



Rights of the Child on Children's Access to Justice and Effective Remedies

The Canadian Bar Association (CBA) brings together thousands of legal professionals from across Canada. This submission was drafted by the CBA's Child and Youth Law Section for consideration by the Committee on the Rights of the Child as it prepares its General Comment on children's access to justice.

Definitions and understandings

The Committee should consider emphasizing the concept of "access to justice" as articulated by the UN High Commissioner for Human Rights in her [2013 Report on the subject](#):

- **Access to justice is a fundamental right in itself** and an essential prerequisite for the protection and promotion of all other human rights.
- **Access to justice for children requires the legal empowerment of all children** and includes access to information and effective remedies to claim their rights, including through legal and other services, child rights education, counselling or advice and support from knowledgeable adults.

The inclusion of the **legal empowerment** of children is particularly important given the tendency to view the active participation of children in non-criminal proceedings as potentially harmful to them and to be avoided.

The **rule of law** should be a central feature of the General Comment. As stated by the International Association of Youth and Family Judges and Magistrates: "Every justice intervention involving children must be based on the rule of law. Children must be recognized by law as subjects of substantive and procedural rights."¹

Related to the rule of law, **due process** should be guaranteed for children as it is for adults, including in all judicial, non-judicial and administrative proceedings, and should not be minimized or denied under the pretext of the child's best interests.²

The General Comment should address the concepts of **capacity** and **party status** for children; the failure to recognize capacity and the absence of standing presents barriers to the recognition of the legal personality of children.

Access to justice also includes **everyday justice** for children beginning at home and in their schools and communities. Nurturing child participation, autonomy and agency in decision-making in these contexts socializes children to be active community participants and defend their own and others' human rights.

¹ [Guidelines on Children in Contact with the Justice System](#) (2017) at 13 [[IAYFIM Guidelines](#)].

² Council of Europe, [Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice](#) at para. III(A)(2).

Children have said that **voice, neutrality, respect, and trust** matter to them in school discipline decision-making.³ Children who participated in school-based restorative practices in Ontario left with strengthened relationships among children and staff, and child participants appreciated the time and space to hear all sides.⁴

Interdisciplinarity is essential to ensuring children’s access to justice. Thinking critically and across disciplines about how to approach the work of access to justice for children requires adult allies working together to make adult-centric systems accessible and effective for children.

Barriers

Artificial age thresholds

Minimum ages are often influenced by social and cultural norms and beliefs, regardless of evidence supporting children’s capacities to participate in decision-making about their lives.

Lack of party status, standing and legal representation

Children are rarely afforded party status or standing in judicial and administrative proceedings. Ontario’s child protection legislation provides children standing in limited contexts.⁵

Legal representation is not automatically available to children in family law proceedings. In Canada, it is dependent on the discretion of the court and the jurisdiction in which the child lives.⁶

Inconsistent mechanisms for participation in judicial proceedings

Non-representational methods of placing children’s views before the courts, including Voice of the Child reports, expert assessments and judicial interviews, have benefits.⁷ However, none assure the child’s meaningful participation in the process and no review mechanisms explicitly ensure that children’s views appropriately inform outcomes. Similarly, adult-directed models of legal representation, such as guardian *ad litem* and *amicus curiae*, may not adequately support children’s legal empowerment.⁸

Lawyers have the same obligations towards children as for adults, and such obligations can and must be carried out consistent with the level of understanding and communication of the child.⁹

Lack of independent representation in family violence and claims of parental alienation

Cases involving allegations of family violence, which often draw counter-allegations of “parental alienation”, present significant access to justice barriers for children. Recourse to extreme remedies, including forced “reunification” therapies and transfers of custody, raises significant concerns

³ Hübsch, J.-F. 2020. [The self-represented child in school discipline under Ontario’s Education Act](#). *Canadian Journal of Children’s Rights*, 7(1), 73–97 [Hübsch, Self-represented child].

⁴ Hübsch, J.-F. 2022. L'accès des enfants à la justice dans les procédures de discipline scolaire en Ontario (Canada). In M. Paré et al. (Eds.) *Accès des enfants à la justice : bilan critique* (pp. 107–120). Dalloz.

⁵ [Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sched. 1](#), ss. 79(4)-(6) [CYFSA].

⁶ D. Lovinsky & J. Gagné. 2015. [Legal Representation of Children in Canada](#) at 8. See also N. Bala & C. Houston. 2015. [Article 12 of the Convention on the Rights of the Child and Children’s Participatory Rights in Canada](#).

⁷ C. Tempesta, [Legal Representation as a Critical Aspect of the Realization of the Child’s Right to Be Heard](#), at 20-25 [Tempesta, [Legal Representation](#)].

