THE CANADIAN BAR ASSOCIATION
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UN Committee on the Rights of the Child
April 2022 Update to the CBA Section Alternative Report

This is an update on behalf of the Child and Youth Law Section of the Canadian Bar Association (CBA Section) to previous Alternative Reports in support of Canada's appearance before the United Nations Committee on the Rights of the Child (CRC) on its compliance with the United Nations Convention on the Rights of the Child (UNCRC)[1] during the 90th session (May 3-May 27, 2022). This update reports on the current status of the cluster of rights described in the CBA Section's initial Report[2], as well as more recent cases and events relating to those rights.

Incorporation of the UNCRC and Ratification of the Third Optional Protocol

Since the last update, Canada has not ratified the **Third Optional Protocol**. Failure to do so was identified as an issue (question 2(c)) in the List of Issues (LOIs) prepared by the CRC in November 2020 in relation to Canada's combined fifth and sixth reports. The CBA Section is troubled by Canada's lack of response to this issue in its Replies to the LOI dated April 6, 2022.[3] There remains a lack of timely, effective and direct mechanisms to redress many children's rights violations in Canada.

For example, on February 23, 2007, the First Nations Child and Family Caring Society and the Assembly of First Nations filed a human rights complaint alleging that Canada's chronic failure to equitably fund First Nations' child welfare and its approach to Jordan's Principle[4] was discriminatory. On January 26, 2016, the Canadian Human Rights Tribunal substantiated the discrimination, finding that on-reserve Indigenous children were prematurely and disproportionately removed from their homes and placed in alternative care in violation of the best interests of the child, and ordered Canada to immediately cease its discriminatory conduct.[5] The Tribunal subsequently issued over 20 non-compliance and procedural orders, including one that required Canada to compensate victims of its discriminatory conduct. On September 29, 2021, the Federal Court dismissed Canada's appeal of the compensation order. Canada filed a further appeal with the Federal Court of Appeal on October 29, 2021. Echoing the concerns of Indigenous and other stakeholders across Canada, the CBA called on the federal government to cease any further litigation in this matter and to move forward in the true spirit of reconciliation.[6] On December 31, 2021, the parties reached a $40 billion agreement-in-principle to compensate those harmed by Canada's discriminatory child welfare practices and to fund long-term reform of the on-reserve child welfare system. The agreement has yet to be approved by the Tribunal and Federal Court.

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1 Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, (entry into force 2 September 1990), online.

2 Canadian Bar Association Child and Youth Law Section, Alternative Report (February 2020).

3 Replies of Canada to the list of issues in relation to its combined fifth and sixth reports, CRC/C/CAN/RQ/5-6 (6, April 2022)

4 For more information about Jordan's Principle, see Alternative Report (February 2020), at p. 24.

5 Alternative Report (February 2020), at p. 23.

6 CBA letter to the federal government dated October 15, 2021 re *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, online.

It took over 14 years to reach this resolution-in-principle. In many instances like this one, there are no direct mechanisms to redress violations of children's rights under the UNCRC. Domestic remedies to rights violations are also often inaccessible to children. Timely resolutions are unlikely, with the pandemic exacerbating delays in the judicial system.[7] Swift action on ratification of the **Third Optional Protocol** remains necessary.

With few exceptions, Canada has also **failed to incorporate the UNCRC into domestic law**. While the federal government references the UNCRC in the preamble to ***An Act respecting First Nations, Inuit and Métis children, youth and families***[8] which came into effect on January 1, 2020, it failed to explicitly incorporate the UNCRC into the amended ***Divorce Act***,[9] which came into force on March 1, 2021, despite calls to do so.[10] Provincial and territorial governments that amended their family law legislation to align with the ***Divorce Act*** amendments similarly failed to reference the UNCRC.[11] As noted in the initial CBA Section Alternative Report, while the UNCRC has interpretive value in legal decision-making, its articles are secondary to often-inconsistent Canadian domestic law.[12] The Canadian government asserts that a review of existing federal, provincial and territorial domestic laws was undertaken prior to ratification, and on an ongoing basis since, to ensure conformity with the UNCRC, making it unnecessary to directly incorporate the UNCRC into domestic law.[13] Conformity is often superficial, however, and provincial governments, have taken contradictory positions in some contexts. See, for example, the position of the Ontario government in ***F. v. N.***[14], a cross-border parenting dispute involving a country that is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. In a pending appeal to the Supreme Court of Canada which involves the proper interpretation of the best interests of the child in the context of discretionary return orders, the intervener, Attorney General for Ontario, suggests that the UNCRC can only assist the Court in a contextual approach to statutory interpretation when there is "ambiguity" in the legislation.[15] This significantly minimizes the importance of the UNCRC and highlights the need for direct incorporation of the Convention into domestic law.

In its Replies to the LOIs, the federal government claims that Canada's federal framework does not allow for the adoption of "national laws" to implement the UNCRC as has been recommended by the CRC. This overlooks the federal government's ability to legislate in areas of federal jurisdiction and its influence on provincial and territorial legislative initiatives.

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7 Update to the Alternative Report (October 2020), at pp. 1-2; C. Houston, R. Birnbaum, N. Bala *et al.*, *Ontario family justice in "lockdown": Early pandemic cases and professional experience*, Fam. Ct. Rev. 1 (2022), at 2.

