

**CHILDREN'S PARTICIPATION and
LEGAL REPRESENTATION in
FAMILY LAW MATTERS :
A RIGHTS-BASED APPROACH**

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Children's Participation in Justice Processes:
Finding the Best Ways Forward
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**Child Participation -
A Rights-Based Approach**

- Canada is a signatory to and has ratified the *Convention on the Rights of the Child* (Convention), the most widely ratified human rights treaty in the world
- the Convention sets out various human rights children have that are inalienable and indivisible
- among them, as a foundational principle, is the right of children to express their views *and* to have those views taken seriously -- to be heard at all stages of the process, a right directly linked to their best interests **(General Comment 14, at para. 4)**

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Children as Rights-Bearers

- the Convention recognizes children as human beings in their own right, not just "human becomings" (*Children: The Silenced Citizens, Final Report of the Senate Standing Committee on Human Rights, 2007, at p. 24*)
- an adult's judgment of a child's best interests cannot override the obligation to respect all of the child's rights under the Convention
- treating children's views with respect both improves the quality of decision-making and contributes to children's self-worth and healthy development

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**Children: The Silenced Citizens
Implementation of Canada's
International Obligations with
respect to the Rights of Children**

"The rights-based approach is of particular importance in the discussion of children's rights because of children's often intense vulnerability, the frequent competition between children's rights and those of adults, and the resulting ease with which a more paternalistic and needs-based approach can be adopted." (at p. 27)

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The Status of the Convention in Canada

- with limited exceptions, Canada has not specifically incorporated the Convention into domestic law; however, our domestic legislation is presumed to conform with international law: *R. v. Hape*, 2007 SCC 26, at para. 53
- moreover, the values reflected in international human rights law, and specifically those in the Convention, should assist in providing a context for the interpretation of domestic laws, including the *Charter*: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70; *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, at para. 82
- also, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at para. 23

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Concluding Observations , Canada, 2012

- the UN Committee on the Right of the Child monitors States Parties compliance with the Convention by receiving periodic reports and preparing Concluding Observations
- in its December 2012 Concluding Observations re Canada, the Committee expressed concern that there are inadequate mechanisms for facilitating meaningful and empowered child participation, and recommended that:
 - the views of the child be a requirement for all official decision making processes relating to children, including custody cases and child welfare cases (at para. 37)
- Concluding Observations can be and have been referred to by courts in legal analysis: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* 2004 SCC 4 at paras. 186-187

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General Comments

- the UN Committee on the Rights of the Child issues General Comments (currently 21 in total)
- they provide authoritative direction to States Parties on their obligations under the CRC
- they can be and have been referred to by courts when interpreting the Convention – e.g. *Divito v. Canada*, 2013 SCC 47, at paras. 26-27; and *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at para. 462

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Articles 3 and 12

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**

Article 12

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

2. For this purpose, **the child shall in particular be provided the opportunity to be heard** in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

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General Comment 14: Best Interests as a Primary Consideration

The child's best interests is a threefold concept:

- 1) **a substantive right:** best interests as a primary consideration
- 2) **a fundamental interpretative right:** if more than one interpretation possible, the interpretation which most effectively serves the child's best interests should be chosen
- 3) **a rule of procedure**
(General Comment 14, at para. 6)

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Procedural Safeguards to Implement the Child’s Best Interests

The Committee on the Rights of the Child identifies eight **procedural safeguards** to guarantee the implementation of the child’s best interests:

- (i) the right of the child to express his or her own views
 - (ii) establishment of facts. “Facts and information relevant to a particular case must be obtained by a well-trained professional in order to draw up all the elements necessary for the best interests assessment”
 - (iii) time perception
 - (iv) qualified professionals
 - (v) legal representation
 - (vi) legal reasoning – decisions must explain how the decision was reached, how factors were weighted, and how the child’s views were considered
 - (vii) mechanisms to review or revise decisions
 - (viii) child rights impact assessments
- (General Comment 14, at paras. 85-99)**

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General Comment No. 12 – Right to Be Heard

- Article 12(1) provides that States Parties “shall assure” the right of the child to freely express his or her views – this leaves no leeway for discretion – the child must be heard if the matter under discussion affects the child
- the fact that a child is very young or in a vulnerable situation “does not deprive him or her of the right to express his or her views...”
- “Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting...” **(General Comment 12, para. 20)**
- in family law matters, observing the child in the care of each parent or in out-of-home (foster or kin) care arrangements can provide invaluable information about their wishes, preferences, affinities and comfort levels with caregivers

