

CBA CHILD RIGHTS TOOLKIT

The Rights of Children in Child Protection Matters

Part I – Introduction / Overview respecting a Child’s Rights in the Context of Child Protection

The role of the State in child protection matters is to intervene when the level of care provided to children by their parents falls below minimum standards. In light of the potentially profound effects of such intervention on both parent and child, particularly when the child is removed from the home, the intervention contemplated by provincial/territorial child protection laws, regulations and practices must conform to the rights enshrined within the *Charter of Rights and Freedoms*. Canada has also ratified the *Convention on the Rights of the Child* (“the *Convention*”) and although it is not specifically referenced in child protection legislation except in limited instances,¹ the Supreme Court of Canada has clearly stated that the values reflected in international human rights law should assist in the interpretation of our domestic statutes, and has used the *Convention* as an interpretive tool in the child protection context.² The Supreme Court has also stated that our domestic legislation will be presumed to conform with international law unless the wording of the statute clearly compels a different interpretation.³ Accordingly, the significance of the *Convention* as an advocacy and decision-making tool in the area of child protection law should not be overlooked.

Consistent with the underlying philosophy of child protection law, the preamble to the *Convention* places primacy on the family “as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children”, as well as the fact that the family “should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”. This suggests the need to provide supportive services to families with a view to preventing the circumstances which may lead to the removal of the child from the home. In situations of abuse, neglect or other maltreatment, the *Convention* recognizes that the best interests of the child may necessitate the separation of the child from his or her parents; however, even when such separation is necessary, State Parties are encouraged to respect the right of the child to maintain personal relations and direct contact with parents on a regular basis, except if it is contrary to the best interests of the child. The Supreme Court of Canada has recognized that child protection proceedings engage not only a parent, but the child’s, s. 7 interests under the *Charter*. As a result, interference in the parent-child relationship may only be justified if it is in accordance with the principles of fundamental justice.

¹ preamble to the Yukon’s *Child and Family Services Act*, S.Y. 2008, c. 1, and principles of the Northwest Territories, S.N.W.T. 1997, c. 13 and Nunavut’s *Child and Family Services Act* S.N.W.T. 1997, c. 13, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28

² *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, [1989] SCJ No. 45, at para. 23; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 69; *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30, at para. 93

³ *R. v. Hape*, [2007] 2 S.C.R. 292, [2007] S.C.J. No. 26, at para. 53

Although the “best interests of the child” is the overarching consideration in provincial/territorial child protection legislation across Canada, and thus in apparent accordance with Article 3 of the *Convention* which requires that the best interests of the child be “a primary consideration” in all actions concerning children, there is a lack of consistency in the application of this principle in specific statutory contexts – for example, the test for access to a child who has been made a permanent ward of the State – as well as in individual cases. Also, the quality of children’s participation and the opportunity to be heard in child protection matters varies from jurisdiction to jurisdiction, requiring vigilance in advocacy and decision-making, and in some cases, reform. The Supreme Court has recognized that the quality of decision-making about a child is enhanced by input from that child and as one jurist stated, adherence to Article 12 of the *Convention* gives children “who have to live with the decisions made by others, the ability to share their concerns about the impact of those decisions on their lives”.⁴

Part II - Source of Children’s Legal Rights

This section identifies the various sources of child protection law in Canada and the significant case law that interprets children’s rights when the State intervenes in the lives of their families. It also identifies international law sources that may assist us domestically with the interpretation of children’s rights in the area of child protection law.

A. Federal Statutes

- *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11

B. Provincial and Territorial Statutes

- Alberta: *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12
- British Columbia: *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46
- Manitoba: *Child and Family Services Act*, C.C.S.M. c. C80
- New Brunswick: *Family Services Act*, S.N.B. 1980, c. F-2.2
- Newfoundland and Labrador: *Children and Youth Care and Protection Act*, S.N.L. 2010, c. C-12.2
- Northwest Territories: *Child and Family Services Act*, S.N.W.T. 1997, c. 13
- Nova Scotia: *Children and Family Services Act*, S.N.S. 1990, c. 5
- Nunavut: *Child and Family Services Act*, S.N.W.T. 1997, c. 13, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28
- Ontario: *Child and Family Services Act*, R.S.O. 1990, c. C.11
- Prince Edward Island: *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1

⁴ *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30, at para. 92; and *Children’s Aid Society of Toronto v. E.U.*, [2014] O.J. No. 2939 (O.C.J.), at para. 264

- Quebec: *Youth Protection Act*, C.Q.L.R., c. P-34.1
- Saskatchewan: *Child and Family Services Act*, S.S. 1989-90, c. C-72
- Yukon: *Child and Family Services Act*, S.Y. 2008, c. 1