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

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

10 Alternative Report (February 2020), at footnote 79.

11 See, for example, Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. C.12, New Brunswick's *Family Law Act*, S.N.B. 2020, c. 23, and Saskatchewan's *Children's Law Act*, S.S. 2020, c. 2.

12 Alternative Report (February 2020), at p. 3.

13 Written replies of Canada to the List of Issues concerning additional and updated information related to the third and fourth combined periodic reports of Canada, CRC/C/CAN/3-4, 21 January 2013, at para. 7; see also, Common Core Document of Canada, at para. 136; and *Children: The Silenced Citizens, Effective Implementation of Canada's International Obligations with respect to the Rights of Children*, Final Report of the Senate Standing Committee on Human Rights, April 2007, at pp. 7-16 and 224-240.

14 *N. v. F.*, 2021 ONCA 614, appeal before the Supreme Court of Canada pending (SCC case no. 39875).

15 Factum of Intervener, Attorney General of Ontario, dated March 10, 2022, at para 20.

The Replies to the LOIs[16] also note the federal government's enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act* on June 21, 2021.[17] The CBA Section urges the federal government to take steps to enact similar legislation for the UNCRC, including the requirement for an action plan and annual reporting, to send an unequivocal message regarding Canada's domestic implementation obligations with respect to the Convention. Provincial and territorial government alignment with such legislation should be encouraged through the Forum of Ministers on Human Rights referenced in the government's Replies to the LOIs (at para. 11), which should be urged to meet more frequently than the stated once every two years.[18]

National Commissioner for Children and Youth

In its February 2020 Alternative Report, the CBA Section recommended that Canada establish an independent national human rights institution with a mandate to protect and promote the rights of children and youth at the federal level. In its October 2020 update, the CBA Section reported that in June 2020, Senator Rosemary Moodie introduced Private Members Bill S-217, *An Act to establish the Office of the Commissioner for Children and Youth in Canada.*[19] The Senator identified three main areas of action for the Commissioner: acting as an independent officer of Parliament who will hold Parliament accountable on its obligations for the well-being of Canadian children and youth and to ensure that their rights are respected; collaborating with various levels of government and communities to work on behalf of children and youth and advocate for their needs; and elevating the voice of children and youth in political discourse. The Bill died when Parliament prorogued in August 2020, and was reintroduced on September 30, 2020 as Bill S-210.[20] The new Bill also died when a federal election was called on September 20, 2021. There is no indication that the Bill will be revived, leaving a significant gap in the promotion and implementation of children's rights in areas of federal jurisdiction.

As noted in the February 2020 CBA Section Report, provincial mandates and resources of independent human rights institutions to promote the rights, interests and views of children and youth vary. The Northwest Territories do not have an office promoting the rights, interests and views of children, and four Canadian jurisdictions have offices with multiple mandates.[21] Of significant concern, in the province

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16 Written replies of Canada to the List of Issues concerning additional and updated information related to the third and fourth combined periodic reports of Canada, at para. 70.

17 The *Act* requires the federal government to take all measures necessary to ensure the laws of Canada (including future laws) are consistent with the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP); to prepare and implement an action plan to achieve the objectives of UNDRIP; and to submit annual reports to Parliament on the measures taken to ensure the laws of Canada are consistent with UNDRIP and on the action plan. The *Act* affirms UNDRIP to apply in Canadian law and includes a non-derogation clause, per which active measures must be taken to uphold and implement Indigenous rights as affirmed by Canada's Constitution, and that there should be no abrogation or derogation from them. The affirmation of application in Canadian law makes UNDRIP an important source to interpret federal law. Many provincial and territorial governments are using UNDRIP as the framework for reconciliation to engage with Indigenous peoples on matters that affect them. For example, British Columbia adopted the *Declaration on the Rights of Indigenous Peoples Act* in November 2019. See Government of Canada, online.

18 As noted in the federal government's Replies to the LOIs, federal, provincial and territorial Ministers also endorsed a Protocol for Follow-up to Recommendations from International Human Rights Bodies and an Engagement Strategy on Canada's International Human Rights Reporting Process (at para. 11).

19 *An Act to establish the Office of the Commissioner for Children and Youth in Canada*, Bill S-217 (June 16, 2020).

20 *An Act to establish the Office of the Commissioner for Children and Youth in Canada*, Bill S-210 (September 30, 2020).

21 In Quebec, the office is part of the Quebec Human Rights and Youth Rights Commission. In Nova Scotia, it is part of the Youth Division of the Ombudsman's Office. In New Brunswick, the Office of the Child, Youth and Senior Advocate has a mandate to promote the rights of seniors, as well as children and youth.

of Ontario, the Office of the Provincial Advocate for Children and Youth was closed in April 2019 following repeal of the *Provincial Advocate for Children and Youth Act, 2007*.[22] Only some of its functions were transferred to the Children and Youth Unit of the Ontario Ombudsman's Office. This has resulted in ongoing gaps in services to vulnerable children and young people.

In a positive development in the province of Prince Edward Island (PEI), the PEI Office of the Child and Youth Advocate officially opened on July 15, 2020 following the appointment of Marvin Bernstein as the first Independent Statutory Child and Youth Advocate for PEI and proclamation of the PEI *Child and Youth Advocate Act*.

