services and by colonial and genocidal policies that have unnecessarily removed them from their homes and communities and disconnected them from their Elders, cultural traditions and languages.”<sup>vi</sup> Inconsistent territorial and provincial policies can make it difficult for many Indigenous children to maintain contact with their families and cultures. For example, barriers to maintaining family and cultural connections for Indigenous children and youth in alternative care from rural areas of Canada have been exacerbated during the pandemic due to air travel restrictions and inequitable access to technology.
- *Pro forma* adjournments of many court matters have limited the ability to challenge suspensions of in-person contact between children and their family members through the courts. This is contrary to articles 3, 9, 12 and 30 of the UNCRC and section 7 of the *Canadian Charter of Rights and Freedoms* which guarantees the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 7 has been held to apply to child welfare matters and the principles of fundamental justice are both substantive and procedural.<sup>vii</sup>
- Case-specific, mitigating measures must be adopted to avoid harmful impacts of COVID-19 restrictions while protecting health. Any limits to children’s in-person contact with family members should be time-bound, subject to regular review, and eased or eliminated as soon as possible.<sup>viii</sup>
- In Ontario, courts continued to hear urgent and statutorily-mandated child protection matters remotely. Jurisprudence early in the pandemic found that blanket policies by child welfare agencies to suspend in-person parent-child access were inappropriate. While COVID-19 concerns were deemed to be gravely important, courts also recognized the importance of children maintaining parental relationships. Absent evidence of parental behaviour inconsistent with COVID-19 protocols, there should be no presumption that the pandemic results in the suspension of in-person parenting time. (*CAS v. T.F. and K.M.*, 2020 ONCJ 169)
- Participation by children in court processes has also been impacted by the COVID-19 pandemic. For example, in Ontario, there have been fewer court requests for legal representation for children in family law and child protection proceedings during the pandemic (data from the Ontario Office of the Children’s Lawyer). This may be explained in part by restrictions in the matters heard by the courts and the inability to file new applications early in the pandemic.
- An Immigration and Refugee Board policy makes the presence of children at refugee hearings discretionary.<sup>ix</sup> This policy infringes on children’s right to be heard and increases the risk that children seeking refugee status will face refoulement, exploitation or violence.
- Children experiencing conflict and violence in their homes or other residential settings are more vulnerable because they are less visible in the community. The pandemic has also limited their access to support services such as social workers, counsellors and legal representatives, which are only available remotely in some cases. For legal representation, public health restrictions created significant impediments to establishing in-person, confidential communications with clients. This limits counsel’s ability to reliably ascertain a child’s views, inform the child about legal decisions being made about them, and adequately assess their interests, including measures to address their well-being, health and safety.
- There have also been positive jurisprudential developments on the best interests of the child and child participation/representation since the start of pandemic that are not related to it:
  - **Michel v. Graydon:**<sup>x</sup> In concurring reasons of a unanimous judgment, the Supreme Court of Canada recognized that courts under provincial family law legislation can vary a child support order, whether or not the beneficiary is a “child” at the time of the application, and whether or not the order has expired. The purpose and promise of child support is to protect financial

entitlements due to children by their parents. This right is not extinguished when the child reaches the age of majority. Citing articles 3 and 27 of the UNCRC as affirming the legal principle of the best interests of the child and the duty of state parties to “take all appropriate measures to secure the recovery of maintenance for the child from the parents”, a concurring judgment recognized children as “full rights bearers”.

- ***Justice for Children and Youth v. J.G.***<sup>x</sup> This appeal decision addresses the rights of a child to independent legal advice in the context of a high conflict dispute between the parents over custody and access. It relied significantly on the UNCRC and General Comments of the Committee on the Rights of the Child. The Court held that access to legal advice is a fundamental right in Canada not limited to adults. Children are entitled to seek legal advice without permission from their parents or the court.
- ***M.A.A. v. D.E.M.E.***<sup>xii</sup> In an appeal of a family law return order in an alleged cross-border abduction case involving a non-Hague country, the Ontario Court of Appeal confirmed the child’s right to participate as fundamental to family law proceedings. The Court cited the UNCRC and held that a determination of best interests must incorporate the child’s views. The Court also addressed the impact of the children’s pending refugee claim on the family law return proceedings, noting Canada’s ratification of the 1951 Refugee Convention and the *Protocol relating to the Status of Refugees*, and Canada’s recognition of the principle of *non-refoulement* in the *Immigration and Refugee Protection Act*. The Court cited the obligation owed to refugee children under article 22 of the UNCRC and held that refugee protection is not limited to those granted refugee status but applies equally to asylum seekers. The Court concluded that children are entitled to protection as they seek asylum and must not be returned pursuant to family law return proceedings under the *Children’s Law Reform Act* before the determination of their refugee claims.

These recent cases are positive developments. They show that enhanced compliance with the principles of the UNCRC is frequently achieved through litigation. The latter two cases also highlight that legal representation for children in cases where their best interests are being assessed is a critical means of actualizing their rights, particularly where there is a conflict between the parties in the decision. States parties must be urged to adequately fund representation for children’s essential legal needs.

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<sup>i</sup> Canadian Bar Association Child and Youth Law Section, [Alternative Report](#) (February 2020).

<sup>ii</sup> An Act to establish the Office of the Commissioner for Children and Youth in Canada, [Bill S-217](#) (June 16, 2020).

<sup>iii</sup> An Act to establish the Office of the Commissioner for Children and Youth in Canada, [Bill S-210](#) (September 30, 2020).

<sup>iv</sup> [2020 ONSC 1829](#)

<sup>v</sup> Child Welfare League of Canada [Maintaining connections for children and youth in the context of COVID-19](#) (revised June 17, 2020)

<sup>vi</sup> *Ibid.*

<sup>vii</sup> [New Brunswick \(Minister of Health and Community Services\) v. G. \(J.\)](#), [1999] 3 SCR 46

<sup>viii</sup> Child Welfare League of Canada [Maintaining connections for children and youth in the context of COVID-19](#) (revised June 17, 2020. More generally, see also [Worlds Apart: Canadian Companion to UNICEF Report Card 16, UNICEF Canada](#), which ranks Canada a declining 30th in child and youth well-being among 38 of the world’s wealthiest countries.

<sup>ix</sup> Immigration and Refugee Board, [Practice Notice: Presence of children at Refugee Protection Division hearings](#)

<sup>x</sup> 2020 SCC 24.

<sup>xi</sup> 2020 ONSC 4716.

<sup>xii</sup> 2020 ONCA 486.