C. Provincial and Territorial Regulations (select)

- Alberta: *Child, Youth and Family Enhancement Regulation*, Alta. Reg. 160/2004
- Ontario: *Exemption from Act – Mohawks of Awkesasne*, O. Reg. 116/11
Adoption Information Disclosure, O. Reg. 464/07
Court Ordered Assessments, O. Reg. 25/07
Methods and Procedures regarding Alternative Dispute Resolution, O. Reg. 496/06
Transitional Matters re: Enactment of the Child and Family Services Statute Law Amendment Act, 2006, O. Reg. 495/06
Complaints to a Society and Reviews by the Child and Family Services Review Board, O. Reg. 494/06
Procedures, Practices and Standards of Service for Child Protection Cases, O. Reg. 206/00
Register, R. R. O. 1990, Reg. 71
General, R. R. O. 1990, Reg. 70
Family Law Rules, O. Reg. 114/99 to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43

D. Indigenous Law

With hundreds of Nations located across Canada, consider the potential application of indigenous laws in your case such as:

- Splitsin By-law 3, *A By-law For The Care of Our Indian Children: Spallumcheen Indian Band By-law #3-1980*: gives to the Band exclusive jurisdiction over any proceeding involving the removal of a child from their family, notwithstanding the residency of the child. It is the only child welfare bylaw which has been allowed under s. 81 of the *Indian Act*
- *Tsawwassen First Nation 2009 Children and Families Act*

E. International Law

- *UN Convention on the Rights of the Child*, Can. T. S. 1992 No. 3 (“*CRC*”), in particular:

General Principles:

- **Article 2** (non-discrimination);
- **Article 3** (best interests as a primary consideration);
- **Article 6** (right to life, survival and development);
- **Article 12** (right of child to express views freely and to have due weight given to those views)

See also:

- **Article 5** (responsibility of parents to provide direction/guidance to the child re his/her rights under the *CRC* consistent with the child's evolving capacities);
- **Article 8** (right to preserve identity, including nationality, name and family relations);
- **Article 9** (non-separation from parents / right to maintain contact with parents, except if contrary to best interests);
- **Article 16** (child's right to be free from arbitrary or unlawful interference with his or her privacy or family and the right to the protection of the law against such interference);
- **Article 18** (primary responsibility of parents and legal guardians for the upbringing and development of the child, guided by the best interests of child, with State Parties having a corresponding duty to provide appropriate assistance to parents in the performance of this goal);
- **Article 19** (right of child to be free from all forms of violence and State parties' responsibility to take appropriate protective measures);
- **Article 20** (special protection/assistance by the state when child deprived of family environment);
- **Article 21** (safeguards re inter-country adoption);
- **Article 22** (appropriate protection for refugee child, whether accompanied or unaccompanied);
- **Article 23** (special care and assistance for disabled child);

- **Article 24** (right to highest attainable standard of health and the need for access to education and support in regard to basic child health and nutrition, including preventative health care and guidance for parents);
 - **Article 25** (periodic right of review re placement for care, protection or treatment of physical or mental health);
 - **Article 27** (right to adequate standard of living, including responsibility of State Parties to take appropriate measures to assist parents in securing the conditions of living necessary for the child's development by providing material assistance and support programmes, particularly with regard to nutrition, clothing and housing);
 - **Article 28** (right to education);
 - **Article 29** (education directed to development of child's full potential, including respect for cultural identity, language and values);
 - **Article 30** (right to culture, religion and language for minority and indigenous children);
 - **Article 31** (right to rest, leisure, play and recreational activities);
 - **Article 33** (protection from the illicit use of narcotic drugs and psychotropic substances);
 - **Article 34** (right to be protected from sexual exploitation and abuse);
 - **Article 35** (measures to protect against abduction and trafficking);
 - **Article 36** (protection against all other forms of exploitation);
 - **Article 37** (protection against torture or other cruel, inhuman or degrading treatment or punishment and deprivation of liberty);
 - **Article 39** (measures to promote physical and psychological recovery of child victims)
- *Declaration of the Rights of the Child (1959)*
 - Optional Protocols to the *CRC* (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography)
 - *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

- *Declaration on the Rights of Indigenous Peoples*
- *Convention on the Elimination of All Forms of Discrimination against Women*
- *Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption*
- *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*