Child Rights Impact Assessments

In its February 2020 Report, the CBA Section recommended that Canada and the provincial and territorial governments mandate Child Rights Impact Assessments (CRIA) for all new bills, regulations, policies and budgets that impact the rights and best interests of children. In its Replies to the LOIs, Canada indicates that the federal Interdepartmental Working Group on Children's Rights partnered with children's rights experts in 2018 to offer CRIA training for federal government officials. In 2020-21, the federal government also engaged with a civil society Advisory Group to inform the development of a CRIA tool. This is a positive development, but the tool has yet to be launched and applied to any federal legislation or policies. Except for the initiatives described below, there are no indications of provincial or territorial proposals to implement CRIA.

As a further positive development, PEI was the first province to pass motions calling for the implementation and public disclosure of CRIA in all policy and legislative developments.[23] These motions, although non-binding, were passed unanimously in October and November 2021. This is also the first time in Canada that a provincial government has committed to making its CRIA public. These motions show significant progress in the progressive realization of the human rights of all children and youth in PEI, and mirror the Preamble of the PEI *Child and Youth Advocate Act* which states that the "Government of Prince Edward Island is committed to ensuring that the rights, interests and viewpoints of children and youth are considered in matters affecting them."

In December 2021, the David Asper Centre for Constitutional Rights released its mandated CRIA on the proposed new child protection legislation in Prince Edward Island, which contained 10 recommendations. In February 2022, the Child and Youth Advocate Office amplified the report in a letter to the PEI Legislative Assembly Standing Committee on Health and Social Development.

In March 2022, the Yukon Child and Youth Advocate Office submitted a CRIA to the Minister of Health and Social Services on Bill No. 11, *Act to Amend the Child and Family Services Act (2022)*.[24] The intent of the CRIA is to ensure the forthcoming child protection legislation complies with the UNCRC and upholds the highest standard for children's rights with special regard for healing and recovery of Indigenous families. Yukon's Child and Youth Advocate, Annette King, further recommended that the CRIA be tabled in the Legislative Assembly to complement Bill No. 11, to better inform members of the Legislative Assembly, as well as the public, of discussion and questions on Bill No. 11 and the extent to which it upholds the rights of Yukon children and youth. This is the first time in Yukon's history that a formal CRIA has been applied in the legislative process.

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22 Alternative Report (February 2020), at p. 8.

23 See Appendix A.

24 Bill No. 11, *Act to Amend the Child and Family Services Act (2022)*.

Education for Judges and Lawyers

In its initial Report, the CBA Section recommended that governments and legal organizations in Canada facilitate mandatory, comprehensive, in-depth and ongoing child rights education with a focus on the UNCRC, and that governments and organizations promote access to justice for children by creating and implementing a roadmap focused on children and their rights.

To that end, Canada's National Judicial Institute, with support of the Canadian Judicial Council, will present a three-day national conference for judges on *Access to Justice for Children: Implementing Child Rights* in Quebec in May 2022. The conference will consider why child rights matter in all areas of law, what it means for children to have the right to participate in decisions that affect them, how to implement child rights in the courtroom, and how to incorporate child rights effectively into judicial decision-making. Seven young adults with lived experiences as children and youth in Canada's justice system are part of the conference faculty. The conference is co-chaired by The Honourable Donna Martinson (retired justice of the British Columbia Supreme Court) and Justice Freya Kristjanson of the Ontario Superior Court of Justice.

In November 2020, the Law Society of Ontario hosted a full-day program on *Access to Justice: Recognizing the Rights of Children under the UN Convention,* focusing on the importance of children's participation in justice processes and the implementation of Canada's obligations under the UNCRC. Topics encompassed the rights of Indigenous, LGBTQIPSA, racialized and migrant children and youth. Faculty included youth with lived experience, a member of the CRC, first instance and appellate judges, as well as lawyers with extensive child rights experience.

Between October 2021 and March 2022, the Ontario Bar Association Child and Youth Law Section ran a five-part webinar series on *Ethical and Practical Considerations when Working with and for Young People*. Topics included an introduction to the UNCRC and how to use it, as well as issues related to children's meaningful participation and legal representation in legal processes[25].

In May 2021, the Interdisciplinary Research Laboratory on the Rights of the Child (IRLRC) at the Faculty of Law, Civil Law Section of the University of Ottawa, organized a 2-day international online conference on *Children's Access to and Participation in Justice: A Critical Assessment.* The conference supported efforts in favour of children's access to justice, such as the Call for Action to achieve Sustainable Development Goal No. 16[26] for children. It further sought to delineate children's access to justice in a global way by addressing current challenges, asking questions that have not yet been asked and bringing new perspectives to existing problems.

In September 2021 the New Brunswick Office of the Child and Youth Advocate and the Université de Moncton jointly hosted an online program for the 10th edition of the International Summer Course on the Rights of the Child with a thematic focus on Child's Rights in Times of Pandemic. Highlights of the training included an opening keynote by UN Special Rapporteur on Violence to Children, Najat M'jid, a focus on pandemic impacts from the former Chair of the CRC, Renate Winter, and updates by Dr. Ziba Vaghri on the development of the GlobalChild platform for monitoring child rights. In June 2022, the summer course will return to in-person sessions at the Université de Moncton campus for an 11th edition on the theme of Article 23: The World's Largest Minority: Focus on the rights of children and youth with disabilities.

