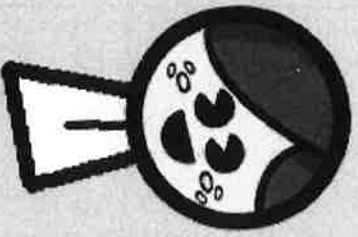


Through the Eyes of Young People:
Meaningful Child Participation
in BC Family Court Processes





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Since 1994 the International Institute for Child Rights and Development (IICRD) has been advancing the quality of life and development of vulnerable children through innovative education, research, and technical assistance that draw on the strengths of children, their families, communities and cultures. As a non-profit organization based at the Centre for Global Studies at the University of Victoria, IICRD establishes partnerships to bridge the gaps in vulnerable children's healthy development. Through the lens of the UN Convention on the Rights of the Child, IICRD works in four key areas:

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3. Children Reconnecting to Culture - Drawing on the Strengths of Traditional Teachings to Support Vulnerable Children
4. Tools for Change - Creating a Culture of Children's Rights

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Table of Contents

Forward	6
Background	9
Executive Summary	12
Introduction.....	17
Chapter I - The Current State of Child Participation in British Columbia (BC) Family Court Processes.....	22
1. The Family Court System through the Eyes of BC Young people	24
a. We Need Information About What’s Going On	25
b. ‘Twelve’ Should Not Be the Age When Adults Start Listening	26
c. A Presumption that All Young People Are Heard and Supported	27
d. One Caring Adult to Support and Listen to the Young Person.....	29
e. An Opportunity to Speak to the Decision-Maker.....	30
f. Overcoming Cultural and Other Differences Faced by Young People.....	31
2. BC Lawyers Hearing the Views of Young people	32
a. Lawyers Play a Variety of Roles in Young People’s Participation.....	33
b. Lawyers Achieve a Young Person’s Participation by Using third Parties, the Judge Speaking to the Young Person, and Less Often s. 15 Reports.....	33
c. A Preference That Judges Not Interview Young People	36
d. Concerns at Various Stages of Court Proceedings.....	38
e. Caution in Certain Cases: Abuse, Improper Influence	39
3. Judges: Listening and Speaking to BC Young people.....	40
a. Judges Play an Important Role in Supporting Young People’s Participation	41
b. Judges Have Heard from Young People at Every Stage of a Proceeding.....	43
c. Judges’ Use a Variety of Practices for Young People’s Participation	43
d. Judges are Reluctant to Speak to Young People Directly	45
e. Age is the Most Popular Consideration in whether Judges Hear from Young People Although Factors are Diverse	45
f. Potential Barriers to Young People’s Participation	46
g. ‘Section 15’ Reports Sometimes Used but Problematic	46
h. Judges’ Suggestions for Improvement	47
4. Service Providers: Supporting Young people’s Participation	49
a. BC Service Providers’ Experiences in Supporting Young People’s Participation	49
b. Suggestions from BC Service Providers to Improve Young People’s Participation:	52
5. Legal Foundations for Young Peoples’ Participation in BC Family Courts.....	54
a. International Law and Young People’s Participation	54
b. Legislation Regarding Young People’s Participation.....	54
c. Process: Rules of Court	56
6. BC’s Cultural Diversity and Its Impact on Young People’s Participation.....	57
Chapter II - Existing Strengths: Good Practices in BC and Beyond that Support Young People’s Meaningful Participation.....	60

1. BC Good Practices	60
a. "Hear the Child" Interviews (Kelowna).....	60
b. Less Formal Settings for Decision-Making that Affects Young People.....	62
c. Information and Education	63
2. Good Practices: Other Canadian Jurisdictions.....	65
a. Quebec: Legal Counsel for Young People and Auto-Enforcing Guidelines	65
b. Ontario: Office of the Children's Lawyer and Kid's Coaches	68
3. International Good Practices.....	72
a. Australia: Child Inclusive and Child Focused (less adversarial system).....	72
b. The United Kingdom: A Dedicated Family Court with Expertise	73
c. South Africa: A Framework and Assessment Tool Empowering Young People.....	74
d. Germany: Judges Speaking to Young People from 4 Years of Age	75
e. USA: Views of the Young Person Presented in Person, Practice Standards	76
f. New Zealand: A Must to Hear from Young People (Family Group Conferences)	78
 Chapter III - Building on Strengths: BC Looking Forward.....	 80
1. Changes in Attitudes and Approaches to Equip Adults in the Family Justice System to Support Young People and Their Participation.....	81
a. <i>Approaching Young People with Trust, Respect and Understanding</i>	81
b. A Common Framework for Family Court Stakeholders	82
c. Education & Training for Decision-Makers and Those Supporting Young People.....	83
d. Practice Standards, Screening and Accreditation	84
e. Monitoring and Evaluation	85
2. Improved Supports to Young People Directly.....	85
a. Information for Young People in a Way They Understand	85
b. One Caring Adult to Support Each Young Person and Their Participation	86
3. Systemic Improvements to Support Young People and Their Participation.....	87
a. Legislative and Procedural Rule Changes: A Presumption of Young People's Participation in Decisions Affecting Them	87
b. A Dedicated, Integrated, Less Adversarial Family Justice Process	90
c. An Array of Options to Support the Meaningful Participation of Young People	91
d. An Advocacy Role for the BC Representative for Children and Youth	92
 SCHEDULE "A": Summary of Experts Session.....	 94
SCHEDULE "B": Questionnaires.....	113
SCHEDULE "C": Literature Resources.....	126
SCHEDULE "D": Kelowna Pilot Information	186

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Last but not least an enormous thank you to the IICRD core team for your continual support, and to the amazing young people who inspire this work. Thank you!

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Forward

This report is the culmination of almost three years of work on a Project entitled, *Meaningful Child Participation in British Columbia Family Court Processes*, undertaken by the International Institute for Child Rights and Development (IICRD), based at the University of Victoria with funding from the Law Foundation of British Columbia.

Never once during this Project did anyone ask, “Why are you doing this”? In fact, we received several unsolicited phone calls during the Project from parents wanting things explained to their children or to interview their children, and from service providers and practitioners interested in learning more. Our experience has been a call for everyone involved in BC Family Court processes to pay close attention to the perspectives and unique situations of young people impacted by family court processes, and find ways to support the meaningful participation of young people promote their full and healthy development.

When the Project began in 2003, Chief Judge Stansfield was then a Provincial Court Judge in Kelowna. He had been a judge for five years when he read ‘Plight of the Voiceless Child’, an article outlining the historical neglect of children’s voices in disputes written by a Supreme Court of Canada Justice. This neglect is reflected in civil law where adults are always included in procedures that directly affect them but young people are not. Committed to improving the family court system for children and families, Chief Judge Stansfield generously agreed to volunteer for the Project’s advisory team. In 2005 he was appointed to the position of Chief Judge of the Provincial Court. Below are a few reflections that Chief Judge Stansfield recently shared on his experience in hearing from children.

July 20, 2006

Re: Contribution to the Views of the Child Project

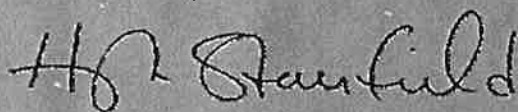
I have been Chief Judge of the Provincial Court for just over a year, but have served as a judge of the court for over 13 years, regularly sitting throughout the province in all aspects of the court’s work. Over the years, but particularly since we instituted mediation-styled case conferences for child protection and family disputes in 1996 and 1998, I have fairly frequently interviewed children, whether because a) I sensed the dispute was such that the child might benefit from knowing someone in the process cared enough to talk to them, or b) I believed the child might have information which would contextualize

or explain information I was receiving from the adversarial parents or the state, or c) I thought that discerning the interests and concerns of the child might become a useful tool in my continuing dialogue with the parents. On rare occasions, I have interviewed children in the context of trials, but there are considerable procedural challenges associated with that practice.

It is rare for me to find that the information provided by children is not helpful. My experience has been that the discussion with children generates not only useful information, but frequently a powerful tool in the continuing dialogue with the parents or social workers. So, for example, one can return to the parents after meeting privately with their daughter and the court clerk to say something along the lines, "You have a wonderful daughter and you both should be very proud of her. She is a credit to both of you. It is obvious to me that she loves you both very much. But as I talked to her and she told me about (various interests associated with school or recreational activities or extended family or whatever might be the issue), it made sense to imagine that for her right now, it would be best to have her home base with (mom or dad as the case may be.)" This creates an opportunity for the parent who may be the proposed secondary care giver to take the approach that the most loving response, and the way for that person to be the best parent she or he can be - quite independently of the conflict between mother and father - is to be respectful about these sensible considerations that have been identified by the child. In other cases I have found simply that children, and often relatively young children, have a degree of insight into the dynamics of the family unit that is far beyond what we might be inclined to imagine is their capacity. In my experience, hearing the views of children is almost always worthwhile.

At the same time, I have concluded that for a number of very good reasons the majority of judges do not wish to speak directly to children. It is important, therefore, that we develop not just other processes, but legislation or court rules to support such processes, through which the views of children are required to be secured in a much higher percentage of cases than happens today.

Yours sincerely,

A handwritten signature in cursive script that reads "Hugh C. Stansfield". The signature is written in dark ink on a light background.

Hugh C. Stansfield
Chief Judge, Provincial Court of British Columbia

This Report recognizes the value of meaningful young people's participation and seeks to identify some of the challenges that exist in creating space for young people's meaningful participation. This document reports on some of the research activities undertaken by the research team over the past three years, research that identifies some major short-comings in the treatment of children and youth in the family justice system in British Columbia. It also examines some promising practices and opportunities in BC for effectively implementing meaningful young people's participation in family court processes. The concluding chapter recommends significant changes for professional and stakeholder practice, legal reform and systemic change in British Columbia. These recommendations set an agenda and direction for reform, though many issues related to the implementation of these reforms will need to be further addressed.

The completion of this Report marks the end of Phase I of this Project. Many of the issues raised in this report will be further addressed in the next phases of this Project.

Suzanne Williams

August 30, 2006

Background

With Article 12 of the UN Convention on the Rights of the Child (CRC) and relevant British Columbia (BC) law as the starting point¹, the International Institute for Child Rights and Development (IICRD), based at the University of Victoria, investigated how the views of children currently are, or are not, being heard in BC family court (custody/access and child protection) processes. This Report, “Through the Eyes of Young People” (“ Report”), outlines the work completed in Phase I of the *Meaningful Child Participation in BC Family Court Processes Project* (“Project”), funded by the Law Foundation of BC.

1. “Young People”

The UN Convention on the Rights of the Child defines “child” as a human being below the age of 18 years.² In BC a person under 19 years of age is viewed as a “child”.³ Recognizing that youth often do not want to be characterized as children, “young people” is generally used in this Report to refer to human beings below 19 years of age.

In certain sections of the Report “children” is referenced, such as where interviewees are directly quoted or there is a reference to relationship between parents and “their children”. We have intentionally left these references in bearing in mind that they are encompassed by “young people” wherever it appears.

2. The Project’s Aim

It was recognized early on by the Project team that family court processes in BC is a broad subject area. In order to keep the Project work manageable, we focused primarily on custody/access and child protection matters that come before the BC Provincial Court, and BC Supreme Court. Having said this, the work is not exhaustive. However, we hope that it creates a reference point for further discussion on very real issues for young people in family court processes and action to address them. While court processes has been the primary focus, the Project work does have application to mediation, family group conferencing, and any situation where decisions are made about young people that involve family law.

The Project’s initial aim was to review whether there was any gap that existed between the intent of legislation supportive of young people’s participation in

¹ *Child, Family and Community Service Act* [RSBC] chapter 46, s. 4(f), *Family Relations Act* [RSBC 1996] chapter 128, s. 24(1)(b).

² *United Nations Convention on the Rights of the Child*, 20 November 1989, United Nations General Assembly, resolution 44/25 [hereinafter CRC], Article 1.

³ Section 1, *Child Family Community Service Act*, [RSBC 1996] Chapter 46

BC family court (custody/access and child protection) proceedings, and its implementation. The Project's work was soon focused on bringing forward the perspective of young people in:

1. examining the current state of young people's participation in BC Family Court Processes;
2. identifying existing strengths: good practices in BC and beyond that support young people's meaningful participation;
3. building on strengths: looking forward to improve supports to young people and their meaningful participation in BC family court processes

3. Key Project Activities

The Project has received narrative input through surveys, interviews, focus and discussion groups from well over 150 people across BC while undertaking the following key activities:

Experts Session

- Bringing together 25 experts from local, national and international levels to share their experiences (August, 2004) about young people's participation in family court proceedings and inform this work (see summary from this session at Schedule "A");

Surveys, Interviews and Focus Groups

- Conducting surveys, interviews, and focus groups with the following BC family court participants about their experiences:
 - i. young people (focus groups: 31; surveys: 25; interviews: 5);
 - ii. lawyers (surveys: 30; interviews: 10; discussion group: 12);
 - iii. judges (surveys: 20; interviews: 5; discussion groups: 10);
and
 - iv. service providers (interviews: 5);(see questionnaires at Schedule "B");

Reviewing Relevant Literature and Good Practices

- Reviewing relevant literature and good practices from other jurisdictions (see a review of a sampling of literature at Schedule "C");

Kelowna Pilot ("Hear the Child" interviews)

- Implementing a small pilot in Kelowna that involved having independent professionals (lawyers and counsellors) interview children, and report on the children's views to the parents and the court and involved :

- i. establishing an interview roster of 15 interviewers (lawyers and counsellors);
 - ii. conducting a brief training with all interviewers on the roster;
 - iii. conducting information sessions with lawyers, judges and court house staff explaining the pilot;
 - iv. obtaining Legal Services Society of BC support to fund interviews where parties met the requirements for financial assistance; and
 - v. implementing the streamlined practice to have the views of young people shared with judges in family court proceedings
- (see relevant pilot documents at Schedule “D”); and

Report

- Compiling findings, research and next steps in this Report.

4. Next Steps in the Project: Pilot and Implementation of Phase II

The Kelowna Pilot was initially scheduled for three months with a completion date of December 9, 2005, and then extended to February, 2006 by request of professionals in Kelowna. After further repeated calls to extend its duration and with a small amount of additional funding secured from the Ministry of the Attorney General, we agreed to extend the pilot to October, 2006. At that time, a more thorough evaluation of the pilot will be completed, and the findings compiled.

Along with the continuation of the Kelowna Pilot, work is just beginning on Phase II of the Project: developing a common framework for stakeholders, and education modules to equip stakeholders (e.g. lawyers, judges and social workers) involved in BC family court proceedings. This work will be developed and piloted over the next year with funding from the Law Foundation of British Columbia.

It is hoped that this Project will result in careful consideration and collective action by all stakeholders in BC family court processes to effectively realize meaningful young people’s participation.

Executive Summary

Family breakdown can victimize children in many ways. It can effectively deprive them of a parent. It can have them living in poverty. It can result in abuse. And it does all this without allowing them an adequate voice. Where children's rights are at stake, perhaps more than anywhere else, reactive legal solutions are inadequate. It takes pro-active attitudes in lawyers and judges to bring children's problems to light and to find solutions to them.

(Chief Justice Beverly McLachlin, Supreme Court of Canada)

This Report highlights work undertaken by the International Institute for Child Rights and Development (IICRD) in Phase I of its project on *Meaningful Child Participation in BC Family Court Processes* ("Project"), funded by the Law Foundation of British Columbia. With the starting point of the UN Convention on the Rights of the Child ("CRC") and British Columbia ("BC") legislation that requires consideration of the views of young people in decisions affecting them, the Project work was aimed at reviewing what happens between the intent of these laws and their actual implementation. The Project involved interviews with young people, lawyers, judges and service providers who have experience in BC family court processes, a review of research and good practices, and identifying existing strengths supportive of young people's meaningful participation as well as the gaps. Suggestions to bridge these gaps form part of this Report, presented through an introduction and three chapters.

"I kept wishing I was 12 so someone would listen to me."
(BC young person)

"Many more cases would benefit from reports but the costs are prohibitive to many parties and the Family Justice resources are often so slow as to be unhelpful."
(BC lawyer)

"I want to hear the views of all children if at all possible.
And so it's really a choice of mechanism."
(BC Provincial Court Judge)

"Leave children out of the fight. Child advocates were excellent when they were available."
(BC Supreme Court Judge)

Introduction

The Introduction outlines the current context of young people's participation, including what is meant by *meaningful* young people's participation, the decision-making processes that could include young people's participation in BC family court processes, and evidence of the benefits of young people's participation in decisions affecting them. Young people want to have an opportunity to have things explained to them and share their "voice" in the legal processes that fundamentally affect their lives. They want to meaningfully participate, but they recognize that they are not the ultimate decision makers. Meaningful participation of young people can be a protective factor for young people during a time when family breakdown puts them at risk. The involvement of young people helps to ensure that better decisions are made, and can promote a settlement of family disputes, saving resources in the legal system. Further, engaging young people in the process can help to ensure that the social and legal systems affecting them are held accountable.

Chapter I: The Current State of Young People's Participation in BC

Chapter I outlines what is happening in BC family court processes. While the adverse impact of recent government cuts to family court processes are noted, so too are the opportunities for improving BC family court systems. The experiences of young people, lawyers, judges, and service providers are highlighted as well as the relevant law, and significance that culture can play in how young people participate in family court processes.

According to the young people who have been involved in BC family court processes, they do not always get information about what is going on in a way they understand, and adults do not always listen to them especially if they are younger than 12 years old. At the same time, most young people want decision-makers to listen to and consider their views. A trend that emerged from the young people's experiences is the difference that one caring adult, who listens to them, can make to their experience in the system. This corresponds with the reality that parents are often dealing with their own emotional needs and sometimes not able to adequately support their children when their family breaks down.

Most lawyers have had direct experience with young people's involvement in family court proceedings and at various stages (e.g. case conferences through to trial), and see themselves as playing an important role in young people's participation. They however, have reservations about young people's participation such as: (1) judges should not speak to young people directly because they are not adequately trained; (2) s. 15 FRA reports are too costly, slow and dependent upon the quality of the interviewer; and (3) involving

young people in processes could be harmful to the young people, particularly in situations of abuse or improper influence by a parent or caregiver.