⁸ *Ibid.* at 25-32.

⁹ [IAYFJM Guidelines](#) at 29.

regarding child rights violations, including deprivations of liberty from police enforcement of court orders and accompaniment to reunification programs. Independent legal representation for children is a critical procedural safeguard for children.¹⁰

Insufficient concern for privacy

Children’s identities in relation to court proceedings are kept confidential in youth criminal justice and child protection/adoption matters in Canada. Such protections should be extended to all other civil law and administrative proceedings. No information that would reveal or indirectly enable identification of a child should be published or otherwise made public.

Records, documents and contents of hearings containing children’s private information should be presumptively confidential and closed to third parties.¹¹ Similarly, any matters involving children as subjects, witnesses, accused persons or in any other capacity should presumptively be heard *in camera*, i.e. in the absence of the public and the media. When children’s records (e.g. counselling records) are being sought in proceedings in which they are not parties, they should receive notice and the opportunity to respond to the application.¹² State-funded legal representation should be provided for this purpose.

Limited judicial interpretation of General Comment 12

In 2018, the British Columbia Court of Appeal upheld an order denying a 17-year-old youth legal representation in a high conflict parenting case.¹³ The Court concluded that Article 12 does not go so far as to guarantee children a right to legal representation or to party status.

With respect to General Comment 12, the Court pointed out that the term “representative” in article 12(2) does not explicitly mandate that the child have access to legal representation.

With respect to paragraph 96 of General Comment 14, the Court compared the English and French language versions to adopt a narrow interpretation, stating: “In using the term ‘un conseil juridique’ ... the French version appears to indicate that the level of “representation” contemplated by the commentary is not a full right to counsel, but rather a right to have the benefit of legal advice.”

The General Comment should clearly articulate a right to legal representation as a due process right necessary for fair judicial proceedings “whenever the child’s interests are at stake”.¹⁴

Lack of state funding for legal representation

Reductions in legal aid funding in many jurisdictions negatively impact children’s access to legal support. Children require an equal footing in legal proceedings, especially in family law proceedings, and resources must be allocated in State budgets for this purpose.¹⁵

Lack of adequate review and appeal mechanisms

¹⁰ See 2023 Report of the Special Rapporteur on violence against women and girls, its causes and consequences, [A/HRC/53/36](#).

¹¹ See s. 70 of Ontario’s [Children’s Law Reform Act RSO 1990, c C.12](#). See also rule 1.3 of the [Family Law Rules, O Reg 114/99](#).

¹² See *T.L.B.L. v. T.E.M.*, [2021 ONSC 8235](#), at paras. 201, 203-225, 255, 258-259, 264-267.

¹³ *J.E.S.D. v. Y.E.P.*, [2018 BCCA 286](#).

¹⁴ See [IAYJFM Guidelines](#) at 29.

¹⁵ Tempesta, [Legal Representation](#) at 47.

Appeal remedies are often available only to children’s parents and guardians. The absence of appeal mechanisms afforded to children in areas that directly affect them can be seen in provincial and territorial education legislation in Canada.¹⁶

Lack of child-friendly complaint mechanisms

A complaint mechanism is a means through which children who believe their rights have been violated, as individuals or collectively as a group, can seek redress and make the violation stop. The right to a remedy is a fundamental human right and an essential dimension of access to justice for children. We draw the Committee’s attention, for example, to the [common principles for a child friendly complaints process](#) developed by the Children’s Commissioner in England in consultation with children.

Limitations on available remedies

Even when children can access justice processes, remedies may be ill-suited to children’s circumstances and non-responsive to children’s experiences. For example, Ontario’s child welfare legislation sets out the rights of children in care and receiving services from child welfare organizations, as well as the requirement for complaints procedures and independent review boards.¹⁷ Yet, the complaints procedures established by individual agencies are inconsistent and often opaque, and the available outcomes on review are severely limited.

Remedies may also face constitutional hurdles. Legislation in Saskatchewan mandating parental consent before school officials use a child’s “gender-related preferred name or gender identity” explicitly states that it operates *notwithstanding* certain rights set out in the *Canadian Charter of Rights and Freedoms*.¹⁸ The legislation enshrines a policy that the courts would otherwise have blocked on an interim basis, *before* a full hearing on its constitutionality.¹⁹

Lack of child-focused timelines

Delays significantly compromise the effectiveness of available remedies. Moreover, financial compensation awards are commonly held in trust by the State until the child reaches the age of majority, further compromising a meaningful and timely remedy.

Lack of explicit child-rights based approaches

Canadian jurisprudence related to children rarely makes explicit reference to the Convention. Explicit use of the language of children’s rights in decisions affecting children helps shape the discourse of children’s access to justice.