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25 See also Canadian Bar Association - The CBA Child Rights Toolkit, which is being updated in 2022.

26 United Nations, Sustainable Development Goals, No. 16: Promote just peaceful and inclusive societies.

Best Interests of the Child

In its original Report, the CBA Section urged the inclusion of the best interests of the child in all legislation, court decisions and policy decisions affecting children. In the immigration, refugee determination and immigration detention context, the CBA Section recommended that Canada minimize the separation of children from family members except when necessary for the best interests of the child. Canada has taken some steps to rectify this in the immigration *detention* context, as described in the original Report.[27] Canada has yet to take steps to address the ability of unaccompanied and separated refugee children whose claims are positively adjudicated to include left-behind parents and siblings in their applications for permanent residence. Parents may generally sponsor their dependent children but minor children continue to be unable to bring their parents to Canada. With limited exception,[28] children who remain in their country of origin are not permitted to join their parents in Canada if the parents did not name them as dependents in their applications for permanent residence.[29] This runs contrary to children's rights not to be separated from their parents, except as necessary for their best interests (article 9), and to positive, humane and expeditious family reunification (article 10).

With children's growing exposure to the digital world resulting from the COVID-19 pandemic, the Section also recommends that General Comment No. 25[30] inform federal policy and legislative initiatives pertaining to online spaces and children, such as Bill S-210, *An Act to restrict young persons' online access to sexually explicit material*, a Senate Bill introduced in November 2021.[31]

In its original Report, the Section also recommended that Canada address children's rights concerns relating to amendments to the federal *Divorce Act*. As noted, Canada failed to take the opportunity to explicitly incorporate the UNCRC into the amended *Divorce Act* although it references article 3/the best interests of the child as "a significant principle internationally" and as "a foundational legal principle in Canadian family law" in its Legislative Background document to the *Act*.[32]

Some case law that has emerged since the *Divorce Act* amendments came into force has positively and purposively interpreted the "best interests of the child" in a manner consistent with the UNCRC. See, for example, an excerpt of ***S.S. v. R.S.*, 2021 ONSC 2137** in Appendix B.[33]

Child Participation and Representation

The CBA Section's original Report made recommendations on children's meaningful participation in court and administrative processes, encompassing the need to inform children about their participation rights, including their right to independent legal representation.

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27 Alternative Report (February 2020), at pp. 20-21.

28 Alternative Report (February 2020), at pp. 21. *Subsequent public policy to facilitate the immigration of certain sponsored foreign nationals excluded under paragraph 117(9)(d) or 125(1)(d) of the Immigration and Refugee Protection Regulations,* July 5. 2019**,** online. This policy was extended to September 9, 2023.

29 Alternative Report (February 2020), at p. 21.

30 UNCRC, General comment No. 25 (2021) on children's rights in relation to the digital environment.

31 S-210 (44-1) - LEGISinfo - Parliament of Canada.

32 Department of Justice, *Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (Bill C-78 in the 42nd Parliament)* (28 August 2019). See also the Department of Justice, *The Divorce Act Changes Explained*.

33 See also *Dworakowkski v. Dworakowski*, 2022 ONSC 734, at para. 56; J.O. v. D.O., 2021 ONSC 8061, at para. 54; *D.M. v. C.R.*, 2021 BCPC 318, at para. 337; *R.S.P. v. H.L.C.*, 2021 ONSC 8362, at para. 70; *Di Iorio v. Tropea*, 2021 ONSC 8575, at para. 15.

Some of the negative effects on the best interests of the child and on child participation and representation were reported in the October 2020 update[34] to the CBA Section's Alternative Report. The pandemic has continued to have a disproportionate impact on access to justice, including access to courts and court-related services, for marginalized and vulnerable individuals, which includes children.[35] Barriers include not understanding the legal issues they face and the options available to them and not having access to the services of professionals, including lawyers.[36] After an initial period of adjustment, court operations have been able to resume fully, but in a different way: most hearings are held remotely using technological tools that are not available to all.[37] Court delays and backlogs have persisted as Canada emerges from earlier pandemic restrictions.

In the family law context, the pandemic has exacerbated access to justice issues for certain groups, including families experiencing high conflict, victims of domestic violence and families involved in child welfare proceedings.[38] Although in-person hearings are beginning to resume, there is a backlog of cases awaiting trial. Law firms and service agencies, including mediators and lawyers for children, also largely shifted to remote services over the course of the pandemic, some more quickly and fully than others.[39] In Ontario, child protection services shifted to a hybrid model and although visits between children in alternative care and their parents generally resumed, they have been less frequent, with considerable use of virtual visits for older children. The pandemic reduced access to family justice in a system already plagued by access to justice concerns, including delay, inaccessibility and complexity. Some of the those involved in family justice processes have been disproportionately affected, including children of separating parents and children in alternative care, many of whom are Indigenous or racialized.[40]

As we emerge from the restrictions imposed in the pandemic, a renewed focus and allocation of government resources is needed to ensure the implementation of the procedural safeguards identified by the Committee, including legal representation, when children's best interests are being assessed by decision-makers,[41] as found by Justice Mandhane of the Superior Court of Justice in Ontario in in ***S.S. v. R.S.*, 2021 ONSC 2137**:[42]

> 39. A human rights-based approach fundamentally recognizes children as subjects of law rather than objects of their parents. Making children more visible in legal proceedings that affect their rights is fundamentally important in Canada because children are not guaranteed legal representation in family law proceedings.