Interpretive Sources

- CRC/GC/2013/14, 29 May 2013, General Comment No. 14 (2013), **“On the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)”**
- CRC/GC/2009/12, 20 July 2009, General Comment No. 12 (2009), **“The right of the child to be heard”**
- CRC/GC/2011/13, 18 April 2011, General Comment No. 13 (2011), **“The right of the child to freedom from all forms of violence”**
- CRC/GC/2006/8, 2 March 2007, General Comment No. 8 (2006), **“The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)”**
- CRC/GC/2005/7, 20 September 2006, General Comment No. 7 (2005), **“Implementing child rights in early childhood”**
- CRC/GC/2009/11, 12 February 2009, General Comment No. 11 (2009), **“Indigenous children and their rights under the Convention”**
- CRC/GC/2013/15, 17 April 2013, General Comment No. 15 (2013), **“The right of the child to the enjoyment of the highest attainable standard of health”**
- CRC/GC/2006/9, 13 November 2007, General Comment No. 9 (2006), **“The rights of children with disabilities”**

- CRC/GC/2005/6, 1 September 2005, General Comment No. 6 (2005), **“Treatment of unaccompanied and separated children outside their country of origin”**
- CRC/GC/2003/4, 1 July 2003, General Comment No. 4 (2003), **“Adolescent health and development in the context of the Convention”**
- CRC/GC/2013/17, 17 April 2013, General Comment No. 17 (2013), **“The right of the child to rest, leisure, play, recreational activities, cultural life and the arts”**
- CEDAW/31-CRC/GC/2014/18, 14 November 2014, **“Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices”**

F. Case Law Summaries that implement children’s legal rights in the area:

- ***New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47**

Brief overview:

This case raised the issue of whether indigent parents have a constitutional right to be provided with state-funded counsel when a government seeks an order suspending the custody of their children. The Court found that when government action triggers a hearing in which the interests protected by s. 7 of *Charter* are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel.

Relevant findings/child rights analysis:

The Court found that state removal of a child from parental custody engages not only the parent’s right to security of the person, but the child’s as well. The Court noted that few state actions can have a more profound effect on the lives of both parent and child:

Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship. (para. 76)

This case also stands for the proposition that representation of a parent by counsel may be necessary for there to be a fair determination of a child's best interests:

Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's s. 7 right to security of the person. (para. 81)

- ***Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, [2000] S.C.J. No. 48**

Brief overview:

In this case, the Supreme Court of Canada considered the constitutionality of apprehensions without prior judicial authorization in non-emergency situations. The Court found that while the infringement of a parent's right to security of the person caused by the interim removal of his or her child through apprehension in situations of harm or risk of serious harm to the child does not require prior judicial authorization, the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimized as much as possible by a fair and prompt post-apprehension hearing. This is the minimum procedural protection mandated by the principles of fundamental justice in the child protection context.

Relevant findings/child rights analysis:

Writing for the majority, L'Heureux-Dubé J. considered the *Convention*:

73 It must also be recognized that children are vulnerable and depend on their parents or other caregivers for the necessities of life, as well as for their physical, emotional and intellectual development and well-being. Thus, protecting children from harm has become a universally accepted goal: see the **Convention on the Rights of the Child**, Can. T.S. 1992 No. 3, now ratified by 191 states, including Canada.

However, the Court also considered the "delicate" balancing of the various interests at stake:

The issues raised by the challenge to the Act require the Court to undertake a delicate and contextual balancing under s. 7 of the following principles and interests: parents' and children's right to freedom from unjustified state intrusion into their lives; the

requirements of fair procedure; children's life and health; and the state's duty and power to protect children from serious harm. Children's interests appear on both sides of this balancing scale. (para. 48)

In considering these sometimes competing interests, the Court ultimately determined that fair process in the child protection context must reflect the fact that children's lives and health may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention. (para. 94)

Although the child's security interest is alluded to by Justice L'Heureux-Dubé at para. 97 of the majority decision, it was Arbour J. in a dissenting opinion, who expounded on the nature of the **child's** security interest (emphasis added):

My colleague, L'Heureux-Dubé J., has emphasized in her reasons the importance of the child's interest in being protected from harm (paras. 73-75). Although I, too, acknowledge the great significance of this aspect of the child's interest, it is equally important to recognize the child's interest in remaining with his or her parents and that harm may come to the child from precipitous and misguided state interference. Lamer C.J. explicitly recognized the child's security interest where the parent's custody of the child is removed by the state in G. (J.), supra, at para. 76:

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

If we fail to give sufficient weight to this aspect of the child's security interest, we may also fail to recognize that removing children from their parents' care may have profoundly detrimental consequences for the child. Professor Nicholas Bala makes this point in "Reforming Ontario's Child and Family Services Act: Is the Pendulum Swinging Back Too Far?" (1999-2000), 17 C.F.L.Q. 121, noting that children are not always placed in a foster care environment that is better than the care the child would have received in

the home. (paras. 13-14)

- ***A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, [2009] S.C.J. No. 30**

Brief overview:

In this case, the Supreme Court of Canada upheld a court's decision to allow the Director of Child and Family Services to authorize unwanted medical treatment on behalf of an adolescent pursuant to the provisions of Manitoba's *Child and Family Services Act*. Although the provisions were found to constitute a deprivation of the adolescent's liberty and security of the person, which encompass "[t]he right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment", they were held to be in accordance with the principles of fundamental justice. The Court found that the "best interests" standard in s. 25(8) of Manitoba's child welfare legislation operates as a sliding scale of scrutiny, with the child's views becoming increasingly determinative depending on his or her maturity.