Judges have a very important role to play in BC family courts, and have the responsibility for making decisions based on young people's best interests, which includes taking account of their views.⁴ They consider a variety of factors in determining whether to hear from young people including age, maturity, potential for emotional harm to the young person, and the ability of the young person to express his or her own views. Nonetheless, many judges are reticent about speaking to young people directly and identify procedural rules, lack of training, lack of resources and lack of time as some of the barriers to young people's participation. They also identify the former family advocate, existing duty counsel and family justice counsellors as good resources that could be reinstated or expanded to assist them in supporting young people's participation.

Several service providers express their frustrations in the patchwork approach to young people's participation in BC family court processes, while encouraging more advocacy support, education and practice standards to improve the situation.

The legal underpinnings to young people's participation such as Article 12 of the CRC and BC legislative provisions in the *Family Relations Act* and *Child, Family, Community Services Act* are outlined. In addition, the findings of Madam Justice Martinson in the BC Supreme Court case of *L.E.G. v. A.G.* that judges may speak to young people directly, even without parental consent, are also noted.

Chapter I on the current state in BC Family Court processes concludes with a section on the influence and importance of cultural considerations in young people's participation.

Chapter II: Good Practices in BC, Canada, and Internationally

Chapter II identifies a few good practices in supporting young people and their participation in family court processes. These include the "Hear the Child" interview practice that was developed in Kelowna during the Project, and is now being piloted there. The advanced state of legal representation for young people in Quebec and Ontario are highlighted as national good practices. Other practices profiled include child focused processes from Australia, a dedicated family court in the United Kingdom, a common framework guiding the work of all service providers working with a young person in child protection matters in South Africa, judges speaking to children as young as four

⁴ See *Family Relations Act* s. 24(1)(b) and *Child, Family and Community Support Act* s.4(1)f

in Germany, and practice standards and an integrated model in the United States.

Chapter III: Building on Strengths: Suggestions for the Way Forward in BC.

Chapter III puts forth some suggestions for improving BC family court processes and in particular, support for young people’s meaningful participation in decisions affecting them. The suggestions are based on the experiences shared by BC family court users and stakeholders, good practices, and research. The suggestions put forth are summarized as follows:

1. Changes in Attitudes and Approaches to Equip Adults in the Family Justice System to Support Young People and Their Participation
 - a. Approaching Young People with Trust, Respect and Understanding
 - b. A Common Framework for Professionals
 - c. Education & Training for Decision-Makers and Those Supporting Young People
 - d. Practice Standards, Screening and Accreditation
 - e. Monitoring and Evaluation
2. Improved Supports to Young People Directly
 - a. Information for Young people in a Way They Understand
 - b. One Caring Adult to Support Each Young Person and Their Participation
3. Systemic Improvements to Support Young People and Their Participation
 - a. Legislative and Procedural Rule Changes: A Presumption of Young People’s Participation in Decisions Affecting Them
 - b. A Dedicated, Integrated, Less Adversarial Family Justice Process
 - c. An Array of Options to Support the Meaningful Participation of Young People

This Report will serve as a foundation for continued work in Phase II of the Project on the “Hear the Child” interview practice being piloted in Kelowna and future development of education modules for stakeholders such as lawyers

and social workers in BC family court processes. It is hoped that this Report will also assist decision-makers in taking proactive steps to improve supports to young people whose families are breaking down, and encourage young people's meaningful participation in BC family court decisions that affect them.

*Through the Eyes of Young People:
Meaningful Child Participation in British Columbia Family Court Processes*

Introduction

1. Current Context

The UN Convention on the Rights of the Child (CRC) was adopted and ratified by Canada and endorsed by British Columbia more than 15 years ago.⁵ Since then, the CRC has become the most widely ratified human rights instrument in the world and Canadian Courts have considered the CRC in well over 100 cases.⁶ British Columbia (BC) also has taken measures to implement legislation consistent with the rights of young people, and BC courts have considered the CRC in making decisions in the best interest of young people.⁷ Yet, much remains to be done before young people's rights are fully realized and their views respected in a meaningful way.

Reviewing young people's participation in BC family court processes is an area that has not been widely explored from the perspective of young people, despite the profound impact these processes have on them.⁸ It is well known that family break down takes its toll on young people: enduring parental conflict can significantly hamper the core development needs of young people and their psychological growth across the lifespan,⁹ and despite young people reacting to separation with distress, anxiety, anger, grief, shock and disbelief, little is done to prepare them emotionally for this experience.¹⁰ For many

⁵ *United Nations Convention on the Rights of the Child*, 20 November 1989, United Nations General Assembly resolution 44/25 [hereinafter CRC] was ratified by Canada in 1991. Prior to Canada's ratification, the British Columbia legislature endorsed the CRC by a unanimous resolution. The CRC defines "young person" as a person under 18 years of age.

⁶ 191 state parties have ratified the CRC: all states except the United States and Somalia; Junger, Robin M., "Canadian Judicial Consideration of the UN Convention on the Rights of the Young Person" (2003)

⁷ In its first Report to the UN Committee on the Rights of the Child, Canada referenced measures taken by BC to implement the CRC. This included mention of BC's *Child, Family and Community Service Act*, proclaimed on January 29, 1996. The Act identifies the safety and well-being of young people as being paramount. The Act was represented as being child-centred legislation that mandates that families and young people be informed about and encouraged to participate in all decisions that directly affect them; In *G. (L.E.) v. G. (A.)*, 2002 Carswell BC 2643, 2002 BCSC 1455 (B.C.S.C.), Martinson J. considered Article 12 of the CRC in deciding to interview a young person in a custody dispute, without the consent of the parents.

⁸ The literature is generally focused on family breakdown from an adult's perspective, be it a parent, lawyer, judge, or mental health professional. See for example, "Separation and Divorce: A listing of materials available at the Justice Institute Library", Justice Institute of BC.

⁹ McIntosh, Jennifer, "Enduring Conflict in Parental Separation: Pathways of Impact on Child Development"; (April, 2003) *Journal of Family Studies*, Vol. 9, No. 1, 63 at 65 referencing the work of Grych & Fincham, 2001; Kelly, "Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research" (2000), 39 *J. American Acad Child & Adolescent Psychiatry* 963.

¹⁰ *Ibid.* The work of Hetherington, Cox, & Cox 1982 and Wallerstein & Kelly is referenced.

young people within a supportive care-given environment these crisis-engendered responses diminish or disappear in the span of one or two years.¹¹ Unfortunately many children do not have such an environment, and even if they do, the break down of their family can have a lasting impact on their lives.¹² The responsibility therefore rests with adults to support young people and their participation through the one, two or several years of family conflict.

3. Meaningful Young People's Participation

Meaningful participation of young people in court processes involves creating space in a system traditionally designed for adults where young people can receive information in a way that they understand, ask questions, share their views and observations about their own lived experiences, have these views listened to in a respectful way and considered in decisions that affect them. Meaningful child participation is a process, and not a solitary event.

In order for young people's participation to be meaningful, young people must have their unique needs and perspectives taken into account by adults. It is not enough for adults to consider young people's participation as having been fulfilled when young people have been assessed or their views captured:¹³

Child participation must be authentic and meaningful. It must start with children and young people themselves, on their own terms, within their own realities and in pursuit of their own visions, dreams, hopes and concerns. Most of all, authentic and meaningful child participation requires a radical shift in adult thinking and behaviour – from an exclusionary to an inclusionary approach to children and their capabilities.

An illustration of young people's own realities is found in a study involving more than 460 young people (as young as 5) whose parents had separated. The researchers found that the young people had little information about their parents' separation, what was happening, and why:¹⁴

A quarter of the children whose parents had separated said no one talked to them about the separation when it happened and only 5 per cent said they had been fully informed and encouraged to ask questions.

A shift in adult thinking and behaviour to support meaningful participation starts with the fundamentals of trust, respect and understanding in relations with young people: like the acronym TRU these cannot be faked.¹⁵

In terms of practice, meaningful child participation is characterized by:¹⁶

¹¹ *Ibid.*

¹² E. Marquardt, *Between Two Worlds, The Inner Lives of Children of Divorce* (New York: Crown Publishers, 2005) at 9-11.

¹³ UNICEF, "The State of the World's Children 2003" (New York: 2002).

¹⁴ Dunn, Judy and Deater-Deckard, Kirby, "Children's Views of Their Changing Families" (York: York Publishing Services for Joseph Rowntree Foundation, 2001) at findings.

¹⁵ Larry Brendtro and Lesley du Toit, *Response Ability Pathways* (Circle of Courage, 2005) at 56-57.

- An ethical approach and a commitment to transparency, honesty and accountability;
- A safe approach in which children's protection rights are properly safeguarded;
- A non-discriminatory approach that ensures that all children, regardless of their class, gender, ability, language, ethnicity etc, have an equal opportunity to be involved;
- A child-friendly approach which enables children to contribute to the best of their abilities in an age appropriate manner and in a supportive environment; and
- Follow-up and evaluation with children.

4. Evidence Supportive of Young People's Participation

Most young people want a say in matters that affect them.¹⁷ Even young children can talk about the notion of having rights and being listened to.¹⁸ Further, while the views of young people inform their best interest, their participation also:¹⁹

- moves young people to the forefront of a dispute and often results in settlement;
- recognizes the valuable contribution young people can, and do, make;
- fosters learning and builds life skills;
- enables self protection;
- is developmental;
- is both a means and an end in itself;
- builds effectiveness and sustainability;
- reveals the strong networks young people have amongst themselves; and
- builds civil society and strengthens democracy.

¹⁶ Save the Children Canada, <http://www.savethechildren.ca/whatwedo/rights/participate.html>

¹⁷ Carl, Eberhard, "Giving Children Their Own Voice in Family Court Proceedings: A German Perspective" at 1; Carl cites the work of Morrow at the Centre for Family Research, Cambridge University, UK, 1998.

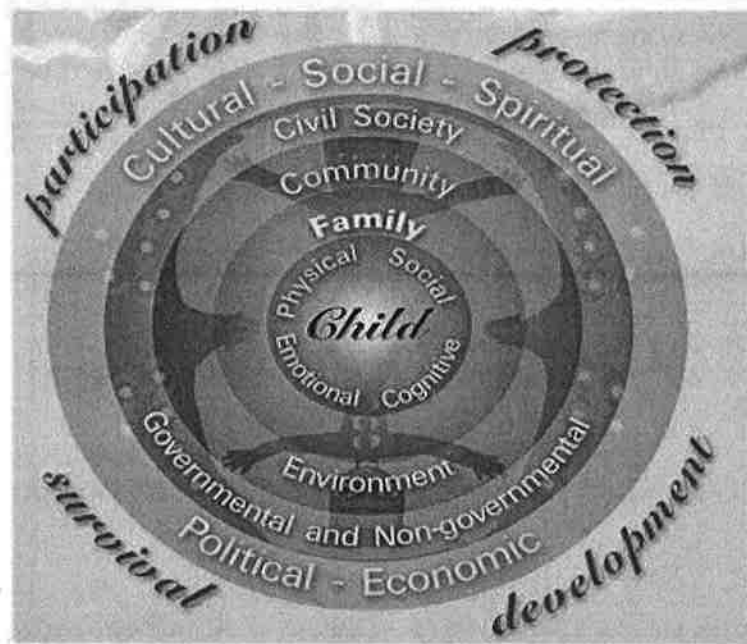
¹⁸ *Ibid.*

¹⁹ Cook, Blanchet-Cohen and Hart, "Children as Partners: Child Participation Promoting Social Change", International Institute for Child Rights and Development, 2004, p. 10; Kelly, J, "Views of the Child" session held Vancouver, July 2005.

In the context of family court proceedings, research also shows there are adverse immediate and long-term effects of excluding young people.²⁰

5. A Rights-Based, Systems Approach

While Article 12 is the entry point for this Project, the right to participation is considered in concert with all other rights and guiding principles articulated in the CRC.²¹ In this way a contextual tapestry of rights is woven together, unique to each young person in supporting his or her holistic needs (i.e. physical, emotional, cognitive, social, spiritual, cultural). The CRC thus provides a framework to support young people's healthy development, rather than taking a more traditional, adversarial "rights and remedies" approach requiring a remedy for each individual right.



IICRD's Social Ecology Model

²⁰ *Ibid.* "Views of the Child". Immediate effects of excluding young people include feelings of isolation/loneliness, anxiety, fear, sadness, confusion, anger and difficulty coping with stress; long-term effects include a longing by the young person for more time with one parent and loss of closeness in parent-child relationship, feelings of loss generally as well as loss of trust in parents and adults.

²¹ This is consistent with the human rights principles of universality, indivisibility, and interdependence. "Implementation Handbook for the Convention on the Rights of the Child" (New York: UNICEF 2002), at XVII; The CRC's four guiding principles are: (1) life, survival, development (recognizing the whole child); (2) best interests of the child; (3) non-discrimination; and (4) participation.

Responsibility for supporting the young person in context rests with key surrounding social systems. This is illustrated in IICRD's social ecology model. Beginning with family and followed by community, civil society (e.g. government, courts, non-governmental organizations) and broader societal norms, each system's actions impact the healthy development of the young person at the centre. Ideally, these systems work in partnership to fully support the young person at the centre. However, where one system breaks down or is completely lost, an increased pressure is placed on the other systems to support the child.

In the context of this Project, where the family is breaking down or lost, there is a need for the other systems (e.g. community, government services, courts) to step up their support to young people. The overall result of the rights-based, social ecology approach to young people's participation is thus both child-inclusive and child focused.²² It recognizes the right of young people to participate in decisions affecting them, and requires each system to place a central focus on them. Issues of systems accountability are key to this process, and it is often at this level where child centred systems such as courts struggle to apply the spirit and letter of the CRC. Developing mechanisms that promote the meaningful participation of young people across these systems helps refine and improve the implementation of child centred services.

²² There appears to be some debate on this issue. See for example: McIntosh, Long, Maloney "Child-Focused and Child-Inclusive Mediation: A Comparative Study of Outcomes", *Journal of Family Studies*, Vol. 10, No. 1, April 2004, pp. 87-95; This Project's approach is not satisfied with just having young people's views heard. The approach requires each young person to be placed at the centre of, and respected by, all decision-making systems that surround that child in fulfilling and supporting his or her rights, participation and development.

Chapter I - The Current State of Child Participation in British Columbia (BC) Family Court Processes

British Columbia (BC) has undergone many changes in its family court system. In the 1970s, lawyers were appointed to represent young people by the court and therefore paid for by the BC Attorney General.²³ The Family Advocate program later replaced this practice. Availability of funding effected program availability, but children had more representation than they do now.²⁴ Today there is an ability to have a lawyer appointed to a represent a young person in child protection cases, but it is rare.²⁵ However, in the area of the *Family Relations Act* (FRA) (custody and access) this is not possible.²⁶

In 1996, family case conferences were introduced for child protection cases: every contested, young person's case in the Provincial Court must go there first.²⁷ The vast majority of cases are settled in this forum.²⁸ Young people are often present in case conferences, but this depends on the judge and social worker involved.²⁹ The volume of family case conferences is high and takes up a lot of time but it saves court time.³⁰

In recent years, government cut backs have been the driving force for significant change to the system. In custody/access matters under the FRA, there are many more cases where neither litigants nor young people have legal representation or a family advocate due to legal aid and family advocate cuts.³¹ As a result, family case conferences are often conducted without lawyers or family court counsellors.³² This presents real challenges for judges and decision-makers who must work with the parties yet remain impartial as the decision-maker.

Throughout Project discussions with lawyers, judges, young people and service providers, the detrimental impact of BC government cuts on young people has been emphasized.³³ It is no surprise that supports to young people and their participation were more widespread in the past than the present, leaving BC behind other jurisdictions in serving children in family court processes.

²³ Information provided by Provincial Court Judge at IICRD session of experts held in Vancouver, August 30, 2004.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Supra* note 1, *Family Relations Act*

²⁷ *Supra.* note 22

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

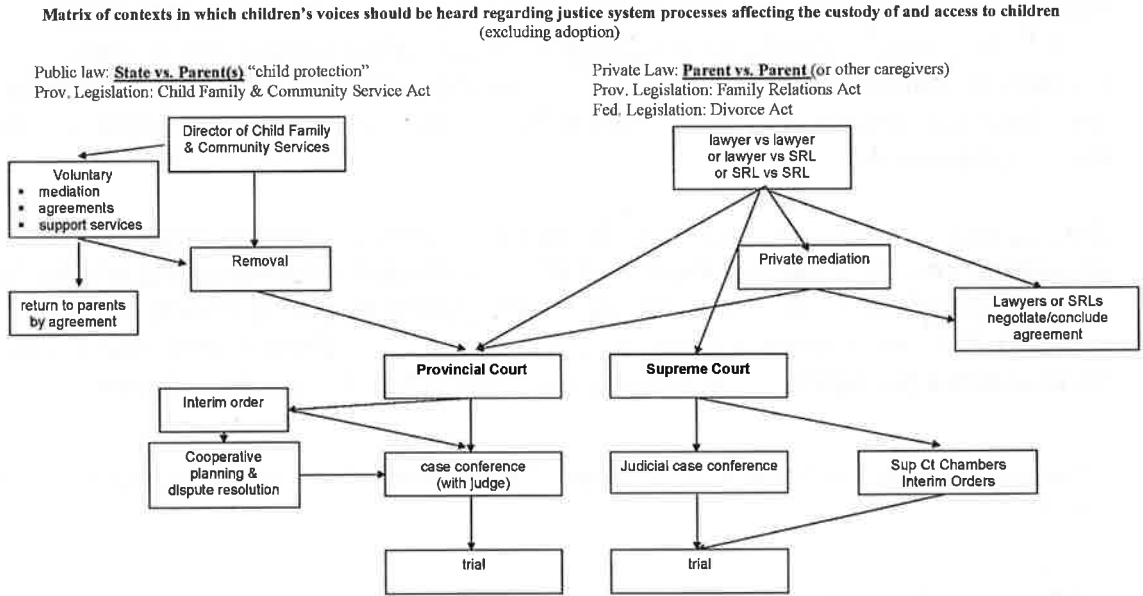
³² *Ibid.*

³³ The elimination of child advocates, and funding for section 15 *Family Relations Act* reports are notable.