The potential for minimization of children's views and meaningful participation is particularly acute in high conflict parenting disputes where issues of "parental alienation" are raised,[43] despite current research suggesting that judges should be cautious in finding alienation and discounting children's views

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34 Update to the Alternative Report (October 2020), at pp. 1-2.

35 Action Committee on Court Operations in Response to COVID-19, *Examining the Disproportionate Impact of the Covid-19 Pandemic on Access to Justice for Marginalized Individuals*, at pp. 1 and 4.

36 *Ibid*., p. 4.

37 *Ibid*., p. 5.

38 C. Houston, R. Birnbaum, N. Bala *et al.*, *Ontario family justice in "lockdown": Early pandemic cases and professional experience*, Fam. Ct. Rev. 1 (2022), at 3.

39 *Ibid,* at 2.

40 *Ibid,* at 3 and 9.

41 Committee on the Rights of the Child*, 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),* UN Doc. CRC/C/GC/14 (2013), at paras. 85-99.

42 See also *E.M.B. v. M.F.B.* 2021 ONSC 4264, at paras. 60-61.

43 *A.M. v. C.H.,* 2019 ONCA 764; *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286.

on this basis.[44] Extreme remedies such as transfers of custody[45] and children's forced participation in reunification therapies pose further risks to children's autonomy and physical/psychological integrity. The need for robust procedural safeguards, including legal representation for children, is significant given "the profound effects" when ordering the "serious intervention[s]" "inherent in imposing attendance at a program" (i.e. intensive family reunification therapies).[46]

Despite these concerns, there have been recent positive decisions addressing the need for independent legal representation for children in high conflict family law matters to ensure respect for their rights under Article 12. See, for example, an excerpt of ***M. v. F.*, 2022 ONSC 505** in Appendix C.

Despite a positive trend in the common law recognizing children as individual rights-holders with distinct interests, as evidenced by the above-noted decision,[47] there continues to be resistance from some decision-makers to "empowering" children through independent legal representation.[48] In ***R.L. v. M.F.*, 2022 ONSC 789**, a recent high conflict parenting dispute involving two children aged 13 and 15, the Court considered ***M. v. F.***, *supra*, but declined to order legal representation for the children based, in part, on the fact that their views would be made known to the Court by mental health professionals (an assessor and a therapist). The Court also assumed, without hearing from the children, that it would be contrary to their best interests to be further "poked and prodded" and that if they did not want their private sessions with their therapist disclosed, they would similarly not wish to have an advocate to support their position before the Court. The Court accepted that the children's views were a necessary and important consideration with respect to the parenting arrangements, but held:

> […] That their empowerment has not included independent legal representation is not determinative of whether section 16(3)(e) [the requirement to consider the views and preferences of the child as part of the best interests analysis when making a parenting or contact order under the *Divorce Act*] of the legislation is being sufficiently respected, in my view. That section is being respected.
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> 18. These two children have been through an awful lot already. They have been poked and prodded by multiple professionals, all with very good cause, and I just do not see how adding yet another layer of the relief being sought by the mother in the within motion is, in all of the circumstances, in their best interests.

This decision threatens the ability of the children to meaningfully participate and have their interests protected in a court process which will directly impact their lives. Without input from them, their right to access the court was minimized under the pretext of their best interests.[49]

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44 C. Tempesta, "Legal Representation as a Necessary Element of Children's Access to and Participation in Family Justice", in M. Paré, M. Bruning, T. Moreau et al. (Eds.), *Children's Access to Justice: A Critical Assessment* (2022: Intersentia), at pp. 204-205; C. Houston, *Case Comment: Undermining Children's Rights in A.M. v. C.H.,* 39 C.F.L.Q. 99 (2020), at pp. 104-105.

45 In *M.P.M. v. A.L.M.*, 2021 ONCA 465, at para. 34, the Court of Appeal for Ontario recognized that "[s]ocial science evidence regarding the effectiveness of reversal of custody orders in cases of alienation is inconclusive […]".

46 *Bouchard v. Sgovio*, 2021 ONCA 709, Nordheimer J.A. dissent, at paras. 108, 110 and 113.

47 See decisions cited in Update to the Alternative Report (October 2020): *Michel v. Graydon*, 2020 SCC 24, at para 77; *M.A.A. v. D.E.M.E*, 2020 ONCA 4716, at para. 46; *Justice for Children and Youth v. J.G.*, 2020 ONSC 4716, at paras. 51 and 61-63. See also *Office of the Children's Lawyer v. Catholic Children's Aid Society of Toronto*, 2020 ONSC 4310, at paras. 12-18; and *Yenovkian v. Gulian*, 2019 ONSC 7279, at paras. 52-69.

48 *D.C.E. v. D.E.*, 2021 ABQB 909.