Relevant findings/child rights analysis:

The Supreme Court of Canada endorsed an interpretation of the "best interests of the child" in a manner consistent with the *Convention*:

...With our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from that child. The extent to which that input affects the "best interests" assessment is as variable as the child's circumstances, but one thing that can be said with certainty is that the input becomes increasingly determinative as the child matures. This is true not only when considering the child's best interests in the placement context, but also when deciding whether to accede to a child's wishes in medical treatment situations.

93 Such a robust conception of the "best interests of the child" standard is also consistent with international instruments to which Canada is a signatory. The Convention on the Rights of the Child, Can. T.S. 1992 No. 3, which Canada signed on May 28, 1990 and ratified on December 13, 1991, describes "the best interests of the child" as a primary consideration in all actions concerning children (Article 3). It then sets out a framework under which the child's own input will inform the content of the "best interests" standard, with the weight accorded to these views increasing in relation to the child's developing maturity. Articles 5 and 14 of the Convention, for example, require State Parties to respect the responsibilities, rights and duties of parents to provide direction to the child in exercising his or her rights under the Convention, "in a manner consistent with the evolving capacities of the child". Similarly, Article 12

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

- ***J.T. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2015 NLCA 55**

Brief overview:

In this case, the mother appealed a continuous custody order in relation to her three children. The trial judge concluded that a continuous custody order was the only realistic statutory option available given the ongoing risks to the children posed by the mother's inability to withdraw from an abusive relationship and her substance misuse. The trial judge further found that s. 32(6)(a) of the *Children and Youth Care and Protection Act* precluded granting the mother conditions for access despite the fact that access was appropriate in this instance. One of the issues on appeal was whether the legislation preventing the attachment of conditions (ie. access) to a continuous custody order infringed s. 7 of the *Charter*.

Relevant findings/child rights analysis:

A majority of the Court allowed the appeal on the above-noted issue and granted a declaration of unconstitutionality for differently expressed reasons related to security of the person of the mother and children, arbitrariness, overbreadth, and denial of principles of fundamental justice. The Court concluded that the provision breached s. 7 of the *Charter* and could not be saved by s. 1. The provision was declared of no force and effect insofar as it purported to preclude access to a child in need of protection when making a continuous custody order and to attach conditions incidental to such access, where it was determined such access was in the child's best interests.

In considering the issue of a s. 7 infringement, Green C.J. confirmed that an order for continuous custody engages the parent's s. 7 right to security of the person, as well as the child's right to security of the person since "the child's psychological integrity and well-being may be seriously affected the by the interference with the parent-child relationship."

Significantly, he found that a denial of access may be sufficient to engage these interests:

Further, I would emphasize that although what is at stake here is whether the parent should continue to exercise *access* to the child and not whether a *continuous custody* order should be made, that does not lessen, in the current circumstances, the significance of

the issue in terms of its impact on the psychological integrity of the mother or the child. The denial of access is the very thing that will bring about the serious interference with the psychological integrity that *G.(J.)* says that section 7 protects.

In a concurring opinion with different reasons, Hoegg J.A. considered the issue of personal autonomy involving control over one's bodily integrity free from state interference, as articulated by the Supreme Court in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331. At para. 136, he concludes:

To my mind, the physical separation of a child from his or her parents engages an aspect of the child's bodily integrity, in the sense that the child is physically and emotionally restricted from contact.

In considering children's rights to have relationships with their parents, Hoegg J.A. also references the *Convention*:

It is also worth noting that international law protects the rights of children to know and be cared for by their parents and not to be arbitrarily separated from them (*Convention of the Rights of the Child*, Can. T.S. 1992 No. 3, articles 3, 5, 7, 8, 9 and 16). (para. 150)

Hoegg J.A. concludes by summarizing the relevant constitutional principles:

156 In summary, section 7 principles of fundamental justice protect procedural rights such as the right to a fair hearing (*G.(J.)*) and fair play (*A.B.*) and substantive rights such as the right of a child to have access to his or her parents and a parent's right to enjoy his or her child's access when it is in the child's best interests (*G.(J.)*, *Winnipeg C.F.S.*, (*C.(A.)*), *A.B.*, and (*A.(R.)*). Legislation which infringes section 7 *Charter* rights is not constitutional unless it operates in a way that is not arbitrary, overbroad or grossly disproportionate to the objective of the legislation (*C.(A.)*, *Bedford* and *Carter*).