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Capacity

- there is an obligation to assess the capacity of the child to form an autonomous opinion to the extent possible
- a child’s capacity must be assessed individually with no age limitation and no starting presumption of incapacity **(General Comment 12, at paras. 20-21)**
- capacity refers to cognitive capacity to form views and communicate them: *B.J.G. v. D.L.G., 2010 YKSC 44, at para. 27*
- in alienation cases, the issue of parental conduct that may amount to alienation should generally not be considered at this stage, but rather at the stage dealing with...the right to have a child’s views given due weight in accordance with the child’s age and maturity **(Ibid)**

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Realizing the Child’s Right to be Heard

Five steps to facilitate the child’s right to be heard:

- **Preparation:** the child needs to be informed of right to express opinion, know their options, and consequences of the choices
- **Hearing:** the context in which the child participates needs to be enabling and encouraging
- **Assessment:** good practice developed to assess capacity and the child’s views must be given due weight
- **Feedback:** the child should be informed of the outcome of the process and explained how their views were considered
- **Complaints:** the child should be informed of what complaint procedures or remedies may be in place **(General Comment 12, at paras. 40-47)**

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Best Interests and the Right to be Heard

- there is an inextricable link and complementary role between the assessment of a child’s best interests (Article 3) and the child’s right to be heard (Article 12)
- there can be no correct application of Article 3 if the provisions of Article 12 are not respected – similarly, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives **(General Comment 14, at para. 43)**

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The Importance of Child Participation to a Best Interests Analysis

Courts have recognized the significance of child participation in decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, the Supreme Court of Canada stated:

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. **(at paras. 92-93)**

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BJ.G. v. D.L.G., 2010 YKSC 44

- the Court summarized many of the reasons underlying the legal right to be heard found in the social science literature by referring to what children want, the benefits of their input to the decision-making process, and the short- and long-term adverse consequences for them of excluding their participation:

Rachel Birnbaum, *The Voice of the Child in Separation/Divorce Mediations and Other Alternative Dispute Resolution Processes: A Literature Review*, June 2009, prepared for the Canadian Department of Justice; Joan B. Kelly, *Child Participation in Divorce Processes: The Structured Child-Focused Interview Process*, prepared for a joint conference, Hear the Child, sponsored by the British Columbia Continuing Legal Education Society and the International Institute for Child Rights and Development, Vancouver, British Columbia, November 19-20, 2009; and Birnbaum, R., Fidler, B.J., & Kavassalis, K., "Children's Views and Preferences", in *Child Custody Assessments: A Resource Guide for Legal and Mental Health Professionals*. 2008, Toronto, Canada: Thomson Carswell (at para. 18)

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Effecting Children's Participation in Family Justice Processes

There are various mechanisms by which children's views can be included in family court processes:

- legal representation (advocate, litigation guardian, amicus curiae)*
- Views of the Child/Hear the Child Reports
- parenting assessments
- judicial interviews
- direct evidence from the child (testimony, affidavit)
- evidence from the parties or other witnesses

* Going forward, legal representation will refer to the role of advocate

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Legal Representation – A Procedural Safeguard to Ensure the Implementation of the Child's Best Interests

- the child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and other equivalent bodies
- in such cases, the child 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 (**General Comment 12, para. 96**)
- legal representation is the only option that affords the possibility of not only placing the child's views before the court, but active advocacy on behalf of the child to ensure that the child's interests are adequately protected and advanced at all stages of the decision-making process

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Role of Child’s Lawyer

- goes beyond simply advising decision-makers about the views of the child; it requires participation throughout the process to protect the child’s interests – this may include appeals, as necessary
- includes ensuring the process is timely, fair and child-friendly; establishing relevant facts through investigation, presentation, and testing of evidence; and making legal arguments which ensure that decision-makers interpret the evidence in a manner that is favourable to the child-client

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Role of Child’s Lawyer

- the ability of the child’s lawyer to address, when there is an expert parenting report, the qualifications of the expert, the methodology used, and the validity of the conclusion through cross-examination and the calling of expert evidence when appropriate, can be important to the best interests of the child in high conflict cases
- the ability of child’s counsel to file or call evidence and make submissions on all of the evidence has been confirmed by various courts (see *Strobridge v. Strobridge*, [1993] O.J. No. 1823 (O.C.G.D.), at paras. 33 and 35, [1994] O.J. No. 1247, (OCA), at para. 36; *C.R. v. Children’s Aid Society of Hamilton*, [2004] O.J. No. 1251 (S.C.J. - Fam. Ct.); *L.C. v. Catholic Children’s Aid Society of Metropolitan Toronto* [1993] O.J. No. 1823 (O.C.G.D.), at paras. 33 and 35)