Nevertheless, there are emerging opportunities in BC to improve family court processes. The Family Law Working Group of the Justice Review Task Force released its report and recommendations last year for an improved, less adversarial system last year and the *Family Relations Act* is now under review. The Hughes Report on child protection matters was also released recently. While the circumstances that caused the report to be written are distressing, there appears to be a renewed commitment by the BC Government to improving the system of accountability for young people in the Province. Other initiatives such as the Parenting after Separation course, Comprehensive Child Support Services, and Family Group Conferencing offer improved supports to families, and incidentally to children. The question remains, however, as to what services are available to improve support to young people affected by decisions made in BC family court processes.

In terms of opportunities to hear the views of children in decision-making in BC family court proceedings, the following matrix is helpful in demonstrating that a young person’s views can affect decision-making from the moment the young person and their family enter the BC family court system, right through to trial.

*Note: SRL in the matrix refers to self-represented litigant.



1. The Family Court System through the Eyes of BC Young people

Tarryl's Story

I spent a lot of time wishing I was 12 so someone would listen to me.

For most of my childhood, ages 2-9, I was in the middle of a long and acrimonious child custody dispute in my family. I always knew I wanted to live with my dad and I told everyone who would listen but felt no one heard me or considered what I had to say. At one point, I felt I had to just agree to anything adults said to me to stop the fighting and went to visit my mother despite not wanting to. I spent a lot of time wishing I was 12 so someone would listen to me.

I was 'assessed' numerous times by various professionals, and yet I did not feel listened to by any of them. My Mom also made false allegations that my Dad was sexually abusing me so I underwent invasive physical exams and I couldn't see my Dad like I wanted. Finally, a Family Advocate (from the Attorney General's discontinued Family Advocate program) was appointed to listen to me. I really felt things got better when my advocate brought my voice forward.

My Family Advocate had an attitude that led me to believe that finally someone was listening to me. She approached me somewhat as an equal, and I realized how important it was that there was someone there for me. The Advocate met with me by myself and also met with my parents.

Although, for the most part, the custody dispute is over, I still find it very frustrating to hear about what innovations are going on around the world and then think about BC and how far we have to go.

It shouldn't be a privilege to be heard because of lack of funding or because it is a custody matter. How hard is it really to just speak to the child involved? What would have happened if I hadn't had a Family Advocate? A family is about the children and so it is frustrating to not put them in the centre of things - especially if professionals making these decisions have their career in family law. To bypass court even and not even have to involve a judge or lawyer, that is great if children can be heard in that process too. But if they have to go to court, they should have an absolute right to be heard. The people that matter should hear what they (children) have to say.

Tarryl's story reflects some of the common experiences we heard from young people whose parents are separating in BC. Over the course of the project, we heard from more than 30 young people in BC through focus groups, one-on-one in-depth interviews, and online survey information. The following section outlines some of the common themes that emerged from this research.

In summary, the young people's voices are clear about the need for:

- Information to explain what is going on during a Family Court Process: both about the process itself, including their own rights, and what this means for them and their family;
- A voice in the process: a chance to tell decision-makers what is important to them and what they would like to see happen, no matter their age or particular circumstances;
- A chance to be part of the process in a safe way: where they have the support they require in order to participate, where information is given

and their voice is sought in a proactive way, and where they are not placed in difficult situations where they are required to 'testify' against their will!

a. We Need Information About What's Going On

We know what's going on. When we don't have information we fill in the blanks and often end up blaming ourselves. (young person, male)

The importance of providing information to young people in a way that they can understand and that works for their age and maturity cannot be understated. Unfortunately, it is clear from the interviews, focus groups and surveys undertaken during this Project that young people don't have the information they need to understand what is going on during a family break down. For a start, many could not identify which specific types of court processes they were involved in and had to work with the interviewer to determine which experiences were criminal court experiences and which ones were family court experiences. Many young people reported being given the message, either directly or indirectly, that the separation 'wasn't their business' and a significant number of young people were not given any information at all. A few young people did recall social workers, parents, foster parents or other family members attempting to explain to them what was going on. In spite of this, many still found the process difficult to understand. Almost all of the young people identified language and terminology as being a huge barrier to understanding the process, and some mentioned that the 'explanation' was a one-off experience, rather than a continuous process of information sharing.

Some youth report taking defensive tactics to protect themselves because of the uncertainty they experienced. For example, when asked questions, youth report a range of defensive behaviours ranging from lying about what was or was not going on, to unresponsiveness. Other youth report signing papers they did not/could not read or could not understand, or saying 'yes' to things when they did not understand what they were saying 'yes' to or the implications.

Sometimes, the information young people were given was inconsistent, creating further confusion in an already complicated process. In general, being able to ask a lot of questions and have them answered by someone who took the time, seemed to result in a more positive experience for these young people.

The findings about young people in BC are consistent with those of young people elsewhere. For example, a study in the United Kingdom in which researchers listened to 104 young people talk about their views, feelings and understanding about their role as active participants in separation and divorce

found that there was a gap in communication between parents and young people:

While 99% of parents said they had told the child about the divorce, only 71% of children agreed. Few children felt they had been actively 'prepared' by their parents for the separation, even where parents themselves were planning the split.³⁴

In the words of one young participant:

It was like, 'Oh well, it's not really your problem, you don't have to go through all the divorce things. But no one seemed to realise I was sort of THERE. They were all concerned with what they were doing. (Libby, aged 13)³⁵

In short, young people in BC overwhelmingly report that they are not being told, in an informative way, about what is going on with their parents or caregivers and the separation and/or 'custody' processes (including guardianship, Temporary Care Orders, etc.). Young people want to be able to ask questions of those they trust about what was going on and their place in the process.

b. 'Twelve' Should Not Be the Age When Adults Start Listening

I kept wishing I was 12 so someone would listen to me. (young person, female)

For many young people affected by BC family court processes, the process of separation (the 'custody battles') goes on for much of their childhood. Yet, the young people who contributed to this project had very few or no experiences over the years of people supporting their participation in this process. This included someone either (1) telling them what was going on; or (2) asking them anything about how they are feeling or what they think.

As already mentioned, many young people recount feeling or being told that they were too young to understand anything, and equate this with a resulting sense of powerlessness. Yet, those same young people, and others, spoke of wanting to have their voice heard, even when they were very young. Many felt that, even at a young age, they knew enough about what was going on that they should be able to speak with decision-makers. Young people spoke about knowing 'what is really going on' and that this information should be valuable to decision-makers. Some, like Tarryl, recall being told that '12' was the magic age that their voice would be heard in the process.

BC legislation does not specify a minimum age at which children should be involved in the proceedings, although certain *Child, Family, Community*

³⁴ Douglas, Gillian (2000) "Children's Perspectives and Experience of Divorce" ESRC Research Programme on Children 5-16, Research Briefing December 2000 Number 21.

³⁵ *Ibid.*

Services Act (CFCSA) provisions do use age 12 as a trigger for certain rights.³⁶ Nevertheless, age seems to be a deciding factor in hearing, or not hearing, from some children.

In a case where the child was 5.5 years old, the judge decided the child's views were not relevant based on age:³⁷

In my opinion, the views of the child are not relevant in view of Liam's age.

In a case where the eldest child was 7 years of age, the court stated:

The children are too young to seek their own views but I do not think that at their ages there will be much disruption to them with a move to Penticton although I do believe that there would be some disruption to them with a change in custody.³⁸

Perhaps in cases such as these the young person's views should be sought and if heard, given appropriate weight. Otherwise, failure to seek the views of children based on age does not permit "a child who is capable of forming his or her own views" to express them.³⁹

c. A Presumption that All Young People Are Heard and Supported

Young people want to be part of the decision-making processes so long as there is a presumption that they are capable for contributing, their contributions are supported and valued, and they are included in way that is sensitive to their contextualized rights and needs. Being a part of the process in this meaningful way involves more than simply asking a young person what they want - it involves informing them about what is going on and having a 'dialogue' that is natural and allows them to paint a full picture of their experiences from their perspective. Some young people said they were asked directly what they wanted, but it was done in such a way that they "didn't know" or they felt they didn't have the information needed to say anything. Some also identified feeling cornered or pressured into answering.

To be part of the process in a safe environment involves *not* being placed in a situation where young people have to 'confront' their parents or caregivers. Young people recall their horrific experiences of 'testifying' in front of those they are accusing or in front of the parent they don't want to live with anymore. In one focus-group conversation, young people spoke about how difficult it was to say what they wanted in a courtroom and in front of the person "I might be going home with."

³⁶ *Supra* note 1.

³⁷ *Scheiber v. Phyll*, 2001 BCSC 565 (CanLII), paragraph 21.

³⁸ *A.M.G. v. S.W.G.*, 2004 BCSC 579 (CanLII) Mr. Justice Trescott, paragraph 28.

³⁹ Article 12, CRC.

The judge may decide that this person is okay and they're fit, even though I know that they're not right. Maybe they won't believe me, and then am I going to stand there and really point my finger at that person when I know I could be possibly going home with them and getting crap-kicked when I get home because of all the things I said? (young person, Female)

These experiences are emotional and, according to several young people, cause long-term 'damage'. Accordingly, it is no surprise that several young adults who we met through this Project and who have had painful experiences in family court processes as young people, are now at school or in jobs working to improve aspects of the family court system for young people.

Being involved in the process in a meaningful, safe way also means young people can avoid resorting to extremes to be heard. Such extremes reported by young people involved running away, stating involvement in prostitution, threatening, or - the most commonly reported 'resort' - literally yelling and becoming emotional in court (or case conference) until someone listened.

Young people themselves told us how inconsistently their right to have their voice heard was followed - or how inconsistent the process is.

You can have private session with a judge. (Female 1)

Nope, I didn't have any options. (Female 2)

A surprising number of young people mentioned a few examples where a judge had asked them what they thought, or had, after some outburst, finally listened to them - and they expressed how fortunate they were to have an experience like that when many of their friends did not get the same opportunity.

At first, I definitely had no say in anything. The judge I went before in Ontario was not great and treated me and my lawyer like finger puppets. When I went before the judge in BC, I was lucky and I know I was lucky, because I had made up my mind to have my voice heard and the judge was willing to hear it. (Male)

The experience of young people in BC interviewed for this Project is consistent with those of other young people. For example, in the words of a young person from a presentation to those working with young people in pain:

I know you are all busy - lots of work that demands paper, paper, paper. But I am here to tell you that I am more than a file. I am a person. I have feelings and am entitled to respect. Please don't only see the problems, see the potential. Over the years, I have had good and bad experiences in the system. The good parts have been some of the caring, trusting, and supportive people I have come in contact with. The bad parts are when people don't listen or trust me.⁴⁰

⁴⁰ *Supra* note 13, Excerpts from Lay, J. (2000). The person behind the file number. *Reclaiming Children and Youth*, 9(2), 68-69 as cited in *Response Ability Pathways*.

d. One Caring Adult to Support and Listen to the Young Person

Young people will freely admit that family court processes are frightening and overwhelming - and they are not always good at expressing these feelings while in the process or reaching out for help.

“One thing that’s really important is that...when I was in that situation, at 14, I was really intimidated. Like even if you had asked me, ‘How do you feel about this?’ I would have just been like, ‘Yeah, okay, whatever.’” (Female)

There is great disparity in the experiences of young people receiving consistent support. Many reported that they felt like someone, predominantly a third party, was looking out for them at some time; however, the majority of young people felt it was ‘hit and miss’ as to whether they had someone in their life during this time that could really support them in a sustained way. Young people spoke very passionately about when they were ‘lucky’ because they had an ‘awesome social worker’ or a ‘great foster parent’, a counsellor, an advocate, or a probation officer who helped them understand what was going on and support them. The passion with which they spoke reaffirms the research on children’s resilience that supports the notion that a single caring adult in the life of a young person can have an immense impact.

I had a good foster parent. I was crying in the car on they way in [to court] saying that I didn’t know what to do. My foster parent said that it was ok, everything would be ok, and to just look at her in the crowd if I got scared. She told me to just say what I needed to say and that would be ok. I really appreciated her support and without her, I would have felt even more scared and uncomfortable. (Male)

It also explains why many young people advised us that, in order to improve the experience for other young people, it is necessary to provide formal, systematic support: when young people can’t find a ‘natural’ advocate to support them (for example, an aunt, family friend, etc) and help them to understand what is going on and make sure their voice is being heard then the system needs to ensure formal advocacy support is available to them.

Young people spoke equally as passionately about the many times they experienced professionals who ‘didn’t care’ and difficult family situations where their parents couldn’t be there for them. Many also spoke of professionals who didn’t advocate for them strongly enough, or who tried to convince them their opinion was misguided.

Half the time it’s not the judge’s fault that they don’t listen - it’s the people that represent you. (Female)

The opportunity to create good experiences for young people happens at each encounter with them. With this opportunity comes responsibility to ensure that trust, respect and understanding guide adult conduct with young people.

e. An Opportunity to Speak to the Decision-Maker

While concern has been expressed by adults that judges should never speak to a young person, the experience of young people suggests otherwise.⁴¹

In certain situations, various young people recount being able to speak directly with decision-makers. Virtually all of these young people report feeling heard and many reported outcomes they were happy with or, at least, could live with.

The judge actually met with me and my brother in the judge's chambers and asked questions about what we wanted. It was just the three of us. The judge was very intense looking into my eyes all the time. Yet, it wasn't scary at all - no way! I was so happy that someone was willing to listen to me finally. You know, of all the people involved [social workers, foster parents, etc.], he treated me as if I was an intelligent young man which was very different than my other experiences where people in the system were treating me as a young child. (Male)

When children are involved...I mean, we're so young and we get all this build up of anxiety and all this...no wonder people are attempting suicide - no wonder! Just open up your ears. We know what we want. (Female)

Everyone was telling the judge what should happen...they all agreed on the 'plan' to send me back to my mom. I was just sitting there quietly in a big puffy jacket holding my teddy bear and sucking my thumb - at 15! Can you believe that! Then the judge turned to me and just asked me what I wanted. I told her that I didn't want to go back. Then I started to cry and basically went hysterical. I was packing and saying that I didn't want to go back and that she was crazy and she hurt me and no one ever believed me that she abused me...The one moment I was proud of myself was when...I said 'well, isn't it worth my peace of mind to make me a permanent ward so I can feel safe...if you don't, I'll go crazy or die.' The judge ordered a psychological assessment of my family and found that I was telling the truth - that my mom was crazy and couldn't take care of me...It actually worked out fine - it was the best think that could have happened to me...the judge was the one that finally put it all together and saved me - and my mom. After the psych assessment, she got the disability pension she needed and the help she needed and started doing better. (Female)

It is clear that young people who have had an experience of a decision-maker, who genuinely listens to what they have to say, feel much more positive about the process.

⁴¹ Results from Project surveys, interviews, and informal discussions with lawyers revealed that there is a prevalent view amongst lawyers that judges should not speak to young people.

f. Overcoming Cultural and Other Differences Faced by Young People

Young people who self-identified cultural or other differences spoke of additional challenges they faced during the separation and custody process.

For example, one young man spoke about the challenges he faced because of his disability and the assumptions people made about his capacity to have a voice in the process - especially when he was less than 12 years of age.

My mom was trying to prove me incompetent and so asked that the judge order an IQ test. It was the best thing they could have done because it came back normal and so they realized that they could ask me questions and value my opinion. After that test at the age of 12, they didn't really treat me any worse than other young people the same age... (Male)

One young woman emphasized the challenges aboriginal families face in these processes due to 'cultural misconceptions.'

I believe there are cultural misconceptions about aboriginal families: that they are limited in their abilities and their capacities to care for their own children. In my case, my mother herself had learning and developmental challenges, a long stemming result of generational alcoholism and subsequent abuse and neglect. I believe this to be a result of my grandmother's negative experiences which in Catholic Residential school. In my family this was the case; however, without mental illness, I believe our family would have been able to stabilize. (Female)

The additional challenges these young people report in participating in BC Family Court processes are fully supported by other research.⁴²

⁴² *Supra* note 13 for example.

2. BC Lawyers Hearing the Views of Young people

Lawyer's Views:

A disservice to children by failing to appreciate what is in their best interests

"Judges, Masters and Mediators have no particular expertise in interviewing children. With luck, the Judge who does so in a given case is a 'gifted amateur' and obtains useful information from the child. Judges etc. should not interview children if the children are represented by counsel but should simply let counsel present the case.

If the judge wants to hear from the child without the other parties or their counsel being present, that can be done but it should be done by the child's counsel and the questions and answers should be recorded for the record and the answers given under oath - preserving the record for the purpose of appeals.

Ideally, the court would have someone on staff who is qualified to interview children of all ages and to provide generic advice to the court about the child's capacity, developmental stage, etc. Because I act for children I have made it a point to consult with experts about how to interview my child clients and how to best present their evidence in court. If time and money permitted, I would routinely use experts at trials involving children, to explain all sorts of things, e.g. how the child perceives different events and their effect on the child (viewing violent altercations between parents would be an example). I think what we end up with is a system that often results in a disservice to children by failing to appreciate what is in their best interests and address their concerns." (lawyer 28)

Target a limited resource

"I think probably a better way is to target a limited resource without having a child advocate sit through and attend a whole trial. And I think that what happens in the Section 15 report world is that the assessors often develop (a) their own biases and (b) often get work from a handful of lawyers and are reluctant to disappoint lawyers that they get a lot of work from and will couch reports accordingly. And so that detracts from neutrality." (lawyer 2)

The views of approximately 50 BC lawyers were captured in the course of this Project through surveys, interviews, and discussion groups. Most of the lawyer participants were self-selected. A series of questions were asked through surveys (see Schedule "B" for a summary of responses) and interviews, and narratives were also obtained through discussion groups.

The lawyers who formally participated in the Project surveys have practiced law for a range of 9 to 32 years, with most practicing family law more than 50 percent of the time. Most have experience with both Provincial Court of BC and BC Supreme Court processes, and a small number with mediation and

collaborative law processes involving both children's issues and financial issues. Most of what we asked them focused on their experience with court processes.

The questions asked included four items focusing on their practice background, one about their experience in having young people involved in family proceedings, one on custody and access reports ordered pursuant to section 15 of the *Family Relations Act*, one on their experience with judges interviewing young people, and one exploring whether masters and mediators should interview young people.

a. Lawyers Play a Variety of Roles in Young People's Participation

Lawyers play various roles in court processes. They have acted as child and family advocates, as a "friend of the court" (*amicus curiae*), as legal counsel representing young people, and as a guardian ad litem in BC family court proceedings. They also play a role in deciding which procedure, if any, should be used to hear the views of a young person in order to determine the best interest of the child.