- ***First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2016 CHRT 2**

In 2007, Dr. Cindy Blackstock of the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint with the Human Rights Commission pursuant to s. 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, alleging that the Department of Indian and Northern Affairs Canada (now known as the Department of Aboriginal

Affairs and Northern Development Canada or AANDC), provides inequitable levels of child welfare funding to First Nations children living on reserve (under Directive 20-1). This inequitable funding was alleged to amount to discrimination on the grounds of race and national or ethnic origin, contributing to the over-representation of status First Nations children in child welfare care.

On March 14, 2011, following a motion by Canada, the Canadian Human Rights Tribunal dismissed the complaint. Following various applications for judicial review, the Federal Court set aside the Tribunal's ruling and the matter was eventually remitted to a differently constituted panel of the Tribunal for a re-determination. In a decision released January 16, 2016, the Tribunal concluded that First Nations children and families living on reserve and in the Yukon are discriminated against in the provision of child and family services by AANDC. Specifically, the Tribunal found that First Nations on reserves and the Yukon are adversely impacted by the provision of services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and that race and/or national or ethnic origin are a factor in those adverse impacts or denial.

- ***Brown v. Canada*, [2014] O.J. No. 1128, 2014 ONSC 1583 (Div. Ct.) (leave to appeal granted); [2014] O.J. No. 5739, 2014 ONSC 6967 (Div. Ct.) (appeal dismissed)**

In a motion to certify a class action related to the "Sixties Scoop", the Court found that there was a certifiable class action related to the following question: "In Ontario, between December 1, 1965 and December 31, 1984, when an Aboriginal child was placed in the care of non-Aboriginal foster or adoptive parents who did not raise the child in accordance with the child's Aboriginal customs, traditions, and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take reasonable steps to prevent the aboriginal child from losing his or her Aboriginal identity?" Canada sought to appeal the certification process at various junctures. In a 2014 decision, the Divisional Court dismissed Canada's appeal on the basis that the plaintiffs' claim of a fiduciary duty was sufficiently made out on the facts as pled. The Court held that it was arguable that Canada had a responsibility to act in the best interests of the class members as children in need of protection, a clearly defined class of vulnerable persons. Similarly, an analysis of the fiduciary claim supported a finding of a sufficient relationship of proximity to ground an arguable claim in negligence. Canada's further request for leave to appeal this decision to the Court of Appeal for Ontario was denied.

Other Relevant Provincial / Territorial Case Law

- ***Children’s Aid Society of Toronto v. E.U.*, [2014] O.J. No. 2939 (O.C.J.)**

In this case, the Court finds that the test for access to a Crown ward under Ontario’s *Child and Family Services Act* has been met, considering amongst other things, the child’s wish to have continued contact with her parents. The Court grants the right of access to the child, rather than the parents, finding:

264 Allowing the child the right to be an access holder, with its associated rights, when the child has expressed a desire to maintain contact with her parents is a recognition of the importance of that child’s feelings and views. It is a preferable alternative to leaving access silent and more consistent with the overarching purposes of the Act. It also takes into account Article 12 of the *United Nations Convention on the Rights of the Child*. Article 12 provides that children should be given the opportunity to express their views and that their right to be heard includes the ability to provide those views to a decision-making body. That right allows children, who have to live with the decisions made by others, the ability to share their concerns about the impact of those decisions on their lives.³⁴

- ***Hamilton Health Sciences Corp. v. D.H.*, 2014 ONCJ 603 and 2015 ONCJ 229**

A hospital brought a third-party child protection application in relation to an 11-year-old Aboriginal child whose mother had decided to discontinue potentially life-saving chemotherapy treatment. The hospital had found that the child lacked capacity to make such a life-and-death decision, a finding which was supported by the Court. The child’s mother, who was found to be a loving parent, wished to pursue alternative traditional treatment. The Court found that traditional medicine continued to be practised on the child’s First Nation as it had been prior to European contact and formed an integral part of the First Nation. The mother characterized her choice in the child’s treatment as consistent with Aboriginal practices and therefore argued it was an Aboriginal right to elect alternative treatment in lieu of western health care. The Court dismissed the hospital’s application on the basis that s. 35 of the Constitution protects the mother’s right, (as the substitute decision-maker), to treat the child using traditional Aboriginal medicine. In an addendum to the decision, on consent of the parties, the Court acknowledged that “recognition and implementation of the right to use traditional medicines must remain consistent with the principle that the best interests of the child

remain paramount.”