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Role of Child’s Lawyer

- in *Re W*, [1979] O.J. No. 2088, (Prov. Ct.), an oft-cited case of Justice Abella when she was a judge of the Ontario Provincial Court, she stated:

Lawyers for children can therefore be expected to do no more and no less than any other party’s lawyer in the adversarial process. This is not to endorse the adversarial process in matters of family disputes. It is rather to acknowledge that it is through this process at present that these disputes are resolved. So long as the forum is the courtroom, the child’s lawyer should represent his or her young client in a way which reflects equal participation with the other parties in this forum. (at para. 6)

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Lawyers' Professional Responsibilities

- the *Model Code of Professional Conduct* confirms that a lawyer must, "as far as reasonably possible, maintain a normal lawyer and client relationship" when a client's ability to make decisions is "impaired because of minority or mental disability" (3.2-9)
- this includes having and applying relevant knowledge, skills and attributes, which encompasses "investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action" (3.1-1)
- further, a lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings (3.2-4)
- a lawyer must at all times must hold in strict confidence all information obtained from a client and must not divulge any such information unless expressly or impliedly authorized by the client...(3.3-1)
- a lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm (3.3-3)

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Office of the Children's Lawyer (Ontario)

- the OCL is a publicly-funded, independent law office within Ontario's Ministry of the Attorney General
- in the family law context, the OCL provides services to children in certain custody/access and child protection matters
- the OCL has 13 in-house lawyers in the Personal Rights Department and approx. 400 agent lawyers in private practice across the province who provide representation to children under the oversight of the OCL
- at the request of the Court, the OCL will provide legal representation to children and youth in child protection matters; in custody/access cases, the OCL has discretion to decide whether to accept a case referred by the Court and if accepted, what type of service to provide
- the OCL may assign a lawyer to represent the child or may appoint a clinician (social worker) to investigate and make recommendations to the Court via a Children's Lawyer Report

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Office of the Children's Lawyer (Ontario)

- when legal representation is provided, a clinician may be assigned to assist the lawyer in putting evidence (affidavit or viva voce testimony at trial) before the court relevant to the child's interests, including his or her expressed views
- in providing services to children, the OCL will always meet with the child (on more than one occasion); will seek to meet with the parents; will obtain information from relevant third party collateral sources (e.g. schools, doctors, police, mental health professionals, children's aid societies, etc.); and will canvass possibilities of settlement
- in the context of legal representation, the lawyer will participate in all court proceedings relevant to the child's interests, including appeals
- the lawyer will advance a position on behalf of the child consistent with the child's views where those views are strong, consistent and independent by strategically adducing relevant evidence and addressing those parts of the evidence which may be adverse in interest to the child's position

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Party Status (Ontario)

- the child is not a party in most family law matters in Ontario (exceptions include support applications by a child and applications for post-adoption openness orders)
- the standard form Order used to request/direct the OCL's involvement, however, provides that if legal representation is provided, the Children's Lawyer shall have "full power to act for the said children as though they were parties"
- Ontario's *Family Law Rules*, R. 4(7), also states that the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise
- under s. 39(6) of Ontario's *CFSA*, a child who is the applicant in a review application, receives notice of a proceeding (a rebuttable presumption for children 12 and over), or has legal representation, is entitled to participate in the proceeding and to appeal as if he or she were a party

(25)

OCL Standard Form Order

Without limiting the generality of the Children's Lawyer's full power to act as though the children were parties, the Children's Lawyer also has the right to:

- (a) make a full, independent inquiry of the circumstances regarding the best interests of the child;
- (b) receive copies of all professional reports and records regarding the child(ren);
- (c) production and discovery according to the Rules;
- (d) appear and participate in the proceeding including the right to examine and cross-examine witnesses, call evidence and make submissions to the Court, such submissions to include the positions advanced on behalf of the child(ren);
- (e) apply to be removed as the legal representative of the child(ren) if the Children's Lawyer believes that such involvement is no longer in the children's interests;
- (f) take such appeal proceedings as deemed appropriate
- (g) seek costs related to the proceedings

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Best Practices – Legal Representation