There are presently no standards or guidelines in place to assist lawyers who act for young people in court proceedings. For example, when lawyers represent young people, do lawyers advocate for what they think is in the young person's best interest, or do they put forth the young person's views? At present, it is up to each lawyer to decide.

b. Lawyers Achieve a Young Person's Participation by Using third Parties, the Judge Speaking to the Young Person, and Less Often s. 15 Reports

About one fifth of lawyers surveyed did not personally involve a young person in legal proceedings. Of those who had involved young people the most common form for seeking the young person's views was having affidavits prepared, followed by having experts involved, having young people speak with the judge/master, having s.15 reports prepared, having counsel/advocate for the young person, and in one case having a judge submit written questions to the young person.

i. Views Obtained via Legal Representation or an Advocate

The BC Attorney General as well as judges used to appoint counsel to represent young people. Some lawyers have sought orders under s. 2 of the *Family Relations Act* for the appointment of a child advocate "to act as counsel for the interests and welfare of the child". Note that this provision of the *Act* does not expressly refer to participation of the young person.

In proceedings involving the Ministry of Children and Family Development (MCFD), on behalf of young people, lawyers have sought an order from the court to have counsel appointed. While there are some procedures in place to have counsel appointed to represent young people, it seems to be very difficult to actually get approval from the relevant government bodies and to obtain funding to support this. As a result, many lawyers are representing young people on a pro bono, ad hoc basis.

ii. Views Obtained by Speaking to Judge, or Master: A Common Occurrence

Of those surveyed, 70 percent have had a Judge, Master or Mediator interview a child or children directly in a case in which they were involved. This occurred more often at the trial stage, followed by the judicial case conference and the interlocutory proceedings and often with positive results:

I had a very mature 12 yr old girl draft an affidavit at the father's request. Again the father insisted that I permit his daughter swear her own affidavit in spite of my warnings not to. Opposing counsel suggested that we ask the Master whether he agreed with this form of giving evidence. The master said that he would prefer to meet the child in Chambers. The Master spent approx. 20 mins [sic] in Chambers talking with the child. Nobody else was there with the Master and child. It was an excellent experience as the child had an opportunity to speak directly to the Master and convey her genuine opinion directly to the Master. (lawyer 10)

Several lawyers had seen similar situations where a judge met privately with a young person in chambers, and on occasion only with the clerk but not counsel or parents present. In these cases, the judge sometimes first negotiated an agreement that potentially limited disclosure to the parties of some or all of the discussion but this was definitely not the norm. In the context of a trial, most often no provision was made to preserve the substance of the conversation for appeal purposes. Very few lawyers had seen a judge permit the participation of young people in a BC Supreme Court judicial case conference and none of the lawyers had seen it done with the other parties excluded from the room. Only one lawyer frequently saw a judge hear *viva voce* from a young person in a trial where custody of the young person was in issue.

iii. Views Obtained via Third Party Reports: A Relatively Small Percentage

Section 15 of the BC *Family Relations Act* states:

Expert witnesses in family matters

15 (1) In a proceeding under this Act, the court may, on application, including an application made without notice to any other person, direct an investigation into a family matter by a person who

(a) has had no previous connection with the parties to the proceeding or to whom each party consents, and

(b) is a family counselor, social worker or other person approved by the court for the purpose.

(2) A person directed to carry out an investigation under subsection (1) must report the results of the investigation in the manner that the court directs.

(3) A person must not report to a court the result of an investigation under subsection (1) unless, at least 30 days before the report is to be given to the court, the person serves a copy of the report on every party to the proceeding.

(4) If satisfied that circumstances warrant, the court may grant an exemption from subsection (3).

In most cases s. 15 reports are carried out by psychologists who prepare formal assessment reports to assist decision-makers in determining the custody or access of young people.⁴³ While more recently s. 15 has included “views of the child” reports to be prepared by psychologists or other individuals, these types of reports do not always capture the actual views of young people.⁴⁴ Rather, the views of the psychologist or author of the report are often provided to the court, instead of the actual views of the young person, as would be done in the case of the more in depth assessments.⁴⁵

The majority of those surveyed and interviewed indicated that the percentage of cases that present children’s views to the court through a s.15 FRA custody and access or similar report is relatively small (below 25 percent). Two participants indicated that their use of the s.15 report, where the views of the young people were canvassed, was over approximately 75 percent.

One lawyer expressed a general concern about the effect that s. 15 reports can have on young people:

. . . “So-and-so says that . . . dad’s like this or mom’s like this” . . . And I think it’s really affected the kid’s relationship with the parent. (interview with lawyer 31)

For other lawyers, there are several factors that influence the effectiveness of the reports, in particular:

A. *Time*: Due to government cutbacks, the process takes longer, causing secondary effects such as the increased possibility of undue stress placed on the child/family.

I only get a section 15 report on the very difficult cases. In our jurisdiction there is no use getting a Family Justice Worker’s report as the waiting list is very long (8 mths- year) .
(lawyer 2)

⁴³ e.g. J.P. Boyd’s Family Law Resource at: <http://www.bcfamilylawresource.com/13/1306body.htm#4>

⁴⁴ Canadian Bar Association (CBA) Vancouver Family Law Section Meeting, Panel of Dr. Michael Elterman and Dr. Philip Cook, fall 2004; Interview with service provider 3.

⁴⁵ *Ibid.* CBA Vancouver Family Law Section Meeting.

Smaller percentage than in years when the government used to fund the reports. (lawyer 5)

Not many now due to back log. They are very effective if they can be done quickly. (lawyer 8)

- B. Money:** As previously noted, government cutbacks have made it increasingly difficult to reach a court settlement in a timely fashion. The client(s) may choose to solve their individual cases privately; however, this option is often financially unavailable for some families due to the costs involved.

Those reports take so long to have prepared and are so expensive that I have never used one. (lawyer 3)

The government ones are too slow; the others are too expensive. (lawyer 13)

s.15's court ordered take 6-8mths. Private cost \$6000. So only (ideal) for a select few. (lawyer 9)

Many more cases would benefit from such reports but the costs are prohibitive to many parties and the Family Justice resources are often so slow as to be unhelpful. (lawyer 27)

- C. Quality of Expertise:** The effectiveness of this method is directly linked to the expertise of the people involved (e.g. psychologist, psychiatrist, counsellors, social workers)

I think it is effective if the "expert" is skilled. (lawyer 4)

Efficacy depends on the report writer's skill and expertise in dealing with the child(ren). (lawyer 21)

Depending upon who is preparing such a report, this method can be extremely helpful and often results in settlement. (lawyer 27)

There are a lot of counsellors out there who are easily "snowed": the only counselors doing these reports should have serious training in alienation and other issues. (lawyer 30)

c. A Preference That Judges Not Interview Young People

One of the surprising results of the Project work was to learn of lawyers' views on judges interviewing young people. While the majority of lawyers believe that lawyers have a role to play in supporting young people's participation, they do not think that Judges, Masters, and Mediators should meet directly with young people. This is primarily due to a lack of time and expertise:

I do NOT think it is appropriate for Judges or masters to interview. Judges and Masters have a lot to deal with in assessing the law and reviewing evidence and I am more and more very pleased with the interest that they are now showing to Family matters. However they do NOT have in there [sic] skill set the ability to peel back layers of alienation and other campaigns that parents wage against each other. I have seen some

horrific examples of parents alienating (successfully) and we can not expect our judges and masters to have the skills or the TIME to review these. Sometimes “the light goes on” at the in home interview - and certainly that would not be part of the Judges or Masters process. I can not stress enough how inappropriate I would think it would be for the court to interview children (lawyer 30)

I think it is very difficult to make “blanket” approvals or disapprovals of the prospect of Judges, or Masters, meeting directly with children. The role of counsel is a large factor, as they have the ability to assess whether that would be harmful to the children or not. Perhaps if the children are mature, and at least 15 or so, and there [is] stark “black and white” characterizations of the evidence, a lot of mistrust, hostility, etc., it would be helpful for the Courts to have this kind of direct information. I think it would be harmful to require that the Court disclose all of the information given if there is a prospect to reprisal/reprimand from either parent.

And

I cannot think of situations where Mediators should interview children unless requested to do so by the parties or their lawyers. Mediators should not be seen to have any decision making authority and there is great danger of this happening, or of mediators using such information to influence the mediation process one way or the other. (lawyer 29)

i. A Fear that Judges Talking to Young People is Harmful

There is a predominant fear amongst lawyers that it is harmful for judges to speak to young people. This fear appears to arise from a perception that young people will take on the burden of making the decision, as well as a perception that judges lack the necessary training.

Judges and Masters are not trained in child psychology and they do not know how to properly interview a child who is in crisis. (lawyer 2)

No-unless absolutely necessary. If someone has enough money to go to trial, then they should commit resources to have child engage with a therapist/child specialist. The process is then neutral and far less intimidating. Does not make child feel like they are picking sides or they are making one parent a winner and one a loser. (lawyer 24)

ii. Young People Talking to Judges, Masters or Mediators Can Be Helpful

Although the majority of lawyers expressed the view that Judges, Masters and Mediators should not meet directly with young people, there were several lawyers who indicated more direct interaction could be helpful under certain circumstances such as:

- When parties and counsel are excluded from the interview:

I think either Judges or Masters could interview the children as long as the parties and counsel are not there in the room where the interview takes place. (lawyer 5)

- When no one else is present, except perhaps a tape recorder:

They should have the freedom to meet with the child with nobody present. Perhaps they should have to keep a tape-recording of the session for the record. (lawyer 10)

- Where children want to speak to the judge:

In certain circumstances, it could be helpful. I've had cases where the children want to be involved and speak to the judge and they have not been able to do so. (lawyer 16)

- Where the judge, master or mediator is comfortable and it would be beneficial:

Yes, in circumstances where the judge, master, or mediator are comfortable with the process and believe that such an interview would be beneficial to determine the issue. (lawyer 20)

- Where the young person is of appropriate age:

If the child is of an appropriate age and is agreeable to speaking to the Judge and the parties agree, such a meeting might assist the Court in reaching a conclusion. I would be concerned about giving too much power and thereby too much responsibility for decisions which adults should be making to young children particularly in highly charged litigation. (lawyer 27)

d. Concerns at Various Stages of Court Proceedings

The fears that are expressed by lawyers about judges interviewing young people do not seem to be reduced when one looks at the different stages of court proceedings.

Interlocutory proceedings:

Yes [young person involved]. Interlocutory Proceedings- not very satisfactory- caused the child to be drawn into adversarial process, and harmed the child and my client. They were both emotionally traumatized. (lawyer 6)

Judicial Case Conferences:

It has been suggested that children over the age of 12 attend JCCs [judicial case conferences] with consent of the parties. I firmly believe the court process is very intimidating for children and young teens. Somewhat less intimidating for older teens (16+yrs). (lawyer 24)

Trial:

At trial- it makes me very uncomfortable. I don't think it is helpful- it's a very scary experience for the child to be meeting and talking to a stranger (no matter how kind and gentle they are). (lawyer 15)

e. Caution in Certain Cases: Abuse, Improper Influence

In addition to reservations about including young people in legal proceedings because of their age (a perception that the young person is too young), several lawyers have similar reservations where there is verbal or physical abuse by a parent, or improper influence by one parent over the young person, or in circumstances where there is a highly charged dispute.

I think it can be helpful for Judges/Masters and mediators to meet with children in certain circumstances. If the child is of an appropriate age and is agreeable to speaking to the judge and the parties agree, such a meeting might assist the court in reaching a conclusion. I would be concerned about giving too much responsibility for decisions which adults should be making to young children particularly in highly charged litigation. (lawyer 26)

I think it can be helpful for Judges/Masters and mediators to meet with children in certain circumstances. In cases where there is an allegation that one of the parties is improperly influencing the child, such a meeting is not helpful. (lawyer 27)

3. Judges: Listening and Speaking to BC Young people

A BC Supreme Court Judge's Story

The abolition of child advocates was a backward step.

"I have long argued for the rights of children. But I never felt their rights were being observed by being forced into court by one parent or the other. The abolition of child advocates was a backward step. They acted as mediators, counsel and an independent voice for the child. More settlements occurred when a child advocate was involved" (Supreme Court Judge 1)

BC Provincial Court Judges' Stories

*. . . it has been difficult to adequately put child's views on record
- and to survive appeal, having done so*

"[I]Have directed parties to family court counsellor to interview - but chances of having availability depends on which town I'm in and when, and willingness has been low - or asking for private [interview] by trustworthy individual has been zilch. Was willing to interview, but it has been difficult to adequately put child's views on record - and to survive appeal, having done so. Have now decided that the system is deficient in this regard, and there is little I can do to adequately obtain the child's view - it is a political problem and the politicians are not interested in providing for it. Appointing counsel does not work and asking for a formal s. 15 report doesn't get a response that is anything like timely given the resources and the priority given the Supreme Court". (Provincial Court Judge 2)

. . . I consider meeting with children in any case to be extremely dangerous . . .

"Having practiced over 20 years in area of family law prior to appointment I consider meeting privately with children in any case to be extremely dangerous and generally fraught with potential problems. Judges are not psychologists and there is a real likelihood they would misinterpret what they are told. Further, there is possibility one or more parents will be unhappy with the result and will blame [the] child for saying something to the Judge - whether or not child said anything and whether or not Judge even considered what child said in coming to ultimate decision. [The] child may also blame himself for outcome. Any input from children should be done in presence of parties and in most cases with safety precaution of having their own lawyer. May not be necessary for some kids - especially teens who are independent - with strong egos and thick skins." (Provincial Court Judge 5)

While it is trite that the best interests of the child must determine matters of custody and access, it seems there is a range of opinion within the judiciary as to how best interests should be discerned generally, what procedures are appropriate to discern the views of young people, and what relevance and weight should be given to such views.⁴⁶

The perspectives of more than 20 judges (for the purposes of this Project includes masters) were captured for this Project via surveys, interviews, and

⁴⁶ e.g. *Young v. Young*, [1993] 4 S.C.R. 3, 1993 CanLII 34 (S.C.C.), *Director v. M.L.* 2005 BCPC 0077, *Scheiber v. Phyll*, 2001 BCSC 565 (CanLII), or *Gordon v. Goertz* 1996 CanLII 191 (S.C.C.).

discussion groups (See Schedules A and B for more details). Most of the participating judiciary members were self-selected. A series of questions was asked through surveys (see Schedule "B" for the survey and some responses) and interviews. The first four of these questions pertained to the background of judges. Questions five and six addressed whether judges view young people as persons "whose interests may be affected by the order sought" and if so what has been their experience in seeking the views of young people. Questions seven and eight addressed section 15 FRA custody and access or other similar reports. Question nine addressed perceived barriers to young people's participation. Questions ten and eleven asked what aspects of young people's capacity are taken into account when deciding whether to hear from them at different stages of proceedings. Question twelve asked judges about their experience in obtaining the views of young people.

The judges who were formally surveyed have served on the Provincial or Supreme Court of BC from 5.5 to 17 years. Most respondents were from the Provincial Court, with 25 - 75 percent of their caseloads being made up of family matters, of which 2 - 80 percent are family case conferences, 5 - 40 percent interlocutory applications, and 15 - 80 percent trials or other hearings. The Provincial Court respondents indicated that 50-90 percent of their cases involve "children's issues", and 25-75 percent "financial issues". For the Supreme Court respondents, 25-80 percent involve "children's issues", and 50-100 "financial issues".

Many judges are struck by the incongruity of making decisions which affect young people's lives so profoundly when frequently, if not typically, they have not met the young people, have relatively little reliable information about them, and have relatively little input as to their concerns, opinions, or other perspectives on the issues.⁴⁷

a. Judges Play an Important Role in Supporting Young People's Participation

Traditionally the role of judges has been to remain the neutral decision-maker and maintain some distance from the parties. In recent times, this role has been challenged as more parties appear in family court matters without legal representation, and no advocate or counsel is available to represent the young people involved in the proceeding.⁴⁸ In addition, there has been a recognition by the court system that early intervention in cases is important to attempt to prevent parties becoming "horribly positional", and to prevent the legal costs

⁴⁷ This was the prevailing opinion that came out of a discussion group with 9 judges in November, 2005.

⁴⁸ *Supra* note 18. Presentation of Judge Gove, BC Provincial Court; Government cuts to funding has created this shift.

from sky rocketing.⁴⁹ As a result, judges now preside over case conferences⁵⁰ and they have a heightened responsibility to respect and support the interests of parties while protecting young people in reaching resolutions.⁵¹ More informal procedures would ideally provide increased opportunity for parties and young people to feel more involved in the proceedings, along with young people being brought to the forefront of the dispute and its resolution. As indicated above, there is unlimited opportunity to involve young people in these informal proceedings.

There appears to be a belief on the part of some of the judges, though perhaps not a consensus, that it is important for children to be given an opportunity to be heard; that is, for children to perceive that their role in the matter is recognized and respected, and that their concerns and opinions are being sought out and listened to.

Many judges indicated that they initiate the participation of young people in family court proceedings:

I ask the parents and/or counsel whether the children have asked to speak to the judge or have written a letter to the judge. I usually ask this at the start of the hearing. At the close of one hearing, I specifically asked to see the children. (Provincial Court Judge 3)

They also indicated that young people's participation has also been initiated by counsel, parents, the young people themselves or their advocates.

Counsel and/or the parents ask you to speak to the child in most instances. I haven't had to initiate steps although I have ordered s. 15 reports that are focused on the child's views but again this is done with the parties consent. (Provincial Court Judge 4)

Most, if not all, judges have involved the participation of young people in cases before them. However, one judge was definite that young people should not be brought into the proceedings:

Parents and counsel should be encouraged to keep children out of proceedings. (Supreme Court Judge 1)

Yet, in this judge's view, involving the participation of young people through child advocates would be appropriate:

Leave children out of the fight. Child advocates were excellent when they were available. (Supreme Court Judge 1)

⁴⁹ *Ibid.* Presentation of Mr. Justice Joyce, BC Supreme Court

⁵⁰ *Ibid.* Presentations of Mr. Justice Joyce, BC Supreme Court, and Chief Judge Stansfield, BC Provincial Court.