- **R.A. (Re), [2002] Y.J. No. 48, 2002 YKTC 28 (YTC)**

In this case, the Court found that in failing to provide for the possibility of court-ordered access following the making of a permanent guardianship order, thus precluding an outcome that the Court felt served the child’s best interests, the Yukon *Children’s Act* (s. 126) violated the s. 7 rights of both the parent and child. The Court also considered the child’s right of participation, even at a young age:

167 Rights of a Child: The court in G.(J.), supra, recognized that “not only is the parent’s right to security at stake, the child’s is as well. Since the best interests of the child are presumed to be with the parent, the child’s psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship” (G.(J.), supra, at para. 76). The right of children to receive the level of care that serves their best interests and their right to enjoy a relationship with their natural parents are related and protected by s. 7. Any state intervention with those rights must accord with the principles of fundamental justice. In deciding what option advances the best interests of a child, it is not just physical care that is considered but, as important, are the emotional, spiritual and intellectual needs of a child. The best interests of a child are defined by the arrangement that maximizes the development of all these aspects of a child. In G.(J.), supra, the Supreme Court of Canada noted that when the infringement of s. 7 rights are not physical, the “impugned state action must have a serious and profound effect on a person’s psychological integrity” (G.(J.), supra, at para. 60). Removing a child from the natural family has such an effect on a child’s psychological integrity.

168 A child may seek an outcome different from what their parents or the department may seek. To deny a child the capacity of an independent voice in proceedings set to determine their best interests violates the fundamental principles of justice. Section 7 protections cannot wait until a child is old enough to advise counsel. Child advocates can raise issues on behalf of young children that neither the department nor parent raise. In order for the court to fully assess the best interests of children, child advocates will be necessary in all phases of child protection hearings, and especially in permanent

hearings. As the ink begins to set early in child protection proceedings, the need for a separate voice for a child begins when the status of a child in temporary care is being considered. A child's rights and interests are different and need to be separately protected (see N. Bala, *Charter Rights and Family Law in Canada: A New Era*, (2001) 18 C.F.L.Q. at 415).

- ***Nova Scotia (Community Services) v. T.C.*, [2010] N.S.J. No. 87, 84 R.F.L. (6th) 156 (S.C.)**

When assessing a child's best interests, the court must consider the child's wishes where ascertainable. The 'CFSA' not only permits the child to have counsel, but mandates it by virtue of s. 41(4)(b). Representation by counsel is consistent with *Charter* values and the need to balance a child's maturity with restrictions on *Charter* Rights. Such an interpretation of the law is consistent with Canada's obligations under the *United Nations Convention on the Rights of the Child*, CAN. T.S. 1992, No. 3.

- ***N.S. (Litigation Guardian of) v. Yukon (Director of Family and Children's Services)*, [2004] Y.J. No. 40, 120 C.R.R. (2d) 174 (S.C.)**

The s. 7 security of the person rights of a 16-year-old were held to have been infringed by virtue of a denial of a full oral hearing in the context of a permanent guardianship application.

- ***R.A.J. (Re)*, [1992] Y.J. No. 126 (Terr. Ct.)**

The court found that the Aboriginal child's s. 7 interests had been impermissibly infringed by legislative provisions that precluded outcomes that were consistent with the child's best interests, namely, a further temporary guardianship order that would allow the child to have a continued relationship with her parents while they continued to address their substance abuse issues.

- ***F.B. v. S.G.*, [2001] O.J. No. 1586, 199 D.L.R. (4th) 554 (S.C.J.)**

The court determined that requiring a minor parent to respond to a summary judgment motion for Crown wardship without access on the date her solicitor was removed from the record constituted a s. 7 infringement.

Part III - Special Considerations

Child protection law involves the balancing of what may appear, at times, to be conflicting interests: children's rights and interests in being raised within and by their natural families, and their rights and interests in being protected by the State from those families when the level of care falls below minimum standards. Given the interests at stake, the promotion of children's participatory rights is essential. Although there is provision for consideration of a child's views within a number of the various provincial/territorial child protection statutes in the context of a best interests assessment, the processes for ascertaining those views and placing them before the courts vary. In no province or territory is there a statutory guarantee that a child with capacity will have the "right to be heard" in every case, as contemplated by Article 12 of the *Convention*.

More generally, the interplay of the *Convention* with our domestic law needs to be contextualized to determine whether our statutory law is in compliance with the *Convention* and, notwithstanding statutory compliance, whether our courts comply in promoting and protecting the importance of the child's place within the family, the child's right to know his or her family, and the right not to be arbitrarily separated from that family.

Within this context, special attention must be paid to the rights and interests of Indigenous and minority children who are overrepresented within our child protection systems. Children's rights of non-discrimination and to enjoy their own culture, profess and practise their own religion and to use their own language are enshrined in the *Convention*, as well as other international instruments which Canada has endorsed, including the United Nations *Declaration on the Rights of Indigenous Peoples*. Similarly, there is some recognition in domestic child protection legislation that services provided to Indigenous children and their families must recognize their culture, heritage and traditions and the concept of the extended family. Given the legacy of colonialism, residential schools and the "Sixties Scoop", the need for culturally appropriate services and a recognition of the Indigenous child's place within his or her community are necessary lenses through which the rights of the Indigenous child in the child protection context must be viewed.