Lack of knowledge about children’s rights and lack of training about child-centered professional practices is a barrier to children’s access to justice. Moreover, sustained funding is needed for child-centered access to justice, such as restorative practices in schools, in health care settings and child protection matters, as has been done in the child justice context.

Preliminary results of a study about children’s access to justice as human rights defenders in Canada indicate that some institutions appear to adopt narrow definitions of the rights they protect and the

¹⁶ Hübsch, Self-represented child; see, e.g., Prince Edward Island’s [Education Act](#), RSPEI 1988, c E-0.2.

¹⁷ [CYFSA](#), Preamble, ss. 8-14, ss. 18, 120.

¹⁸ [The Education \(Parents' Bill of Rights\) Amendment Act](#), SS 2023, c 46.

¹⁹ *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, [2023 SKKB 204](#).

public they serve.²⁰ If enabling legislation does not explicitly mention children and their rights, structural adult-centrism can lead to uneven access to justice and remedies.

Enabling factors and strategies

Support to regional bodies and institutions

A priority should be given to supporting regional efforts to promote child friendly justice interventions outside of Europe, through the OAS, the African Union and other forums.²¹

Networks for child-friendly justice

A global forum of specialized human rights agencies for children, akin to the European Network of Ombudsman for Children, could coordinate efforts to ensure institutions work intentionally within a child rights framework. States Parties should also support the work of national, regional and global networks.

Building professional capacity

A culture of children's rights requires significant and sustained professional development in all sectors. In British Columbia, the CBA's provincial Child and Youth Law section is collaborating with Access2Justice BC and other civil society organizations to champion legal best practices for hearing children's voices among family court lawyers and judges.

Technologies supporting access to justice

Video conferencing and remote participation of children in legal proceedings may offer protective environments and help children to be active participants in proceedings. Online tools for professionals can promote a culture of children's rights, such as the CBA's [Child Rights Toolkit](#) and Justice Canada's guidance and training on the use of [child rights impact analyses in federal policymaking](#).

Indigenous-led child and family services

As part of the journey of reconciliation, federal legislation empowers Indigenous communities to exercise direct jurisdiction over child and family services for their community members, and includes an obligation to consider children's best interests in all judicial matters related to Indigenous children and families.²² Some provincial child protection legislation includes specific provisions about Indigenous children.²³

²⁰ Paré, M., Levesque, A. & Hübsch, J.-F. 2024, May 14. La participation des enfants et des jeunes auprès des institutions de défense des droits : données préliminaires d'une étude au Canada [Conference session]. 91^e Congrès de l'Acfas, Université d'Ottawa, Ottawa, ON, Canada.

²¹ A. Mazzinghy. 2020. [Child-Friendly Justice Behind Bars: A Comparative Analysis of the Protection Mechanisms of the Rights of Arrested Children in the Practice of the Working Group on Arbitrary Detention and of the European and Inter-American Courts of Human Rights](#). *American University International Law Review* 35:2. See also, R.M. Ortiz. 2010. Access to Justice in the Inter-American System: Standards and Challenges. In [Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child](#). Brill: Nijhoff. pp. 335-339.

²² *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24.

²³ See, for example, *CYFSA*, Part IV.

Child rights-based legal supports

In Ontario, the [Office of the Children’s Lawyer](#) (OCL) and the legal aid services of [Justice for Children and Youth](#) are pre-eminent models for specialized and accessible legal representation of children in ways that substantively and effectively advance children’s access to justice and effective remedies in that province. The OCL has been described as “fundamental to the proper functioning of the legal system”.²⁴

Emerging practices in Canada

Examples of emerging rights-respecting practices in Canada include:

- [Child and Youth Advocacy Centres](#) provide integrated service delivery to child victims of sexual and physical abuse.
- The pioneering work of the [Fondation Dr. Julien](#) in community-based social pediatrics in Quebec is expanding to other parts of Canada.
- [Integrated Service Delivery](#) is a philosophy of service integration for children with complex needs across education, health, child protection and justice services in New Brunswick.
- The Canadian Institutes for Health Research fund the development of community-based youth hubs, such as [Access Open Minds](#), where youth can access child rights-informed lifesaving clinical supports.
- Quebec now has a province-wide [schools ombudsman supported by a team of regional schools ombudsmen](#).
- Since 2022 the Child Welfare League of Canada has been promoting the adoption of the [Equitable Standards for Transition to Adulthood for Youth in Care](#), informed by lived experience of children in care in Canada.

²⁴ *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, [2018 ONCA 559](#), at paras. 46 and 53.