⁵¹ In the British Columbia Supreme Court, the responsibility for protecting the interests of young people is grounded in judges' *parens patriae* [parent of the country] jurisdiction; see *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, 1986 CanLII 36 (S.C.C.) per La Forest J.

b. Judges Have Heard from Young People at Every Stage of a Proceeding

Some judges have experience hearing from young people at each stage of a proceeding: from case conferences, to interlocutory proceedings and trial settings.

Many judges singled out case conferences as the best forum to hear from young people as it creates an opportunity for dialogue between young people and their parents, and is:

Less formal. You hear from both parents. (Supreme Court Judge 1)

This less formal setting means that there is more flexibility than in formal hearing or trials where procedural and evidentiary rules are not flexible enough to accommodate the unique needs of young people. Nonetheless, there are still challenges:

Best format - not well used in our area. I think I will begin to use it, but timing and arranging are big issues with circuit courts and lack of help. (Provincial Court Judge 2)

c. Judges' Use a Variety of Practices for Young People's Participation

I want to hear the views of all children if at all possible. And so it's really the choice of mechanism. And I would set probably about two or three years of age as the lower limit. And in terms of how would I assess the appropriateness of that, I say we hear the views of children in every case except where they are extremely young and the literature suggests, or the experts will tell me, that that's way too young, they're way too young. (from interview of a Provincial Court Judge)

It is evident that judges care deeply about the young people they see in family court proceedings, although the way this is reflected in their practices varies greatly. As a result, judges have employed a variety of techniques in support of young people's participation.

Specifically, the judges who we spoke to have:

- had young people attend at judicial and family case conferences;
 - sometimes this was with parties present, and sometimes the parties were excluded from the room;
- met privately with a young person with only a clerk present, but not counsel or parents;

- in some of these cases an agreement was negotiated in advance that had the potential of limiting disclosure to the parties of some or all of the discussion;
- met with young people in the context of a trial;
 - no judge who responded has ever preserved the substance of such a discussion for appeal purposes;
- met directly with young people in chambers with a clerk present;
 - no respondent ever permitted counsel and parents to be present;
- received a report (i.e. section 15, parenting capacity report) provided by an expert such as a private psychologist, or family justice counsellor;
- appointed an Advocate;
 - Asked Attorney General to appoint a family advocate (before the funding of the family advocate was withdrawn. (Provincial Court Judge 1)
- on rare occasion, heard from young people *viva voce* in a trial (only one respondent said this was done frequently).

Some of the judges who responded to the survey were quite detailed about how they approach young people's participation:

I always prefer to have the consent of all parties. I make it clear that I may not report back everything that is said as I will respect any of the children's requests for privacy if any are made.

I always have a clerk present. I do not have the interview taped or recorded.

I never ask children where they want to live or which whom they want to live - this is too hard on them - but I do ask questions that allow me to form an opinion on that issue.

(Provincial Court Judge 8)

1) set out the ground rules on the record; 2) get parents' consent, on the record; 3) meet with child(ren) in chambers, with clerk and taking notes; 4) in written decision (always written) set out substance of interview (clerks notes destroyed after decision filed).

(Provincial Court Judge 3)

Some other judges expressed concern that bringing young people to the courthouse is generally likely to be perceived by the young person as being very stressful; with one judge stating that it may be more onerous for the young person than having to visit the young person's school principal.

d. Judges are Reluctant to Speak to Young People Directly

Some of the judges revealed that they are reluctant to meet directly with young people, for a number of reasons, including concern that:

- judges may lack necessary skills to interview young people without causing harm;
- judges may be ill-equipped to recognize issues of "capacity" (re age, competence, etc.) and instances of "coaching";
- judges are unlikely to have sufficient time to establish a rapport with children, or generally to "get at" whatever may be the issues;
- there exists the possibility that disclosures could be made to a judge which would trigger child protection reports, or otherwise expose the judge to the risk of becoming a witness; and
- while there are obvious concerns in the context of trials regarding anything which might occur outside the courtroom, even in the conference context, there can be complications as to what is said by the child and what can or should be disclosed to the parents.

e. Age is the Most Popular Consideration in whether Judges Hear from Young People Although Factors are Diverse

Almost every respondent judge had a different set of factors in determining whether to hear from a young person. This reflects the broad discretion exercised by judges with respect to young people's participation:

In a case involving a mature/competent child who makes it known that he/she wants to speak to the judge then it would be necessary but otherwise the judge will have to exercise discretion whether to hear the views and that depends on the circumstances/facts unique to the case. (Provincial Court Judge 4)

I presume a child should be heard in person, unless their age or the emotional harm that may occur due to their age or other circumstances of the case would preclude their attending a family case conference. (Provincial Court Judge 1)

Age was the most commonly identified factor in hearing from young people:

I have spoken with children as young as 6 or 8 but prefer to speak to only teenagers or pre-teens. (Provincial Court Judge 8)

Judges also identified several factors in determining whether to hear from a young person, including the young person's:

- Age;
- Maturity;

- Vulnerability to emotional harm;
- Ability to verbalize, articulate, express their views;
- Disability as a limiting factor;
- Willingness to share views;
- Alienation (whether present in case);
- Understanding as to why meeting with judge;
- Level of intelligence;
- Parental influence (includes whether young person coached);
- Presumption and preference of young person to be heard.

f. Potential Barriers to Young People’s participation

While two respondents indicate there are no barriers to young people’s participation in family court proceedings. The remainder of the judges identified the following as barriers:

- The discontinuation of the Child and Family Advocate program;
- Parents may not want to have their children’s views heard unless these views are in accordance with their own views, or where that parent has attempted to unduly influence them;
- Young person is too young;
- Young person is not willing to speak;
- Judge lacks appropriate training;
 - Yes. My lack of training/comfort in speaking to children - concern of subjecting them to stress. (Supreme Court Master)
- Procedural restrictions (e.g. Judges interviews in chambers: the parties have a right to know the evidence)
- Lack of resources;
- Lack of agreement by the parties.

g. ‘Section 15’ Reports Sometimes Used but Problematic

Ordered preparation of s. 15 report by family justice counsellor or private psychologist.
(Provincial Court Judge 1)

As set out previously in this Report, Section 15 of the *Family Relations Act* allows the court “an investigation into a family matter” by a person with no

prior involvement in the proceeding and who is a family counsellor, social worker or other person approved by the court. This person must report the investigation back to the court.

The judges who responded to the surveys indicate that they use these reports 5-50 percent of the time, and most found them helpful. However like lawyers, several judges found there are challenges to using this method to assess young people's views such as: (a) timeliness; (b) the lack of resources to pay for the reports; and (c) the skill or quality of the interviewer.

When they were available on a timely basis s. 15 reports were very useful - with the delays now they are useless. Private reports are best if the parties can afford them. (Supreme Court Judge 2)

They are very good if the interviewers have the skills - so depends on the area or person. (Provincial Court Judge 2)

Many referred to the helpfulness of third party interviewers, including former child advocates, who could lend assistance to the proceedings by interviewing the young people in their home in order to obtain their views.

The best way of getting the views of children, particularly young ones - they can be interviewed in the familiar surroundings of the home environment by a person trained to interview children. (Supreme Court Judge 2)

h. Judges' Suggestions for Improvement

Several judges made it clear that they believed that improvements are required in the system. As one judge succinctly stated:

Help!! (Provincial Court Judge 2)

Government cut backs were cited as a significant problem, especially with respect to the family advocate program and the funding for s. 15 reports. Some judges provided recommendations to address the current challenges including:

- A less adversarial process for matters involving young people;

Non-adjudicative resolution of custody/access disputes is vastly preferable whenever possible. (view expressed in judges' discussion group)

- A restored, enhanced office of the Child and Family Advocate BC;

Professor Nicholas Bala of Queen's University Law School, Kingston, Ontario specializes in children and youth law. His paper "The Role of Advocacy and the Children's Lawyer in Ontario's Justice System" provides a good assessment of the role of the family and child

advocate in promoting justice for young people.

<http://qsilver.queensu.ca/law/papers/roleofcinov02.htm>. My hope is that some day soon funding with (sic) be restored to an enhanced and expanded office of the Child and Family Advocate in British Columbia. (Provincial Court Judge 1)

- Duty counsel with similar responsibilities to that of the former Child Advocate;

If we don't get it, child advocate, if we don't get timely custody access reports from the family justice counsellor or outside folks, then I would like to see the family duty counsel have some child advocate-like responsibilities. Now I don't know how they could do that because currently they don't get - they get involved with the family justice - case conference, and that's where they're worth their weight in gold. They don't act for a contested trial. But if they could somehow have more time. There'd have to be more of them. They'd have to be specially targeted and trained. If they could do that, what I just said: child advocate-like work but sort of the - a simplified format. I don't know whether that - it's just an idea. (Provincial Court Judge 12 Interview Excerpt)

As to the mechanics of enabling young people's participation, and securing children's input, there is a strong view that judges should not be directly involved. Alternatives suggested included:

- The technique used by a Master in Kelowna of securing the agreement of the parents to pay jointly (typically about \$200) for an independent professional to meet with the children (as an alternative to a vastly more expensive psychologist's report), with the lawyer providing an account of the discussion with little or no editorial commentary; and
- For parties who lack financial resources (i.e. those involved in Provincial Court proceedings) it is believed that a case should be made to the Legal Services Society or to the Attorney General that a similar function should be made available by the Legal Services Society of British Columbia (LSS) of the BC Ministry of the Attorney General (AG) whether through the recently-affirmed LSS duty counsel, or as a separately-funded tariff item, or through LSS or the AG paying appropriately-trained social workers.

4. Service Providers: Supporting Young people's Participation

Stories from Service Providers

Kids Need to be Listened to in a Very Meaningful Way

“. . . in child protection matters, kids need to be listened to in a very meaningful way - not in a way that a social worker is trying to cover their butt. . . . also, parents need to know that they should be listening to their children. It needs to be mandated that parents go through better parenting through divorce education. In some places in the States, there is a 6 week course and they have to attend 2 hours a week. Teaches them to listen and protect the child.” (Service Provider 4)

Young People Don't Have Much Say Because "it's adults business"

“Generally, children don't have much say because both they and parents think that “it's adults business”. Chinese young people - need someone to help them understand what is happening - this is the most important question.” (Service Provider 1)

Need Advocacy, Education, Guidelines, Shift in Culture, Access to Lawyers

“Getting children's views isn't standard practice in any area. CFCSA legislation is explicit about views being considered but in practice, can't be sure that is happening. Even in child protection mediation, children are not included in the process. They don't know how to include children. We get calls from mediators, and Family Justice Counsellors asking how to interview children. We receive calls from MCFD asking for representation of children in court. Children need: 1. Advocacy - access to local support 2. Education -for those who work within systems and for young people about their rights 3. Practice standards/guidelines - so that getting children's view becomes standard practice. This MUST include demonstrating HOW children's views were factored into decision-making and, if you can't include children's views in the process, you need EXCEPTIONAL reasons why. 4. Shift in cultural attitude 5. Children need access to lawyers if they need them.” (Service Provider 2)

a. BC Service Providers' Experiences in Supporting Young People's Participation

There are several service providers, in addition to lawyers and judges, who either already do, or potentially could, support young people and their participation in family court proceedings. Five service providers were interviewed during the Project. All expressed frustration over the lack of resources to support representation for young people in family court processes, with special mention being made of the elimination of the Family Advocate

program. The lack of resources means that few, if any young people are heard from or represented by legal counsel in family legal proceedings. Generally only where the young person has been a victim of violence or at grave risk will counsel be appointed.⁵²

Not one service provider indicated that it was usual for young people in BC to have an opportunity to share their views and have them considered in the family court decisions affecting them. Where young people are given an opportunity to share their views, there is a “hodgepodge” of ways this is done. One service provider commented that BC is one of the few provinces where legal aid does not usually provide funding for young people in matters affecting them.

Some key service providers in BC who can support young people’s participation include:

- Family advocates (in the past):⁵³

When a judge feels that the parties in court are unable to act in the best interests of a child involved, the judge may order (under section 2 of the FRA) a family advocate be appointed. Once appointed, the family advocate may intervene at any stage in the proceedings to act as counsel for the interests and welfare of the child.

- Social workers (MCFD):⁵⁴

A director with the Ministry of Children and Family Development may delegate any or all of the director’s powers, duties or functions under the CFCSA to social workers. This gives social workers the authority to offer support to children and families, enter into agreements, investigate the need for protection and remove children.

In child protection cases:

In child protection matters, a child has the right to legal counsel for section 60 [CFCSA] consent orders only. MCFD keeps a roster (LSS is not involved). The court CAN make an order to provide the child with representation but then doesn’t necessarily come from their roster” (Service Provider 3)

- Legal Services Society:⁵⁵

Legal Services Society of British Columbia, commonly known as Legal Aid, provides legal counsel to help make or respond to an application made under the FRA, and in some cases, under the CFCSA. A party must meet certain financial qualifications before being eligible for assistance.

⁵² Service Provider 3 interview.

⁵³ BC Ministry of the Attorney General, *Family Court Manual*, Chapter 1, Family Court, “Family Advocates” available online at <http://www.ag.gov.bc.ca/courts/manuals/fcm/index.htm>

⁵⁴ *Ibid.* “Social Workers”.

⁵⁵ *Ibid.* “Legal Services Society”.

Legal counsel may be appointed to represent a child, but generally only where that child has been abused. Legal counsel may also take the form of duty counsel who can assist in part or all of a case.

- Family Justice Counsellors:⁵⁶

The Attorney General appoints counsellors under section 3 of the FRA, to provide counselling and mediation services for people who want help to resolve their family problems. They help parents negotiate their differences, and search for solutions that will meet the needs of both the parents and the children involved.

and

A judge may order a custody and access report (under section 15 of the FRA) directing the Family Justice Counsellor to investigate a family matter. The Family Justice Counsellor completes the investigation, then submits the report to the court to help the judge make a decision about custody and/or access. A judge may also refer a case to a family justice counsellor for mediation, and may order a mediation report to be prepared.

Family Justice Counsellors will sometimes also prepare Views of the Child Reports, although there does not appear to be any standardization of what is required in preparing the reports (e.g. how they are conducted; how are the views of the counsellor and young person reported to the court?).

- Government bodies such as the Child and Youth Officer for BC

The Child and Youth Officer provides support to children, youth and their families in obtaining relevant services. The Officer also provides independent observations and advice to government about the state of services provided or funded by government to children and youth in British Columbia, including justice services.⁵⁷ New legislation has been proposed for a new Representative for Children and Youth.⁵⁸

Children who call are involved in "the system" - court processes are mostly completed by the time they call. If things are at the court stage, it is usually the adults in the child's life that phone. It was unusual but recently, we received two calls from children because they wanted to know if our office could help them have their voice heard in a custody and access case before the court. Unfortunately, the system doesn't generally allow children to come before the court unless one of their parents request it and the judge grants it. And, it is very unusual for children to get lawyers. Children in care have a little more access to lawyers but not much. I am not sure if it has changed or not, but usually MCFD only give a child a lawyer if they are over 12 and going for a permanent custody order. I suspect that this doesn't really happen in real life. The only other time is when the child's position

⁵⁶ *Ibid.* "Requesting Services from Family Justice Counsellors".

⁵⁷ *Office for Children and Youth Act* [SBC 2002] Chapter 50, section 3

⁵⁸ *Representative for Children and Youth Act*, Bill 34 - 2006, passed third reading May 18, 2006.

differs from everyone else's opinion. Again, I am not sure how often this actually happens. When they do get a lawyer, MCFD picks one from their roster. I believe that children over 12 should be able to talk to a lawyer if they want to. Difficulty - older kids are not being brought into care and therefore not needing lawyers. Younger children are assumed to not need to have a voice in matters affecting them. (Service Provider 2)

- Experts (e.g. psychologists or psychiatrists)
 - Experts are generally professionals such as psychologists who assess children and report back to the court.
- Individuals called upon by the court or the parties themselves to speak to young people:
 - These include formal professionals (e.g. psychologists, or former social workers), as well as individuals who work well with young people (e.g. people who have been child advocates or provided supervised access services in the past).
- Community Organizations
 - Community organizations often provide direct support to families who are facing challenges and who may be involved in the family court. An example:

My organization works with Chinese Canadian families including immigrants from Hong Kong, Taiwan, Mainland China and from other parts of the world, as well as local born Chinese. I work with young people - there are some young people I work with who are going through divorce/custody arrangements. Maybe 10% of my caseload. Mostly child/parent relationship stuff. Mostly, schools and parents come to me and refer children to me. (service provider 1)

b. Suggestions from BC Service Providers to Improve Young People's Participation:

Several service providers offered suggestions to improve the current state of young people's participation in BC family court processes. These are summarized as follows:

- Advocacy and support for young people to encourage their participation;
- Education of those working in the family court system about young people's participation;
- Practice standards that make young people's participation a regular practice;

- An automatic presumption that young people will be heard from, unless there are exceptional reasons not to hear from them such as when they have been abused and they do not wish to participate;
- Must be a neutral third party who meets with young people (not a judge, mediator or lawyer who will intimidate or who is not trained; but do not require a high degree of education such as a masters degree to meet with young people);
- The person who speaks to young people should be skilled in child development and the needs of children and family dynamics - social worker or family therapist: Family Justice Councillor program could be a good place to house such a program but they are also responsible for writing custody and access reports;
- Encourage decision-makers to consider:
 - looking at the Board of Registration of Social Workers website for their standards for speaking to children during adoptions;
 - MCFD roster for legal counsel (s. 22 mediation);
 - Standards for section 15 assessments in custody and access proceedings where there are protection concerns.

5. Legal Foundations for Young Peoples' Participation in BC Family Courts

a. International Law and Young People's Participation

Article 12 of the UN Convention on the Rights of the Child (CRC), ratified by Canada, states that:⁵⁹

1. 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.

Article 13 of the Convention sets out the right of young people to seek, receive, and impart information in a way that they understand. Despite the existence of these international human rights provisions, more effective means of incorporating and implementing these provisions in Canada is required.⁶⁰

b. Legislation Regarding Young People's Participation

Regrettably the law in BC is not particularly supportive of effective implementation of young people's participation, and in fact poses some real challenges. For example, the law often regards young people as unreliable and measures them by an adult standard.⁶¹ This corresponds with much of the current thinking on children's developmental capacities which is derived from Western child development theories. Such theories rest on a presumption that adulthood is the normative state, with children being in a state of immaturity characterized by irrationality, incompetence, passivity and dependence.⁶² As a result, young peoples' views are often treated with scepticism with adults thinking that the only people capable of speaking to young people are

⁵⁹ *Supra.* Article 21, CRC

⁶⁰ Interim Report of the Standing Senate Committee on Human Rights, *Who's In Charge Here? Effective Implementation of Canada's International Obligations With Respect to the Rights of Children*, November 2005.