Other Considerations:

- under the *Convention*, a person below the age of 18 is considered a "child", unless under the law applicable to the child, majority is attained earlier
- the definition of a child is not consistent under provincial/territorial child protection legislation – for example, in Ontario, a child must be under the age of 16 at the time of a child protection agency's initial involvement (s. 37(1), *Child and Family Services Act*, R.S.O. 1990, c. C. 11); in British Columbia, protective services may be provided to a child/youth up to the age of 19 (s. 1, *Child, Family and Community Service Act*,

[RSBC] Ch. 46). This means that there is a discrepancy in the availability and provision of child protection services to young person depending on their province/territory of residence

- these age distinctions are also relevant to the situation of unaccompanied minors whose ability to access the services and care of a provincial child welfare authority will be dictated by the port of entry at which they arrive

Part IV - Practice Essentials

Practice essentials that can assist lawyers and the judiciary in implementing children's rights in the context of child protection:

- identify child rights generally and individual child-client rights specifically
- promote and protect a child's rights when the state intervenes to protect them from their family
- recognize an "interest" as compared to a "right", especially when they diverge
- become familiar with the provisions of the *Convention* that are particularly relevant to the child protection context (see Part II(D) above) and refer to them in oral and written submissions - for example, in addition to the right to be free from all forms of violence, for children who are removed from the care of their families, the right to maintain personal relations and direct contact with both parents on a regular basis except as contrary to the child's best interests; the right to be heard; the right to enjoy their own culture, religion and language; the right to receive an education that corresponds to a child's aptitudes and abilities; the right to medical and dental care (health); and the right to participate in recreational and athletic activities that are appropriate for the child's aptitudes and interests
- review the General Comments applicable to the above-noted provisions (see Part II(D) above). General Comments are developed by the United Nations Committee on the Rights of the Child and provide authoritative direction to State Parties on the interpretation of various rights under the *Convention*
- consider whether the child's s. 7 *Charter* rights to security of the person have been engaged by the intervention of a child protection authority (ie. has the child been removed from a parent's care; has there been a termination or severance of the child's right to access to a parent or other significant family member); has the infringement of the child's right been in accordance with the principles of fundamental justice (ie. has there been a timely hearing; has the child and/or parent been afforded the right to legal representation, etc.)

- canvass the need for independent legal representation for the child – does the governing child welfare statute provide for this? Where it does not, can an argument for state-funded legal representation be made? (Consider *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47)
- canvass other means by which a child's views may be placed before the court, in accordance with his or her age and maturity ("Views of the Child" report; assessment; evidence of social worker; judicial interview; child's evidence)
- explore the child's views regarding his or her living arrangements, including alternatives to state care (kinship or community plans), as well as significant persons in the child's life with whom he or she may wish to maintain contact if removed from the family home, and ensure those views are placed before the court
- advise the child of the viability of any proposed plans and visiting arrangements and explore alternate plans if it is unlikely that a court will endorse the child's position, as well as terms and conditions that may mitigate risk (e.g. safety plans, supervision of access by a third party, counselling or other programming for the parent and/or child)
- canvass the child's ability and willingness to receive notice and/or be present at the child protection hearing (see, for example, s. 39(4),(5) and (6) of Ontario's *Child and Family Services Act*, R.S.O. 1990, c. C.11)
- ensure that information is provided to the child about any proceedings in a manner that they understand – this may include explaining court documents or assessments in a manner commensurate with the child's age, maturity and cognitive development
- canvass the child's right to participate in the development of his or her own plan of care or service plan, whether placed in state care or receiving services from a children's aid society while still residing in the home or community
- maintain regular contact with the child to ensure that any issues related to placement, contact with significant persons, access to needed services (ie. counselling), appropriate educational programs and participation in recreational or other activities, are addressed in a timely way
- canvass the child's right to participate in the development of a permanency plan if they are unable to return to the care of their parents or previous caregivers, including any plans for permanent state care, adoption, customary care, kinship care, other custodial arrangements or transitions to independent living
- for youth transitioning to adulthood and/or independent living, consider the availability of on-going supports through the child protection agencies (financial support, housing, educational subsidies, medical benefits)