- explain the lawyer's role to the child-client in age-appropriate language and what it will entail
- explain solicitor-client privilege and *potential* exception re imminent risk of harm
- establish rapport / meet more than once
- meet in neutral place where child feels comfortable (e.g. school)- canvass location with child
- ask open-ended questions; use language that is age- and developmentally-appropriate
- have regard to /accommodate any language barriers, cultural considerations, special needs and/or experiences of trauma the child may have had
- respect child's preference NOT to participate if this is their wish

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Best Practices – Legal Representation

- explore the child’s views about possible living arrangements, including alternatives to state care in child protection cases (kinship or community plans), and the people with whom he or she wishes to maintain contact if removed from the care of family members
- when concerns about alienation are raised, explore whether there are other reasons why the child may hold his/her views, based on their own experiences and their own interpretation of events - children may have legitimate affinities for one parent over the other, or may have had experiences with the “alienated” parent that justify the estrangement
- ensure the child’s views are placed before the court by appropriate evidentiary means (affidavit/testimony of social work or mental health professional; third party service-provider reports, etc.)

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Best Practices – Legal Representation

- advise the child of the viability of any proposed plans and visiting arrangements and explore the child’s views regarding alternate plans if it is unlikely that the parties or court will endorse the child’s position (ie. Plan “B”)
- explore any 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/child)
- explain proceedings in a manner that the child understands – this may include explaining court documents, assessments and proposed resolutions in accordance with the child’s age, maturity and cognitive development
- use child-centered language when drafting or amending documents – i.e. rather than “parent A’s access” or “parent B’s custody”, use “the child’s access” or “the child’s parenting time”;
- canvass the child’s ability and willingness to receive notice and/or be present at the hearing or alternative resolution process

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Best Practices – Legal Representation

- maintain contact with the child at regular intervals so that any issues related to living arrangements, contact with significant persons, access to needed services (e.g. counselling), appropriate educational programs and participation in activities, are addressed in a timely way
- keep the child informed of outcomes of steps in the case, providing ongoing advice based on the facts and relevant law, including the need/viability of any review/appeal processes
- monitor timelines and their impact on the child, including the impact on the child of multiple adjournments, non-consecutive trial days and other delays in decision-making
- consider less-intrusive options (voluntary services, ADR processes)

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The Interests at Stake

- the interests at stake in certain family law matters are arguably of the highest order:
 - children temporarily or permanently removed from the care of their parents in child protection proceedings;
 - those whose access to biological family members is severed in this context when they are made permanent wards of the state or placed for adoption;
 - refugee children and arguably, other children who are forced to leave Canada against their will in proceedings under the *Hague Convention on the Civil Aspects of International Child Abduction* or other cross-border parental disputes;
 - and children whose relationships with parents are significantly impacted by custody/access orders
- these cases may engage a child's s. 7 Charter rights to security of the person, including psychological integrity, and as such, must conform to the principles of fundamental justice (see *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46; *J.T. v. Newfoundland and Labrador (Child, Youth and Family Services)*, [2015] N.J. No. 390 (C.A.); *A.M.R.I. v. K.E.R.*, 2011 ONCA 417; and *J.E.S.D. v. Y.E.P.*, 2017 BCSC 495 and 2017 BCSC 666)

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Unacceptable Risk of Error

- the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46, identified the section 7 interests at stake for parents and children and the risk of error in a child protection case caused by a lack of representation:

Without the benefit of counsel, the appellant [mother] 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 section 7 right to security of the person. (at para. 81)

- there is no principled reason why the same analysis would not apply to the need for legal representation for the child since it is the child, more than anyone else, who is most directly significantly affected by the court's decisions in family law matters

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Fundamental Justice

- the need for procedural safeguards, including legal representation, was also confirmed by the Ontario Court of Appeal in *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, in the context of a refugee child who was the subject of a return order under the Hague Convention:

An order of return under the Hague Convention has a profound and often searing impact on the affected child. Where the proposed return engages the child's s. 7 Charter rights, as in this case, meaningful procedural protections must be afforded to the child. In our view, these include the right to: (1) receive notice of the application; (2) receive adequate disclosure of the case for an order of return; (3) a reasonable opportunity to respond to that case; (4) a reasonable opportunity to have this or her views on the merits of the application considered in accordance with the child's age and level of maturity; and (5) the right to representation.

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For further information, see the workshop paper submitted:
***Legal Representation for Children in Family Law Cases:
A Rights-Based Approach***, The Honourable Donna J.
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