49 Human Rights Council, Report of the United Nations High Commissioner for Human Rights: Access to justice for children, UN Doc. A/HRC/25/35 (2013), at para. 16; Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice and their explanatory memorandum*, 17 November 2010, at para. III(A)(2).

The issue of the autonomy of capable children to make treatment decisions has also been highlighted during the pandemic in the context of parental disagreements over vaccines. In Ontario,[50]and other Canadian jurisdictions,[51] there is a presumption of capacity to make medical treatment decisions, with no minimum age, if the person understands the information relevant to making the decision and appreciates the reasonably foreseeable consequences (or lack thereof) of treatment. Where a capable child consents to or refuses treatment, a parent cannot override this decision, even where the parent does not believe the decision is in the child's best interests.[52] As substitute decision-makers, parents can only make decisions for children who are not capable of making these decisions. In the context of parental disputes over whether children should be vaccinated against COVID-19, many courts have granted decision-making in this regard to one parent grounded in the child's "best interests", in the absence of evidence that the child lacked capacity, thus undermining children's autonomy to make treatment decisions.[53] A recent case involving 12- and 10-year old children highlights this tension – although due consideration was given to the children's views, their autonomy (and legal right) to make treatment decisions was subsumed by the parental interest in making decisions in their best interests. See excerpt of ***J.N. v. C.G.*, 2022 ONSC 1198** in Appendix D. In this case, the children's views were placed before the Court via a Views of Child Report but they did not have independent legal representation.

In the immigration and refugee law context, the consequences of a lack of representation for an asylum-seeking child at the port of entry was highlighted in a December 20, 2021 decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada[54]. The Minister of Citizenship and Immigration Canada (the Minister) appealed a decision of the Refugee Protection Division (RPD) granting refugee protection to the child claimant who was an unaccompanied minor when she entered Canada. She arrived at the airport at the age of 15, fleeing an expected forced marriage in Nigeria. She had been sexually assaulted while escaping to Canada, resulting in an ectopic pregnancy requiring emergency care in an Ontario hospital. Although she had been assigned a designated representative (like a guardian *ad litem*) for the refugee proceedings and RAD appeal due to her age and identified vulnerability, she was interviewed at length by two male Canada Border Services Agency (CBSA) officers at the airport when she first arrived in Canada, without the presence of a lawyer, child's representative, or worker from a child protection agency. One of the grounds of the Minister's appeal against the positive refugee determination was that the RPD failed to properly analyze the discrepancies between the young person's statements as documented in the port of entry notes and the subsequent intake documents. The RAD found that the CBSA breached procedural fairness and committed "an egregious error and a significant breach of natural justice" by failing to invite a representative for the child to participate in the port of entry interview. The RAD therefore declined to consider the notes from that interview which were a significant basis of the Minister's appeal. The appeal was ultimately dismissed and the young person's status as a Convention refugee was upheld. This decision confirms the CBA Section's previously-articulated position regarding the need for migrant and asylum-seeking children, particularly separated and unaccompanied minors, to have both competent designated representatives and legal representatives from the time they arrive in Canada to the point that their immigration status is resolved or they are forced to leave Canada.[55]

The CRC has held that the right to an effective remedy is an implicit requirement of the UNCRC. The realization of the rights of all children requires Canada to implement structural and proactive

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50 *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A., ss. 4(1), (2).

51 *Consent to Treatment and Health Care Directives Act*, S.P.E.I. 1996, c. 10, ss. 3(1), 4; *Care Consent Act*, S.Y. 2003, c. 21, ss. 3, 6(2), (3).

52 *Gegus v. Bilodeau*, 2020 ONSC 2242, at paras. 48-51; *A.C. v. L.L.*, 2021 ONSC 6530, at paras. 34, 35 and 39**;** *Hughes Estate v. Brady*, 2007 ABCA 277.

53 *BCBG v. E-RRR*, 2020 ONCJ 4381, at paras. 241 and 243.

54 RAD Decision No. #TC1-10937 (unpublished).

55 Alternative Report (February 2020), at p. 35.

interventions to enable access to justice, including the provision of child-sensitive information, advice, advocacy and access to the courts with necessary legal assistance. In its March 2022 budget announcement, the government of British Columbia committed $730,000 to the Society for Children and Youth to fund the expansion of a legal clinic to meet the growing demand for legal services for children and youth by making more lawyers available throughout the province. Although this is a positive development, it remains insufficient to meet the legal needs of many children and youth in British Columbia. Also, as noted in the CBA Section's February 2020 Report, children's ability to obtain legal representation is significantly impacted by the jurisdiction in which they live, with children in many parts of Canada having no access to assistance regarding their legal needs.[56]

The CRC has recognized Article 12 as one of the four fundamental principles of the UNCRC, along with the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, all of which frame children's access to justice.[57] Legal and other assistance is essential for ensuring that children are able to take action to protect their rights. Canada's Replies to the LOI make no reference to any government initiatives to provide funding to enhance implementation of the child's meaningful right to participate in judicial processes.