⁶¹ See for example *Evidence Act* [1996] Chapter 124, section 5 presumes that anyone under 14 years of age is a witness whose capacity is in doubt.

⁶² Lansdown, G, "Evolving Capacities and Participation" (Canada: IICRD, 2002) at 8.

experts.⁶³ While young people must be viewed within their own developmental context, there is a need for the law to recognize that young people are the ones best able to comment on their own experiences and thus experts over their own lives.

Nonetheless, some legislation applicable to BC family courts provides a starting point for young people's participation, including the following provisions:

- Section 24(1)(b) of the *Family Relations Act* (FRA) provides that the views of the child must be considered in determining the best interest of the child, if appropriate; section 30(2) requires consent from a child over 12 years of age before a guardianship order is made;
- Section 4(f) of the *Child, Family & Community Services Act* (CFCSA) provides that the views of the child must be considered in determining his or her best interests; section 21(2) requires children over 12 years of age to have an explanation of their plan of care and have their views considered; children over 12 years must have notice of hearings under section 28 (2)(b) and 33.1(2)(a), and under s. 34.3(a) the Director must advise the young person of the time, date and place of hearing;
- Section 16(8) of the federal *Divorce Act* expressly requires that the best interests of the child be taken into consideration in making an order for custody but is silent with respect to the views of the child. This provision, however, has been interpreted as requiring the consideration of the views of the child in determining their best interests.⁶⁴

There is very broad discretion contained in the legislation as to whether the views of young people need to be considered in determining their best interest, and if so, how. At the same time, there is a relatively limited body of case law touching upon young people's participation in BC family proceedings to inform this discretion. One recent BC Supreme Court case in particular has begun to inform the participation of young people in BC courts. Madam Justice Martinson in *E.G.(L.) v. G.(A.)* ("L.E.G. v. A.G.") sets out some criteria as to when a Judge is able to interview young people in order to obtain their views.⁶⁵

In *L.E.G. v. A.G.*, a case involving custody of three young people aged 14, 13 and 9 years, the court canvassed the following questions:⁶⁶

⁶³ Experts here refer to those people who qualify as experts in court as contemplated by relevant laws and procedures.

⁶⁴ *E.G.(L.) v. G.(A.)*, 2002 BCSC 1455 (Can LII) (April 24, 2002); Note also *Daniels v. The Queen*, [1968] S.C.R. 517 at 541. There is a common law presumption that Canada will not breach its international obligations, and where a statute is ambiguous its provisions should be interpreted to conform to Canada's international obligations (e.g. CRC).

⁶⁵ *Ibid.* L.E.G.

⁶⁶ *Ibid.* paragraph 1.

- can a judge, during a custody trial, interview a young person outside the court room to obtain the young person's views both without the parents present and without the parents' consent? and
- if the judge can conduct such an interview, under what circumstances should the interview take place?

The court decided in *L.E.G. v. A.G.* that judges could interview young people, even without the parents' consent, based on its *parens patriae* jurisdiction and on its statutory duty to act in the young person's best interests.⁶⁷ In determining when to interview a young person a judge must consider, on a case by case basis, whether conducting such an interview is in the best interest of the young person to do so.⁶⁸ Factors to be considered include the general purpose of the interview, the general benefits and concerns associated with the judge interview process, relevance of the information to be obtained to the issues to be decided, reliability of the information, and the necessity of conducting the interview rather than obtaining the information in another way.⁶⁹

In a subsequent ruling in the *L.E.G. v. A.G.* case, Martinson J. confirms that there are no starting presumptions in determining a young person's best interests. Instead, the Court refers to the principles arising from s. 24(1)(b) of the FRA that require the court, if appropriate, to consider the young person's views in determining the young person's best interest in order to decide the issue of custody under the *Divorce Act*.⁷⁰ Martinson J. determined, under the particular facts of that case, that it was not appropriate to interview the young people directly. The young people had already been put in a difficult position by their mother and aunt who had, on separate occasions, previously asked them what their views were in the context of a s. 15 report being prepared. Further, the Court indicated that other evidence was also available to provide further information about the young people's views.⁷¹

c. Process: Rules of Court

Family court procedures are guided by rules of court such as the BC Provincial Family Court Rules. These Rules are also not generally supportive of young people's participation, as they fail to consider that young people or their

⁶⁷ *Ibid.* paragraphs 3 and 4. The British Columbia Supreme Court has a *parens patriae* jurisdiction. This Latin term, meaning "parent of the country" gives the Court a discretionary power to take appropriate steps to protect the interests of young people.

⁶⁸ *Ibid.* paragraph 4.

⁶⁹ *Ibid.* paragraph 5.

⁷⁰ *L.E.G. v. A.G.* 2002 BCSC 970

⁷¹ *Ibid.*

representative are parties to the proceedings, nor do the rules make it mandatory that young people are represented at hearings where decisions impacting them are determined. There is no one designated or mandated with the responsibility to advocate for the best interest of the young person, including the young person's meaningful participation. While parents most often fill this role, they are generally concerned with their own emotional needs in family court matters and easily forget about the emotional needs of their children.⁷² Ironically, there are no procedures in place for the court to obtain the views of the young people whose interests are affected, yet there are procedures in place for one party to obtain further financial information if the current information is incomplete.⁷³

6. BC's Cultural Diversity and Its Impact on Young People's Participation

In considering young people's participation, it is critical to recognize the potential significance that cultural values and practices can have on such participation. This is particularly so given the cultural make-up of British Columbia where in the Lower Mainland visible minorities comprise 31 percent and immigrants comprise 35 percent of the total population. Approximately 200 First Nation communities are located within BC, representing approximately one third of all First Nation communities in Canada.⁷⁴

While child-rearing customs can differ based on cultural values, the basic needs of young people are the same.⁷⁵ Hence, the importance of young people's participation transcends cultural differences. However, improvements are required to understand how young people's participation is affected by their specific cultural circumstances, and to ensure that each young person's participation is contextualized to respect these circumstances.

For example, in one interview with a service provider who works with, "Chinese Canadian families including immigrants from Hong Kong, Taiwan, Mainland China and from other parts of the world" it became evident that cultural values have a large influence on young people's participation:

Must look at the beliefs and values of a culture with respect to children's place and decision making in family and community. For lots of cultures, court/government can feel like a violation of their right to privacy and can be a humiliating experience. (service provider 1)

Further, the perceived "fault" of one parent can affect the young person's perspective and alignment:

⁷² *Supra* note 18, "Views of the Child" session.

⁷³ *Court Rules Act*, B.C. Reg. 417/98, *Provincial Court (Family) Rules*, Rule 6(3).

⁷⁴ Law Foundation of British Columbia, *Diversity Study*, 2002.

⁷⁵ *Supra* note 14 at p. 15.

I work with children who are experiencing difficulties with the separation of their parents. In many cases, children have aligned themselves with one of the parents already. In cases where the child cannot find 'fault' with one of the parents and therefore cannot decide which parent is 'right' they are confused about the separation. (service provider 1)

In the context of traditional aboriginal cultures an important consideration in decision-making affecting young people is that:⁷⁶

Every Aboriginal Nation had a viable and effective system for preparing young people to make the transition from child to adult. It worked. It was part of a truly holistic, natural education process that prepared people for life. This process was consciously and deliberately fractured as part of the colonial subjugation of Aboriginal peoples. . .

The new colonial education systems very explicitly severed young people's connections with some of the following key aspects of the traditional system:

- Knowing your family and social history
- Intimate knowledge of and connection with your land and its eco-systems
- Speaking your own language
- The oral culture – song, story, dance, drama to record and transmit culture
- Participation in the spiritual and ceremonial life of the community
- A connection with family, especially Elders
- Participation in the traditional economic life of the community
- Understanding the complex web of social relationships and responsibilities
- Experiencing the traditional rites of passage designed to prepare youth for adult life
- Understanding and respecting yourself and your culture
- An ongoing relationship with mentors and guides”.

In present day, many aboriginal young people are connected, or are reconnecting, to their traditional cultural roots. How they participate in family court processes may very well be influenced by this traditional culture, and certainly decisions made about them can also have a profound impact. Similarly, the legacy of family separation brought about by the Canada's residential school system, has left deep social and emotional scars in aboriginal families. As a result, additional sensitivity is needed when working with aboriginal parents, young people and families.

Thus, how to best involve the participation of young people from various cultural backgrounds can be complex, as we heard during one interview:

If you were to create a program to help these young people: - it is vital that you take the time to help them to express themselves. They are not used to expressing themselves in the same way as young people in mainstream Canadian society. - Even if they wanted to express themselves, they don't have the vocabulary to express themselves, feelings, etc., and don't know that they CAN say how they feel (if they have societal permission) - What you can say and how you can say it depends on who you are speaking to - this means that you need to understand their status within their family (i.e. father's side has

⁷⁶ Noris, Julian, *In the Trail of the Ancestors, A Consultation with Aboriginal Elders and Youth Workers*, IICRD: April, 1998.

more status/power, sons do, elders, etc.) and they will try to gauge permission of the parents really. And parents may be giving very mixed messages to them - both talk and don't talk about it. - Again, every word is being judged and they are very afraid of this. - a program would need to explore the issues for them: relationship, loyalty (big consideration), attachment, respect, love. - then you would have to ask them what they expect from each parent - then, if there is conflict in the family, what would you expect from each parent - if it is a really big conflict in the family, what would you want to happen - only by asking these questions in this order, will you be able to get at how they truly feel. (service provider 1)

Given this complexity, cultural considerations are likely best determined on a case by case basis with guidance from the young person him or herself and at least one adult with relevant knowledge from within that culture. It may be that the current legal system does not serve the cultural rights of certain young people and their families, and a new approach is required. This underscores again, the importance of a rights based, systems approach to young people's participation where the holistic needs and rights (including culture) of the young person are considered in the broader context of the systems that surround the young person.⁷⁷ This is an area requiring further research and specialized policy and program development.

⁷⁷ See earlier discussion in this Report's "Introduction", section 5 on a rights-based, system approach.

Chapter II - Existing Strengths: Good Practices in BC and Beyond that Support Young People's Meaningful Participation

Several good practices supportive of young people's participation were identified in the course of this Project. Below is a selection of a few of these good practices that could be built upon, or drawn from, in improving the state of young people's participation in BC family court processes.

1. BC Good Practices

One of the key strengths that exist throughout BC, are the people working within the family court systems who genuinely care about young people and their well-being. Many are natural advocates for young people, either because they look out for their interests, or have actively sought out their participation in a way that is sensitive to the young person's needs and have encouraged the consideration of their views in the decisions affecting them. In many cases these natural advocates have had to find creative ways to navigate the existing system to support young people and their participation with few, if any, resources.

a. "Hear the Child" Interviews (Kelowna)

One good practice that was identified in custody/access matters in Kelowna during the Project involves an independent lawyer meeting with the young person to hear the young person's views. This is done with the agreement of the parents, who jointly pay for the lawyer (Legal Aid is sometimes available). The lawyer provides a written account of the discussion to the court and the parties involved with little or no editorial commentary. This process is viewed as an attractive alternative to a vastly more expensive report prepared by a psychologist to obtain the views of the young people.

Based on this Kelowna experience, a pilot was initiated in October, 2005 by the Project to encourage others in Kelowna to try a similar practice to capture the views of young people from 8 years of age and up with the following parameters:

Preparation:

- Any one of the judge (includes a master), party or counsel may initiate the process;

- The parties must consent to participate in the pilot (complete a consent form);
- The parties (including counsel if applicable) agree to and select an interviewer (who they would pay) from a roster of 14 volunteer interviewers;
- The roster of volunteers include lawyers and counsellors, all of whom have completed a brief mandatory training;
- The parties then complete a background intake form and provide it to the interviewer;
- The interviewer sets up the interview with the parents who are each responsible for either picking up or dropping off the young person;

The Interview:

- Each young person attends an interview to share his or her views, and the interviewer first explains to the young person the reasons for the interview;
- The interviewer asks the young person if they wish to be interviewed;
- With the young person's consent, the interviewer takes approximately one hour (generally at the interviewer's office) to interview the young person, with an emphasis on listening to the views of the young person;
- The interviewer records the young person's views verbatim in writing;
- The notes are reviewed with the young person: periodically during the interview, at the conclusion and/or following the interview;

Reporting:

- The interviewer provides the written views of the young person to the parties and to the judge for consideration in the decision that affects the young person;
- The parties and judge are encouraged to provide the young person with information, appropriate to the young person's maturity level, about any final decisions that are made with an opportunity for the young person to ask questions about the decision.

Interviewers are paid approximately \$250 per interview. Some financial support from the Legal Services Society was provided for a short time during the pilot until March 31, 2006 in order to cover the cost for those who met the income eligibility criteria.

At the outset of the pilot, information sessions were held with the Canadian Bar Association Family Law and Alternative Dispute Resolution Sections in Kelowna, as well as with members of the Kelowna judiciary and staff at the Kelowna court house. A mandatory training session was also held with volunteer interviewers, comprised of lawyers and clinical counsellors. The topics covered with the volunteer interviewers included basic techniques to put young people at ease, tips on talking to young people, general developmental information about young people, and recommended interview formats.

The pilot was intended to run for a period of just three months, but at the urging of the Kelowna volunteers, the pilot was extended initially to March, 31, 2006 and then to October, 2006. Thus far, some of the interviewers have been quite struck by how open the young people have been in sharing their views with them. A more detailed review of the Kelowna pilot will be carried out when the pilot is completed in the fall of 2006 thanks to some additional financial support from the BC Ministry of the Attorney General.

Pilot information, including the interviewer roster, is available for all interested people at www.iicrd.org/childparticipation and through the court registry. Additional information about the pilot is also available at Schedule "D" to this Report.

The Kelowna good practice is consistent with similar ad hoc practices in other parts of the Province. For example, a similar process to interview young people is used in some of the areas of the BC Lower Mainland. Unfortunately, in these cases the report of the young person's views goes only to the parties and not to the court as no mechanism is in place to provide the report to the court directly.

b. Less Formal Settings for Decision-Making that Affects Young People

The relatively recent use in BC of several less structured, more collaborative processes to resolving disputes in family court proceedings such as judicial case conferences, family group conferencing, and mandatory family mediation represent another good practice to build upon in supporting young people and their participation. These forums present opportunities for young people and their families to have an improved sense of control over decisions that affect them through their direct participation in the process to reach a decision. Further, these procedures provide greater flexibility to include and focus on young people in a way that is sensitive to their needs, rather than in more formal processes. These formal processes are often driven by rigid procedural or evidentiary rules that do not take the special needs of young people into account. Less structured processes also better enable family cases involving children to be managed through processes designed to "address the

relationship issues and underlying emotions that actually drive family conflict”.⁷⁸ This was confirmed during the Project where for example, one judge has watched “the walls melt away” during communication between a father and son in a judicial case conference in a way that “never could have happened in a trial setting”.⁷⁹

While these practices present an opportunity to improve support to young people’s participation and relevant legislation supports it, more is required to raise awareness and equip those working within the system to meaningfully support young people’s participation. This was highlighted in a recent survey of child protection mediators in British Columbia where despite the relevant legislation requiring the views of the young person to be taken into account where decisions are made about that young person, this happens in very few child protection mediations.⁸⁰

c. Information and Education:

Education and information for young people are essential tools required for young people’s meaningful participation. A good practice of the Law Courts Education Society is a “Kid’s Guide to Separation and Divorce”, including a website (www.familieschange.ca) created to provide information to young people, particularly the younger ones, in a format that they understand. At least some family court education is happening in BC as classrooms of young people, frequently younger people of school age, come to the courthouse in Kelowna to participate in tours. During the tours, many of the young people indicate that they have had some direct or indirect experience with family court as they refer to their own or friends’ personal stories during the question and answer portion of the tour.

Another education initiative in BC is “Parenting After Separation”, a three-hour course, free for parents and funded by the Ministry of the Attorney General, is available to BC parents and other adults who are involved in custody or access proceedings; in 10 locales it is mandatory for parents who have launched cases in the Provincial Courts to attend. It is intended to assist adults to make informed decisions about their separation to attempt to resolve any conflicts that may arise and to ensure these decisions consider the best interests of the young people affected. This practice provides an opportunity to prepare the adults in supporting young people’s meaningful participation. A similar format could also assist in preparing young people, as another young person has said:

⁷⁸ Family Justice Reform Working Group, *A New Justice System for Families & Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force (BC)*, May, 2005, p. 5.

⁷⁹ Interview with judge 3.

⁸⁰ Henry, Arlene, “Mediating Child Protection Disputes – A Canadian Perspective: Are We Leaving Room for the Child at the Table?” *The Advocate*, Vol. 63 Part 6 November 2005 847 at 854-859.

You sent my parents to a class called, Parenting Through a Divorce. I think it helped them. It would really help if you had a class called, How To Go Through Your Parents Divorce.⁸¹

⁸¹ C. Hardwick, *Kid's Letters to the Judge*, (Canada: Pale Horse Publishing, 2002) letter of Belinda D at 118.

2. Good Practices: Other Canadian Jurisdictions

a. Quebec: Legal Counsel for Young People and Auto-Enforcing Guidelines

The following is a summary from presentations shared during the Project by two Quebec lawyers who regularly represent young people in custody/access and child protection matters.⁸²

In Quebec since 1994, the court has been required to give the opportunity to young people to put their views forward in family decisions affecting them. Age has become a less important determination of whether to hear from a young person. Rather, if the judge knows that the child wants to be heard, he or she hears the child.

In Quebec custody and access family matters a party or the judge can appoint a lawyer for the young person. Young people can also become a party to a hearing and have standing, unlike in BC, so long as the young person has the capacity to give instructions. Such capacity is presumed unless the young person is under 12 years of age (judges have found that even those under 12 years do have the capacity to instruct a lawyer). Either government funding is available to pay for this representation, or the judge can decide who pays (e.g. when costs are awarded).