- be aware of timelines and their impact on the child, including statutorily-imposed timelines for various steps in the court process, particularly those relating to the need for permanency (ie. limitations on temporary in-care orders), the adjournment of court dates and the impact on the child of delays in decision-making
- consider the possibility of less-intrusive measures, ie. voluntary services or the availability of preventative or community services rather than residential care; also, the possibility of ADR processes rather than court proceedings
- consider privacy issues relating to a child's personal and service information and the child's participation in decisions regarding the access to and sharing of this information
- ensure that children are aware of any complaint or review mechanisms regarding the provision of services by a child protection agency, including access to the services of a provincial advocate or ombudsman
- consider the impact of any intersecting proceedings/issues (YCJA, family law, immigration status issues) and how any order made in the child protection context, or vice versa, may impact on the child's rights – liaise and/or consult with criminal law and/or immigration counsel

Indigenous Children

- be aware of and consider the impact of colonialism, residential schools and the Sixties Scoop on Indigenous families, the effects of intergenerational trauma and the consequent relationship with child welfare systems
- Indigenous persons should be entitled to provide their own child and family services, wherever possible, and all services to Indigenous children should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family
- consult with (and ensure that child protection agencies consult with) the child's band and/or Indigenous community regarding the provision of culturally appropriate services and placements
- recognize the pivotal role that Indigenous communities play in the upbringing of First Nations, Metis, Inuit and urban Aboriginal children & youth – consider the preferred options of customary and kinship care to residential placement
- if a child is placed outside of his or her community, ensure that child protection agencies work to ensure that cultural and community ties are available for the child
- consider the use of reports which take into account *Gladue* factors in the child protection context

Part V - Additional Resources (max 10 – hyperlink if possible)

- **Precedents – Pleadings, Facta:**

Factum of the Intervener, Justice for Children and Youth, in *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, [2009] S.C.J. No. 30, <http://jfcy.org/wp-content/uploads/2013/10/JFCYFactum31955.pdf>

Notice of Constitutional Question of the Children’s Lawyer for Ontario in *Catholic Children’s Aid Society of Toronto v. S.S.B.*, [2013] O.J. No. 6117, 2013 ONSC 7087

Notice of Constitutional Question of the Children’s Lawyer for Ontario in *B.M and M.M. v. Dilico Anishinabek Family Care*, Child and Family Services Review Board, Court File No. 15-0027

Factum of the Children’s Lawyer for Ontario in *Children’s Lawyer v. N.N.D.*, [2014] O.J. No. 6396 (O.C.J.)

- **Resources:**

Tempesta, C., *The Family in Transition II: The State and Child Protection*, C. 3, in Wilson J. (ed.), *Wilson on Children and the Law* (LexisNexis) (QL)

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Lovinsky, D. and Gagné, J., *Legal Representation of Children in Canada*: <http://www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rje/>

Bala, N., Leckey, R., *Family Law and the Charter’s First 30 Years: An Impact Delayed, Deep, and Declining but Lasting*, (2013) 32.1 Canadian Family Law Quarterly 21-52

Bala N., Kehoe K., *Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective*, Department of Justice publication, <http://canada.justice.gc.ca/eng/rp-pr/fl-lf/famil/fv-vf/index.html>

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Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*,
[http://www.trc.ca/websites/trcinstitution/File/2015/Honouring the Truth Reconciling for the Future July 23 2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring%20the%20Truth%20Reconciling%20for%20the%20Future%20July%2023%202015.pdf)

Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*,
[http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls to Action English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls%20to%20Action%20English2.pdf)

Government of Canada, "Chapter 2 – The Family", *Royal Commission Report on Aboriginal Peoples, Vol. 3 "Gathering Strength"* (1996)
http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html

Beaucage, J., *Child First – The Aboriginal Advisors Report on the Status of Aboriginal Child Welfare in Ontario*,
http://www.children.gov.on.ca/htdocs/english/documents/topics/aboriginal/child_welfare_EN.pdf

Commission to Promote Sustainable Child Welfare, *Aboriginal Child Welfare in Ontario – A Discussion Paper* (2011),
<http://www.sustainingchildwelfare.ca/assets/Aboriginal-Child-Welfare-in-Ontario-Discussion-Paper-July-2011.pdf>

The Aboriginal Justice Implementation Commission, *Child Welfare, Report of the Aboriginal Justice Inquiry of Manitoba* (C. 14, Vol. 1), 1991

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<http://www.nntc.ca/docs/aboriginalcommunitiesandthecfcsaguidebook.pdf>

Minister of Children and Youth Services (Ontario), *Formal Customary Care: A Practice Guide to Principles, Processes & Best Practices* (2013)
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McCaffrey, S., *Kookum Knew . . . Exploring historical contexts: aboriginal people, the justice system, and child welfare*, (2010) *International Journal of Child, Youth and Family Studies* Vol. 1 No. 3/4

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Sinha, V., and Kozlowski, A., *The Structure of Aboriginal Child Welfare in Canada*, (2013) 4(2) *The International Indigenous Policy Journal* 1

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