Conclusion

Due to their special and dependent status, children often have no capacity to act without their parents or legal representatives, the former being particularly problematic in cases of a conflict of interest, and are often unaware of their rights and the existence of services, lacking information about where to go and whom to contact to benefit from advice and assistance.[58] Children continue to face disparate and serious challenges in accessing justice in Canada, limitations that particularly impact marginalized, racialized and Indigenous children. The CBA Section reiterates its recommendation that federal, provincial and territorial governments in Canada must facilitate and ensure dedicated and adequate funding to meet children's essential legal needs. Recommendations contained in the current and previous CBA Reports, including swift ratification of the **Third Optional Protocol**, specific incorporation of the UNCRC in domestic law, the establishment of a National Commissioner for Children and Youth, and ongoing child rights education for judges and other legal professionals, remain critical to ensure children's access to justice and the meaningful protection of children's rights under the UNCRC.

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56 Alternative Report (February 2020), at p. 31.

57 Human Rights Council, Report of the United Nations High Commissioner for Human Rights: Access to justice for children, UN Doc. A/HRC/25/35 (2013), at para. 12.

58 *Ibid*, at para. 14.

APPENDIX A:

Motion 70 Amendment (Bemard)

Karla Bernard moves, seconded by Stephen Howard, the following:

That the operative clause be deleted and the following substituted:
"THEREFORE BE IT RESOLVED that the Legislative Assembly urge government, in consultation with the Child and Youth Advocate, lo develop and share a CRIA tool to be used in all policy and legislative development within government;"

The addition of the following after the last operative clause:
" THEREFORE BE IT FURTHER RESOLVED that the Legislative Assembly urge government to publicly share any and all CRIA analyses that are completed."

Signed: Karla Bernard

Signed:

02.11.2020

APPENDIX B: S.S. v. R.S., 2021 ONSC 2137

The "Best Interests of The Child"

29. When making a parenting order, I must stay laser-focused only on the child's best interests: *Divorce Act*, s. 16(1).

30. According to the *Divorce Act*, to judicially determine the child's best interests, the court must "give primary consideration to the child's physical, emotional and psychological safety, security and well-being", while considering "all factors related to the circumstances of the child": ss. 16(2)-16(3).

31. The "best interests of the child" test in the new *Divorce Act* effectively implements Article 3(1) of the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990, accession by Canada 13 December 1991) ("*Child Rights Convention*"): Department of Justice, *Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (Bill C-78 in the 42nd Parliament)* (28 August 2019), s. B ("Legislative Background"); *Child Rights Convention*: *Combined fifth and sixth reports submitted by Canada under article 44 of the Convention, due in 2018,* 28 January 2019, CRC/C/CAN/5-6, at para. 58.

32. Article 3(1) makes the "best interests of the child" the "primary consideration" in all actions concerning children. In General Comment 14, the UN Committee on the Rights of the Child ("Committee) notes that the "concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child": *General Comment 14: The right of the child to have his or her best interests taken as a primary consideration* UNCRC, 2013, UN Doc. C/GC/14, at para. 4.

33. The Committee explains, at para. 37, that the expression "primary consideration" within Article 3 means that the child's best interests must be given priority over all other considerations, explaining that:

> This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

34. The Committee further cautions that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention": at para. 4.

35. The Committee notes that the best interests analysis is wholistic, explaining at paras. 71-74, that:

> When assessing and determining the best interests of a child or children in general, the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being (art. 3, para. 2) should be taken into consideration. The terms "protection and care" must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as "to protect the child from harm"), but rather in relation to the comprehensive ideal of ensuring the child's "well-being" and development. Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.
>
> […]

> Assessment of the child's best interests must also include consideration of the child's safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse (art. 19), sexual harassment, peer pressure, bullying, degrading treatment, etc., as well as protection against sexual, economic and other exploitation, drugs, labour, armed conflict, etc.(arts. 32-39).

36. I agree with the Committee that judicial determination of the "best interests of the child" is broader and more wholistic than a child welfare agency's determination of whether a child is in need of protection.

APPENDIX C: M. v. F., 2022 ONSC 505

Issues and Analysis

11. The issues to be decided on the motion to change must be based on the best interests of the child under section 24 of the *Children's Law Reform Act*, R.S.O. 1990, c. C12. On the motion to change, the court must consider all factors relating to the circumstances of the child including "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained": CLRA, s. 24(3)(e). Section 64(1) of the CLRA provides: "In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them."

12. The obligation to consider the views and preferences of the child before parenting orders are made recognizes the agency of children and is based on the rights of the child. The *United* Nations *Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, Article 12 ("UNCRC") specifically recognizes that children who are capable of forming their own views have the right to express those views in all matters affecting them, and that for this purpose, the child shall be provided the opportunity to be heard in any judicial proceedings affecting them, either directly, or through a representative or an appropriate body. As Benotto, J.A. states in *M.A.A. v. D.E.M.E.* at para. 46:

> The right of children to participate in matters involving them is fundamental to family law proceedings. Canada has adopted the *Convention on the Rights of the Child*, effectively guaranteeing that their views will be heard. A determination of best interests -- which is engaged in all child-related matters -- must incorporate the child's view.

13. The court, on consent, ordered a Voice of the Child report to hear the child's views and preferences. But the father wishes to cross-examine the author of the report because he asserts those views are not independent, nor freely given, but the product of the mother's undue influence. The cross-examination is specifically directed at the only evidence the court will have on the motion to change about the child's views and preferences. As importantly, it undermines the child's right to be heard. As stated by Justice Martinson in *G. (B.J.) v. G. (D.L.)*, 2010 YKSC 44, para. 13:

> [13] There is no ambiguity in the language used. The [UNCRC] is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.