In child protection cases, the young person (any age) is automatically appointed a lawyer (party to the proceedings). Regrettably in practice the lawyer doesn't always see their client. This is problematic as it is difficult to understand how counsel can effectively represent the young person without meeting them. Even in cases involving very young people, a visit by a lawyer to his or her client can assist the lawyer in better understanding the circumstances of the client and representing the best interests of that young person in court.

The Role of the Child's Counsel in Court Proceedings:

Much thought has gone into the role of legal counsel in representing young people in family court proceedings as set out below.

Preliminary matters:

⁸² IICRD, "Meaningful Child Participation in BC Family Court Processes: Summary of Experts Session", Vancouver, August 30, 2004, presentation by Sylvie Schirm and Pascale Vallante.

If the child is going to testify considerations have to be given to what is going to be asked, how is the child to be questioned and who is going to question the child.

Judges are no longer meeting children in chambers rather, children are in court testifying.

One must prepare the child - explaining to the child what is going to happen, child-friendly training etc.

All details about the young person's involvement are addressed for the parties. For example, everyone knows who is bringing the child to court, what is going on in the child's life such as leisure schedules that need accommodation etc. The child will then testify for example in the morning or after lunch so they can be there before court with the adults.

One of the Quebec lawyers who shared her experience in Quebec indicated that she makes a point of introducing the children to lawyers, etc. and ensuring that parents are not hanging around the court room entrance so as to inappropriately intimidate, pressure or influence the young person when he or she enters the court room, or provides testimony.

The Child Testifying in Court:

Some judges come down from the bench, or take off their robes. Lawyers for the parents sit in the back of the court room. A child is questioned first with easy questions. The Judge may ask questions or talk to the child. After questions, the child goes outside the courtroom, and the lawyers discuss with the judge which questions they have and they decide if further questioning is required. The parents still can stay outside the court room as their lawyers can discuss matters in a general way (this process is part of their civil code in Quebec). The judge or the young person's lawyer then asks the young person any outstanding/ cross-examination questions, not one or the other of the parent's or party's counsel.

Practice Issues:

The family bar committee in Quebec was asked to advise on the role of the child's attorney. This resulted in a series of guidelines (e.g. on rights, age of the child, capacity considerations) provided to everyone in the Quebec family bar, of which all lawyers and judges were supportive. The result was that the guidelines became auto-enforcing as judges will apply the guidelines and ask lawyers to adhere to them. Lawyers will do the same of judges.

Appeal Issues:

The parties ask the court to seal the tapes made of young people providing testimony or talking to judges. In one case that was appealed in Quebec, the court listened to the tape and the judge decided that it was not damaging to the boys and therefore released the tape to the parties for the purposes of the appeal.

Funding

When legal aid pays for representation, the pay is minimal - the funding will range from \$275 to \$600 for the entire proceeding. Given the amount of preparation time and time working with the child, this is minimal. Surprisingly, the lack of adequate funding does not appear to decrease the number of lawyers representing young people. The courts consider the parents or parties' financial circumstances in order to determine whether they can afford counsel for the young person.

Reflections on the Quebec Experience:

It is important:

- to consider the credibility of witnesses: most kids do not have a position on living with mom or dad, but refer to other information that is important to them when testifying;
- for the judge to see the young person and even in the worst cases, the young person is put under so much pressure, it is important that the young person have an opportunity to express his or her views and testify if necessary;
- to recognize that even if the decision that is made differs from the views of the young person, the young person feels that at least he or she has been given an opportunity to testify.

The perspective of one of the lawyers has changed dramatically with her experience in representing young people: initially she thought young people could be harmed by going to court, but now advocates that young people are more than able to handle being in court - if done right.

b. Ontario: Office of the Children's Lawyer and Kid's Coaches

In Ontario:⁸³

The Children's Lawyer provides legal representation to young people. In child protection matters, the court may request the appointment of an independent legal representative for a child under the *Child and Family Services Act*. This happens when the court believes a lawyer for a child is necessary to represent the child's interests in protection proceedings. In custody/access matters, the Children's Lawyer may provide a legal representative to represent the young person or to prepare a report, or a combination of both.

Several people interviewed or surveyed during this Project indicated how envious they were of the Office of the Children's Lawyer in Ontario, and how they wished for a similar resource in BC.

The General State of Practice in Ontario

Professor Nicholas Bala from Queen's University shared some of the Ontario experience during the Project:⁸⁴

Office of the Children's Lawyer (OCL)

In 1975, the Office of the Children's Lawyer (OCL) became involved in providing lawyers for children in custody and access cases. It now has both lawyers and child social workers, who are screened, trained together, and monitored, and provide services for children in custody/access and child protection cases.

The Province of Ontario now spends about \$10,000,000 a year (about \$1.00 per person in the province) on the OCL. In serious contested cases in Ontario, the young person usually has an OCL lawyer appointed to represent him or her, or an OCL social worker may be involved in the case. The OCL has a small staff of lawyers and social workers in Toronto, and most of the services around the province are provided by lawyers and social workers who are on the OCL "panel."

In child protection cases, an OCL lawyer must be appointed if a judge makes an order for representation. These orders are commonly made in contested child protection cases, especially if the child is old enough to express views or preferences. In parental disputes, if a judge makes an

⁸³ See Attorney General of Ontario, Office of the Children's Lawyer website, section "what we do" at: <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp>.

⁸⁴ *Supra*. Note 71, presentation of Professor Nicholas Bala.

order for OCL involvement, the OCL has a discretion to become involved in case by appointing counsel, a social worker or both; as the OCL has a fixed budget, that Office has the final decision about whether to be involved in a parental dispute.

Once a lawyer is assigned to represent the young person, the lawyer:

- should meet the child at least three times (in practice this varies);
- cannot give evidence in court about the child's wishes, unless the parties agree; if evidence of the child's views is to be brought before the court, it is common practice for an OCL social worker to interview the child and appear as a witness;
- the lawyer must always ensure that the young person's wishes are put before the court;
- can put the lawyer's views about the young person's interests forward if they differ from the young person's, especially in cases where the lawyer is concerned about potential harm .

In practice, a very important function of OCL lawyers and social workers is to facilitate settlement of cases, by ensuring that parents understand the views and interests of their children. Lawyers from the OCL often have a role in helping to negotiate a settlement of a dispute.

Ways to hear from children in Ontario

In Ontario, young people most commonly share their views with the court by having a lawyer or social worker from the OCL. It is not uncommon for children's out-of-court statements (hearsay) to be communicated to the court by a psychologist or other person who has met the child; in some cases an interview may have been video-recorded and may be played in court, especially if there are abuse allegations.

Young People's Wishes

Young people's wishes are an important aspect of the resolution of disputes between parents. If a child has strong and clear wishes, and a child is ten to twelve years or older, a case is likely to settle. The research suggests that ignoring young people's wishes can cause distress to the young person, and lead to later variation of the order.

Children as Witnesses

According to Professor Bala, there are considerable challenges in having young people appear as witnesses in court, though this is commonly required in criminal cases where the child was the victim of abuse or a witness to family violence. For young children in particular, there are concerns with how they are questioned in court. The process of testifying

can be traumatic for children. It is, however, now common in criminal cases in Canada to hear from young people as witnesses, particularly when they have been abused. In these cases, there are usually special supports for child witnesses, and they may, for example, be permitted to testify via closed circuit television rather than appear in the courtroom.

In the Ontario family context, young people very rarely appear in chambers or testify in court or to provide their views. This can be attributed to the qualifications, or lack thereof, of the judge in interviewing a young person. Most commonly the views and preferences of the child are communicated to the parents and court by a lawyer or social worker from the OCL. In some cases the judge will admit in as evidence a videotaped investigative interview with a young person, provided that the interview was conducted by a trained investigator (and not a home-video of a parent). In some cases judges will receive a letter written by the young person and submitted by a parent or even sent directly by the young person to the judge, but there are concerns about the potential manipulation of the young person as the circumstances in which the latter was written are not known. In addition or instead of having a lawyer or social worker from the OCL, in some cases the views of the young person are brought forward through an assessment by a psychologist, but this method is very expensive.

Office of Child Advocacy

Ontario also has a special advocacy office, specifically for children who are in the care of the state (child welfare, mental health and youth justice.) This Office has social workers on staff who meet with young people and advocate with service providers on their behalf in cases where there are issues of violations of rights, abuse or failure to provide adequate services. There are concerns that this Office is part of the Ministry responsible for providing services to children in care, and the Ontario government has announced that it will increase the independence of the Office.

Reflections on the Ontario Experience

This area of young people's participation is an under-researched area but what research there is, suggests that young people sincerely want to be heard. A critical part of this is to figure out how to convince the parents to listen to their children. There should be a range of options based on the context. There should also be training of people in the system, research and evaluation of young people's participation.

Kid's Coaches and Kid's Contracts

Another innovative practice applied in Ontario is “Kids Coaching”, whereby a “kid’s coach” is retained for the young person.⁸⁵ The kid’s coach provides support to the young person and facilitates a dialogue between the young person and his or her parents with respect to the parenting plan allowing a forum for the young person’s desires and concerns to be expressed. The kid’s coach goes on to facilitate the creation of kid’s contracts between the children and each of their parents which are appended to the Parenting Plan.

⁸⁵ *World Congress on Family Law and Child Rights*, Cape Town, South Africa, March, 2005, presentation of Deborah Graham; see also www.kidsinthemiddle.ca.

3. International Good Practices

a. Australia: Child Inclusive and Child Focused (less adversarial system)

Since the introduction of the Family Law Reform Act 1995, which amended the Family Law Act 1975, Australia has undertaken various innovative practices to improve how young people are included in family and child counselling and mediation.⁸⁶ The legislative changes have increased the emphasis on parental responsibility, and encouraged parents to actively consider the best interests of their children and to use non-judicial processes to resolve issues of family conflict and transition where possible.⁸⁷ As a result, the Australian government, through the Family Services Branch of the Attorney-General's Department, commissioned research into what was happening for young people and their families in the system, and in particular in family counselling and mediation settings.⁸⁸

The researchers proposed a more "child focused" approach in mediation and counselling processes with young people, and were surprised by a fearful reaction from some stakeholders in the system.⁸⁹ These fears arose from a concern that young people would be seen in all cases, a scenario that was never envisaged.⁹⁰ There were also those in the system who maintained that a greater focus on children's needs was both feasible and necessary. The Australian Government built on this view in developing the concept of 'Child Inclusive Practice', trialed the model of Child Interview and Consultation, and articulated the principles of good practice.⁹¹ The model's four major components are:⁹²

(i) **Early focusing of parents on children's needs:** Early on and throughout the course of the mediation, mediators work to enable parents to focus on and identify the needs of their children and the likely impact of decisions on them.

(ii) **Consulting directly with children (school age):** This is a process of once off consultation, *not decision making*, not counseling and not a full developmental assessment.

(iii) **Feeding back to parents the child's needs and views:** The feedback session usually

⁸⁶ Australian Government, "Child inclusive practice in family and child counselling and family and child mediation" (2006) s. 3, The Project Story, online at:

<http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/families-CIPcontents.htm>

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

occurs in the next scheduled parent mediation meeting, with parents' mediator/s also present if a separate child consultant has been used.

(iv) Integrating the child's needs and views into negotiations: This model is not intended to replace the work already done with parents in divorce mediation around property settlement. Following the child feedback session, parents' mediators continue the mediation process, with ongoing thought given to the needs of the children based on earlier discussions and on the statements gained from the child interview. If agreements are reached, the parenting plan should identify in some detail the needs of each child and the manner in which the parents have agreed to address them. Parents are encouraged to share the results of the mediation with the children. This stage foreshadows developmental changes as the children grow older and the likelihood that plans will need to be reviewed as the needs of the children change.

The stories from organisations that trialed the Mediation Model and others that had considerable experience in working with children were built into the fabric of the workshops and formed the basis for the development of a framework for future practice at both the organisational and the clinical levels.

The work during the pilot of this Model resulted in positive short and long-term outcomes for both young people and their parents.

b. The United Kingdom Experience: A Dedicated Family Court with Expertise

In the United Kingdom (UK), a dedicated court at Wells Street in Inner London was established in 1997 following the introduction of Family Proceedings Courts upon the implementation of the Children Act 1989.⁹³ In support of the specialized court, judges have been trained and developed knowledge of children's development and needs.⁹⁴ Work at the dedicated court over the past several years has enabled expertise to further develop and the workload to increase, with the result that service delivery has improved, delay has been reduced and there has been a reduction in unit costs.⁹⁵ To date, there remains only one full time Family Proceedings Court district judge in England and Wales despite recommendations that judges who wish to specialize in family proceedings should be able to do so.⁹⁶ The dedicated court has also identified early intervention strategies that can serve to resolve disputes quickly by educating parents about the benefits to them and their children of early settlement.⁹⁷

⁹³ Wilson, *Evidence submitted by the Greater London Family Panel*, UK Parliament's Select Committee on Constitutional Affairs, November 1, 2004.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ United Kingdom Parliament, Select Committee on Constitutional Affairs Sixth Report, section 2, Delays and resource issues, prepared June 11, 2006

⁹⁷ "Judges Urge End to Family Nightmare", <http://www.fathersdirect.com/index.php?id=4&cID=73>. "The 'Early Interventions Pilot Project' would involve parents who ask the courts to settle disputes over child contact being diverted first to meet experts who would explain what children need after separation. They

The physical space of the dedicated court is also sensitive to the needs of young people and their families. For example, judges do not robe, families sit around a table to resolve disputes and there is an effort by all court staff to create a welcoming, informal atmosphere.⁹⁸ Recent proposals with respect to Family Court Centres in London also make special provisions for physical space for young people: “we will aim to provide a children’s room”.⁹⁹

Unified Family Courts, with comprehensive family jurisdiction, experienced judges, and support services, have also been established in urban centres in a number of provinces, including Saskatchewan, Ontario, Manitoba, Newfoundland and Nova Scotia. For constitutional reasons, federal-provincial co-operation is required to establish these courts in Canada.

This integrated approach lends itself to improving supports to young people, particularly when this integration involves various services and professional disciplines. For example, having a counsellor or referral service available along with legal representation and knowledgeable judges means that a young person could have access to counselling or legal representation should the need arise.

c. South Africa: A Framework and Assessment Tool Empowering Young People

South Africa has developed and implemented a framework from which various stakeholders and professionals (e.g. lawyers, judges, social workers, probation officers) involved in the State child protection system can operate to deliver the least restrictive and most empowering decisions about young people’s care.¹⁰⁰ The framework recognizes the full continuum of care along which decisions can be made about young people at risk: from prevention, to early intervention, to full care (from foster care to full custody).

The framework is informed by key guiding principles, and a developmental assessment tool is employed to ensure decisions are made to support young people’s healthy development. The views of young people are required in making decisions about them, and adults who make the decisions are required to explain their decisions in a way that the young people understand. Hence,

would then be required to agree to a parenting plan that recognised that children typically do best after separation when they see plenty of both parents. Couples would be told that partners failing to work with the process could lose out on parenting time.”

⁹⁸ Comments provided to the Project by Nicholas Crighton, District Judge (Magistrates Court), Inner London Family Proceedings Court, Cape Town, South Africa, March, 2005.

⁹⁹ HMCS London Region Proposals for a Network of Family Courts Centres, Consultation Paper CP 16/06, July 31, 2006 for consultations ending October 23, 2006.

¹⁰⁰ Discussions with L. du toit, and A. Skelton, former Advisors: Government of South Africa Inter-Ministerial Cabinet Advisers on Children, Pretoria, South Africa, March, 2005.

the decision-makers are made accountable to the young people, the subjects of their decisions. Training of stakeholders in the system was a key aspect at the outset of implementing the framework and assessment tool to ensure all people within the child protection system, from child care workers to judges, make the least restrictive and most empowering decisions about the young people with whom they work or affect.

d. Germany: Judges Speaking to Young People from 4 Years of Age

In German law young people are viewed as possessors of their own basic rights in custody and access proceedings and must have an opportunity to make their relationships to both parents known to the court.¹⁰¹ German courts are obliged to hear the views from each child personally, assuming the young person can effectively communicate his or her views. While the German courts have consistently stated in past decisions that they assume that children older than approximately four years are capable of expressing their views, in practice the court often does not hear from young people unless they are at least school age.¹⁰²

The intent of the German system is to assist the parents in custody/access matters to reach a consensus and judges often try to make the parents understand that an ongoing quarrel between them is detrimental to the young person. There is also an emphasis that the young person needs regular contact, assuming it is safe for the young person, with both parents.¹⁰³ The court is not bound to hear from witnesses or to listen to evidence presented by the parties: it may conduct its own investigations or delegate such investigations to relevant government bodies.

The conversation that a judge has with the young person is conducted as follows:¹⁰⁴

- The judge meets with the young person without parents and lawyers;
- The judge provides a child-appropriate explanation of the role of the child and the role of the judge;
- The judge must take the conversation down in writing in order to create a record of the interview;
- The young person must have an opportunity to state his or her position on the record;

¹⁰¹ *Supra* note 16 at 2.

¹⁰² *Ibid.* at 3.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

- After the conversation the judge reports back to the parents and lawyers in an appropriate manner (often drawing on mediation techniques such as reframing, neutral language, focusing on future solutions) about:
 - How the young person behaved;
 - What the young person said;
 - What were the judge's impressions of what happened.