14. In a high conflict case like this one, the key issue will be the weight to be given to the child's views considering the child's age and maturity and the other factors which inform the judicial assessment of a child's best interests. But the child's views and preferences should be before the court.

15 The father states that he wants the child to be kept out of the litigation, as having a legal representative would be like "forcing" C. into the middle of the legal conflict, causing distress. I do not agree that keeping kids and their voices out of court is the solution. Rather, as stated by the Honourable Donna J. Martinson & Caterina E. Tempesta in "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," 31 *Can. J. Fam. L.* 151 (2018). at pp. 167-168:

> In most cases, it is the fact of the conflict that is harmful, not the expression of the child's views. Even in the few true "parental alienation cases", efforts should be made to enable children to share their views, although the court may have to determine the

> weight to be assigned to those views. In addition, in many cases where alienation is alleged, children may have legitimate affinities for one parent over the other, or may have had experiences with the "alienated" parent that justify the estrangement. In such cases, it would not be desirable to exclude the child's perspective from the decision-making process.
>
> Even in cases where parents are careful to avoid influencing their children's views, it is inevitable that children will be influenced by the words and actions of those around them. The possibility of parental influence on its own should not be a basis for excluding children's participation nor for discounting their expressed views. An approach that considers the extent to which the child's views are rooted in reality, or might reasonably be perceived as such by the child, is preferable, as it considers the situation from the child's perspective. Reviewing the substance of a mature child's reasons where the reasons are not based on objectively incorrect information and where there is no evidence that upholding the child's views will be harmful is unnecessarily paternalistic and inconsistent with the child's right to have appropriate weight attached to her views.

16. Since the child's views and preferences are contained in the Voice of the Child report, C. has an interest in the cross-examination of the author of the report, and the submissions that will later be made about his views and preferences on the motion to change. In the circumstances here, I find that it is in C.'s best interests to have a legal representative to ensure that the court has evidence and argument relevant to C.'s views and preferences on the motion to change.

17. The mother has asked that the OCL provide a legal representative. The Court of Appeal for Ontario has recognized the OCL as a model in promoting access to justice for children by ensuring that their views are heard in court processes in a manner that does not expose them to further trauma or cause more damage to the family: *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 at paras. 65-66. I thus request the OCL to provide a legal representative for C. pursuant to s. 89(3.1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

APPENDIX D: *J.N. v. C.G.*, 2022 ONSC 1198

10. The father wants two children ages 12 and 10 to receive COVID vaccinations. The mother is opposed. […]

27. All parenting issues – including health issues – must be determined based upon the best interests of the child. Last year's amendments to the *Divorce Act* (applicable in this case) and the *Children's Law Reform Act* make it mandatory for the court to include consideration of a child's views and preferences to the extent that those views can be ascertained.

28. As Justice Mandhane stated in *E.M.B. v. M.F.B*. 2021 ONSC 4264 (SCJ):

> 60. The requirement in s. 16(3)(e) to consider the "child's views and preferences" is new and is consistent with Article 12 of the *Child Rights* Convention. In the Legislative Background to the *Divorce Act* amendments, the Department of Justice explains that:
>
> Under Article 12 of the United Nations *Convention on the Rights of the Child,* children who are capable of forming their own views have the right to participate in a meaningful way in decisions that affect their lives, and parenting decisions made by judges and parents affect child directly. The weight to be given to children's views will generally increase with their age and maturity. However, in some cases, it may not be appropriate to involve the children, for example if they are too young to meaningfully participate.
>
> See also: Official *Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 326 (26 September 2018) at p. 21866 (Hon. Jody Wilson-Raybould).
>
> 61. A human rights-based approach fundamentally recognizes children as subjects of law rather than objects of their parents. Making children more visible in legal proceedings that affect their rights is fundamentally important in Canada because children are not guaranteed legal representation in family law proceedings. Therefore, in my view, even where there is no direct evidence about the child's views and preferences, s. 16(3)(e) still requires the court should make a reasonable effort to glean and articulate the child's views and preferences wherever possible, considering the child's age and maturity and all the other evidence before it.

29. In this case, the children's views have been *independently* ascertained -- *they both don't want to receive the COVID vaccines* – but the father is asking me to ignore how they feel and force them to be vaccinated against their will. […]

30. While I agree with the father that these two children are not old enough to decide this complicated issue for themselves, I disagree with his suggestion that we should completely ignore how they feel about what they experience and what their bodies are subjected to. […]

78. I find that the combination of sections 16(2) ("the child's physical, emotional and psychological safety, security and well-being") and 16(3)(e) ("the child's views and preferences...") require that significant weight should be given to each child's stated views and requests. I would be very concerned that any attempt to ignore either child's views on such a deeply personal and invasive issue would risk causing serious emotional harm and upset. […]

83. On balance, I am satisfied that that mother's request for a cautious approach is compelling, and reinforced by the children's views and preferences which are legitimate and must be respected. […]

88. The mother shall have sole decision-making authority with respect to the issue of administering COVID vaccines for the children L.E.G. and M.D.G.