The objectives of speaking directly with young people include:¹⁰⁵

- Gives the judge an opportunity to become familiar with the young person's wishes, fears, interests and needs;
- Relieves the young person from responsibility: the decision is not the young person's to make;
- If the situation involves an interruption of the young person's contact with one parent, the judge can cautiously explain the wishes and interests of the parent who is not living with the young person, and where appropriate, develop an understanding of the young person's views of the non-custodial parent;
- Encouraging the young person to take an independent role as young people know their parents best and often come up with very concrete suggestions that result in positive outcomes, even in areas of minor disagreement;

Recognizing that a careful approach to young people is required, judges must have training on basic educational theory and psychology as well as further practical training, skills and experience to effectively communicate with young people.¹⁰⁶ The ability of the judge to empathize with the young person's psychological state and "strike up a conversation" with the young person can also not be underestimated.¹⁰⁷

If necessary to safeguard a young person's best interest, the court will also appoint a guardian to the young person for the court proceeding.¹⁰⁸

e. USA: Views of the Young Person Presented in Person, Practice Standards

(i) Focused Child Interviews by the Mediator

¹⁰⁵ *Ibid.* at 6-8

¹⁰⁶ *Ibid.* at 5

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* p. 2

Dr. Joan Kelly, a psychologist and long time mediator developed and undertakes a non-therapeutic structured interview with young people in collaborative and mediated family dispute resolution processes. With the consent of the parents, sometimes after some education as to the importance of hearing from their children, she will undertake a one hour, structured interview with the young person focussed on obtaining the young person's views about aspects of the separation, living arrangements, and conflict that they are experiencing. With their permission, she reports the young person's views back to the parties at the next mediation session. This practice is invaluable at bringing the young person to the forefront of the parties' minds in subsequent discussion and attempts to resolve their dispute. The mediator is able to ensure the views and best interests of the young people remain present in making decisions about them without compromising their neutral position. Further, this practice often brings forward valuable information that would not otherwise reach the parent or the party, and results in better, long-term decisions for all.¹⁰⁹

An important element of Dr. Kelly's approach is to present the young person's views to the parties in person rather than through a written report. She will take copious notes, including many direct quotes from the child that capture the young person's views, and obtain the young person's permission to share their views and suggestions for parents with the parties. However, once the young person's views have been presented to the parties and a discussion about them has been had, the notes are retained in her confidential case file. The parties do not receive any written document about what the young person has said. This approach enables the neutral third party to present, contextualize if necessary and debrief with the parties about the young person's views. Further, this method hopefully avoids having one or more of the parties get caught on one thing the young person said when the views appear in writing.

(ii) Practice Standards

Surprisingly, very few standards or guidelines exist for professionals or adults working with young people in family court systems. The American Bar Association has developed guidelines for legal counsel when representing young people. The guidelines recognize that:¹¹⁰

The child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position.

¹⁰⁹ Joan Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice"(2002), 10 Va. J. Soc. Policy & Law 129.

¹¹⁰ American Bar Association, "Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases", Approved by the American Bar Association House of Delegates, February 5, 1996; available online at: <http://www.abanet.org/child/repstandwhole.pdf>

Interestingly, Part II of these practice standards is titled, “Enhancing the Judicial Role in Child Representation”, recognizing the critical role of the judiciary in representing young people effectively. Such standards do not exist for lawyers or other advocates working with young people in BC.

f. New Zealand: A Must to Hear from Young People (Family Group Conferences)

The Children’s Commissioner for New Zealand shared some of her perspectives on the state of young people’s participation in New Zealand family court processes during the Project:¹¹¹

Law and the Judiciary:

In recent years the New Zealand Government carefully examined how the court delivers justice with respect to the care and protection of young people. The Care of the Children Act is one of the outputs from this review that places a strong emphasis on the rights and views of the child (they must be taken into account, and the requirement to appoint a lawyer to represent a young person is stronger). It requires judicial personnel to be up-to-date in child participation research and child development.

Legal Representation:

In most cases it is common practice to have, and legislation requires, the appointment of a lawyer to represent young people in family law cases involving adoption, care of children, care and protection, domestic violence, mental health, and other matters. There is a preference that young people not go to court but if the young person wants to see the judge they can ask their counsel and the counsel must take that into consideration.

There are some difficulties with legal representation of young people in New Zealand. For example, lawyers do not always meet directly with the young people they represent, even though the Law Society has a requirement that they do so. As a result, the young people’s views are sometimes misrepresented or not put forward at all by their respective lawyers.

Family Group Conferencing

¹¹¹ *Supra.* Note 71, presentation of Dr. Cindy Kiro Children’s Commission for New Zealand.

Family Group Conferences is an initiative that has been highly successful in New Zealand. This process is for families with children under 18 years and includes the young person, immediate and extended family and government representatives. The best interests of the young person are the first and foremost consideration in these conferences and accordingly, the adults must hear the young person's views directly. Individuals are dedicated and trained to provide this service. Virtually all cases referred to family group conferences result in a resolution, as parties participate in the process for as long as it takes to resolve the issues in dispute.

Chapter III - Building on Strengths: BC Looking Forward

Family breakdown can victimize children in many ways. It can effectively deprive them of a parent. It can have them living in poverty. It can result in abuse. And it does all this without allowing them an adequate voice. Where children's rights are at stake, perhaps more than anywhere else, reactive legal solutions are inadequate. It takes proactive attitudes in lawyers and judges to bring children's problems to light and to find solutions to them.¹¹²

In 2002 Chief Justice McLachlin of the Supreme Court of Canada called for creative pro-action in ensuring young people's rights are respected in situations of family breakdown. Regrettably, in the same year that this call to action was made, BC moved backwards and instituted cuts in the family court system that have adversely impacted young people and their families.

A central recommendation from this Project is that BC must make a commitment to its children and youth and to their families to ensure that proper resources are allocated to support them when they are most vulnerable at the time of family breakdown. Some suggestions of how adequate resources might be allocated to improve the state of things for young people and their families are set out below.

Ensuring that young people can meaningfully participate in the decisions that vitally affect them is a fundamental aspect of respect for the rights of children and youth. It will also ensure that the decisions which are made will truly promote their best interests. While there are financial costs associated with some of the steps that must be taken to involve young people in the family justice system, increased meaningful participation of young people should promote the settlement of more cases, which will ultimately result in savings for the justice system. Further, investing in resources and supports for children, youth and families when they are most vulnerable will have long term societal benefits in terms of better social and educational outcomes for children and youth, and will have long term societal dividends.

The process of attitudinal and systemic change to ensure meaningful participation by the child will be gradual, and change will often be evolutionary rather than revolutionary. As a result, changes in one area may reinforce and facilitate change in other areas.

¹¹² McLachlin, C.J., "Reaction and Pro-action: Bringing Family Law Advocacy Into the 21st Century", Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, Family Law Dinner, Ontario Bar Association, Thursday, January 24, 2002, Toronto

1. Changes in Attitudes and Approaches to Equip Adults in the Family Justice System to Support Young People and Their Participation

Ensuring the meaningful participation of young people requires changing the attitudes and approaches of professionals and stakeholders who work in the family justice system. This requires education, training, practice guidelines, monitoring and evaluation.

a. Approaching Young People with Trust, Respect and Understanding

Every adult who comes into contact with a young person has the ability to have a positive impact on that young person. Every adult involved the family court process should therefore approach young people, particularly those under emotional stress, in a way that reflects and is guided by trust, respect and understanding for that young person and their situation. Lack of trust, respect and understanding of youth makes it virtually impossible for young people to meaningfully participate and endangers their emotional and developmental well-being.

This approach can be systematized by building on the good practice developed in Australia and includes:

- early focusing and education of parents and families on the impact of prolonged disputes, and decisions, on their children;
- early consulting directly with young people in a meaningful way, including;
- feeding the views of young people back to families and decision-makers; and
- integrating the views and needs of young people back into negotiations and decisions about them and explaining these decisions to young people in an appropriate manner.

All the above steps require a rights-based, systems approach that contextualizes all actions affecting the young person having regard to their families, communities and cultures.

An important benefit of this child and youth focused approach is early resolution of family disputes. Parents and child welfare workers who are properly informed of the views and perspectives of young people are more likely to settle their disputes about the young person, thereby reducing

unnecessary trauma and stress for the young people affected and their families. Early resolution also leads to a reduction in the amount of time and resources required to resolve family disputes.

Although changes in attitude are a necessary first step, full adoption of a child and youth focused approach also requires changes to legislation and to the family justice system.

b. A Common Framework for Family Court Stakeholders

Young people we spoke to commented on the confusion that arose from being told different things by different people in the court system and from the different approaches of the different adults that they dealt with. It is clear that there are inconsistencies in the various approaches to supporting young people's meaningful participation in the family justice system. There is a need for all professionals and systems working in BC family court processes that affect young people to share a common framework in implementing young people's meaningful participation. This framework requires a set of principles and tools that can be employed by all stakeholders, and can assist in addressing a prevalent fear held by adults that young people may be harmed through their participation. This framework can help ensure that young people's meaningful participation is carried out in a way that respects young people's development and rights across the family court system.

It is expected that some of the basic components of this common framework will be developed in the course of Phase II of this Project, but some elements of the framework are clear. The framework should be informed by the *United Nations Convention on the Rights of the Child*, and in particular a statement that professionals involved in the family justice system should respect the following principles:

- every child has the right to be heard and provided with information about the family justice process, in a timely fashion and in a manner that the child can understand, on an on-going basis;
- every child has the right to meaningfully participate throughout the family justice process, and to be heard before decisions are made that affect them;
- every child is an expert on their lived experiences, and has a valuable contribution to make to decisions that affect their lives;
- families should be encouraged to resolve disputes in a non-adversarial manner that protects and supports children;

- every child has strengths which must be identified and acknowledged in processes that affect them;
- every child must be treated as an individual, and on a non-discriminatory basis;
- decisions affecting the child must be made in the context of the young person's family, community and culture.

With a common framework, all stakeholders who work in the family justice system, such as a family justice counsellor, lawyer, judge, social worker, advocate, counsellor or other stakeholder would be working from the same page in assessing and making decisions supportive of young people's meaningful participation. Ideally such a framework would become auto-enforcing amongst the stakeholders involved.

The framework should be reflected in common materials that can be used by all professional groups, similar to the common system-wide materials previously developed in British Columbia to address child abuse.

c. Education & Training for Decision-Makers and Those Supporting Young People

One of the greatest gaps identified through the Project is that there is presently no continuing education training for key stakeholders such as judges or lawyers about the importance and implementation of young people's participation in the family justice process.

Due to this lack of training, lawyers and judges in BC are often not well placed to facilitate meaningful child participation in the family justice process. As one lawyer whom we interviewed commented, at present the young person's participation in the family justice system depends on whether there happens to be a "gifted amateur" available to meet with and hear the child's views. Too often there is no such "gifted amateur". It is time to move from an amateur approach to a professional approach in supporting young people and ensuring their participation in the family justice process. This will require:

- Continuing education on the importance of young people's meaningful participation for lawyers, judges and other stakeholders working in the BC family court system, based on up-to-date research and information; and
- Specialized training for lawyers, judges or other stakeholders who work directly with young people. In Alberta, lawyers for children were

recently required to attend a mandatory 2 ½ day education program, that dealt with legal and social context issues, as well as an introduction to interviewing children.

Education should include provision of materials and protocols for interviewing children.

d. Practice Standards, Screening and Accreditation

In order to ensure there are clear expectations of the adults working with young people, and to ensure that others in the system can have confidence in these adults' ability to work with young people effectively, practice standards, screening and systems of accountability should be established.

There is, for example, controversy over some issues related to the professional ethics and role of lawyers appointed to represent children in family law cases, with some differences between professional codes in different jurisdictions.¹¹³ The Law Society of British Columbia should address the issue of professional standards for lawyers representing children. It is important that appropriate practice standards and codes of conduct extend to all professionals working in the family court system with young people. The development and dissemination of practice standards will be another way of educating professionals who work in the family court system about the common framework, about the various methods to engage young people's participation, and about the ways in which the rights of young people in family court proceedings are supported.

Recognizing the unique vulnerability of young people, adequate screening of the adults working with young people is also required.

Professional accountability is also necessary to ensure that those adults who are interviewing young people, working with, or representing young people do so in a way that truly supports young people and their meaningful participation (e.g. they must turn their minds to everything from the physical environment in which they work with young people, to the language they use in speaking with young people, to how they support the views of young people in the process). Further, everyone is not naturally adept at working with young people, nor does everyone want to work directly with them. As a result, a system of accreditation and accountability would ensure that young people are served only by those committed adults who are skilled at both fulfilling the role and establishing the necessary relationship with the young people they serve.

¹¹³ See e.g. discussion in Bala "Child Representation in Alberta: Role and Responsibilities of Counsel for Child" (2006), 43 *Alberta Law Review* 845-870.

A useful professional accountability model to consider is the system of recruitment, screening, training, supervision, and accreditation that has been put into place by the Ontario Office of the Children's Lawyer for lawyers and social workers appointed to represent and assess children

e. Monitoring and Evaluation

Monitoring and evaluation is necessary to ensure that the intention of legislation, policy, and practice is translated into effective support to young people and their participation. It is clear that decision-makers are hesitant to call upon people to assist them in obtaining the views of young people unless they have confidence in the interviewer's, or other professional's, ability to do the job.

Monitoring and evaluation of any of the reforms proposed will be an important way to assist in building confidence in the role and competence of professionals working with young people. Monitoring and evaluation of family court processes requires the involvement of young people directly as their views on what has been effective for them may be very different than the views of adults. Such monitoring and evaluation should be done regularly to ensure the best possible service is being provided to young people and their families involved in BC family court processes. Further, monitoring standards should be consistent with the CRC to ensure young people's rights are respected and their healthy development promoted.

2. Improved Supports to Young People Directly

There are direct supports that need to be provided to young people to help them to better understand the family justice system and allow them to more effectively and meaningfully participate in it.

a. Information for Young People in a Way They Understand

Young people who were involved in this Project spoke to the need for information to be communicated to them in a way that they can understand. Young people need to receive information in a way that is sensitive to their developmental stage, and to have explained to them what happens in family court processes, what their rights are, and what their role will be. For children whose parents are separating, general information about issues in family breakdown will also be important. Without this information, young people may be harmed by a misplaced feeling of being responsible for their parents' or

their family's situation. The process by which this information is provided is as important as the information itself. Such information needs to be provided in a way that:

- (i) Is appropriate to the young person's maturity and capacity (e.g. language used, format used to present information etc);
- (ii) Is sensitive to the context of the young person and their needs (e.g. taking into account culture, disability, existence of abuse etc);
- (iii) Enables the young person to feel comfortable to ask questions, including after they have had time to think about the information which may require meeting with the young person on several occasions.

b. One Caring Adult to Support Each Young Person and Their Participation

A key trend that emerged in discussions with young people and their experience with family court processes, was the importance of having one caring adult who listened to them. The importance of a caring adult is consistent with the research conducted by experts such as Masten and Coastsworth (2002), and Werner (1994) on supporting the resilience of young people at risk.¹¹⁴ Therefore, a suggestion for improving the BC family court system would be to ensure one, caring adult is made available to each young person from the moment their case is assigned to any process within the family court system.

The caring adult would be available solely for the young person (not other family members) and would carry out such functions as explaining the processes to the young person and answering questions, preparing the young person for their participation, and explaining decisions that are made that affect the young person. This role would be non-therapeutic, and provide an opportunity to build a relationship characterized by trust, respect and understanding. Precautions would need to be put in place such as ensuring criminal background checks are done on these adults, and providing a complaint mechanism available to young people who are not comfortable with their caring adult. In this way young people are not put at further and unnecessary risk at a time when their vulnerability is heightened due to family breakdown.

¹¹⁴ McIntosh, Jennifer, "Enduring Conflict in Parental Separation: Pathways of Impact on Child Development" (April, 2003) *Journal of Family Studies*, Vol. 9, No. 1, 63 at 65.

In some jurisdictions, like Ontario, lawyers appointed for children may be involved in a case from an early stage and have a continuing role in terms of supporting children. In some jurisdictions in the United States, there are specially screened and trained volunteers, known as C.A.S.A. volunteers (Court Appointed Special Advocates) who carry out this function, along with others, and this option could be explored in British Columbia.

3. Systemic Improvements to Support Young People and Their Participation

A child focused approach to improve the effectiveness and outcomes for young people and their families can only be realized if changes in legislation, procedural rules, structures, policy and practice occur.

a. Legislative and Procedural Rule Changes: A Presumption of Young People's Participation in Decisions Affecting Them

A starting point for supporting young people's participation in the BC family court systems is to enact legislation that creates a presumption that children and youth have the right to participate in decisions affecting them. This presumption must recognize the difference between young people's perspectives and an assessment of their best interests.

Not only do most young people want an opportunity to be heard and to understand what is going on, the research also shows this participation can itself be an important protective factor. For example, it can reduce young people's stress and support them through a time that puts them at risk and help ameliorate the ongoing trauma of parental separation. The discretion presently conferred on decision-makers by use of terminology such as "if appropriate" should, for example, be narrowed significantly so that it is not exercised at the outset of discounting young people's participation, but rather in determining how best to support each young person's participation.¹¹⁵ This will take:

- (i) *Legislative changes to ensure all young people have an opportunity to participate.*

Changes to existing legislation, or provision in any future legislation, involving decisions about young people must require decision-makers across the family law system to ensure, before making substantive decisions about young people, that all young people (of all ages and competencies) have had an opportunity to:

¹¹⁵ *Supra* note 1, *Family Relations Act*, s. 24(1)(b).

- participate including where young people are capable of expressing their views, and wish to express them, to have them heard and considered in decisions affecting them;
- have information provided to them in a way that they can understand;
- ask questions and have them answered in a way they can understand;
- be informed of the final decision made about them in a way that they can understand;
- have their participation contextualized given the relevant young person's developmental needs and the systems in which they live (e.g. family, community, culture); and
- be supported by a caring adult in their participation.

Legislation could be drafted in such a way as to create a reverse onus provision so that those wishing to object to the young person's participation bear the onus of indicating why this right should be denied to the young person. For example, the participation of a young child such as an infant cannot be denied outright based on their age, but rather may involve contextualizing their participation by having a representative for the young person's interest's visit where the young person lives and report back to the court strictly "through the eyes of the young person".

(ii) Procedural change

In addition to legislative requirements supporting young people's participation, changes to procedural provisions are also required. For example, the Provincial Court (Family) Rules do not make express reference to hearing the views of children. The only indication that suggests the importance of young people's participation in the Rules is where a young person may attend a Family Group Conference session with the permission of the Judge (Rule 7(3)).

Some potential procedural improvements to the Rules to support young people's participation include:

- At the time the Registrar refers the parties to a family justice counsellor, before setting a date for the parties' first appearance, information about the procedures should be provided to the young people affected in a format that the young people will understand for discussion with the Family Justice Counsellor (Rule 5(3));

- Including an express option to refer parties and young people to a person or service specifically dedicated to supporting the participation of young people affected by the proceedings (Rule 5(4)) and making orders to this effect at Family Case Conference (Rule 7(4)) Trial Prep Conference (Rule 8(4));
- Enabling young people affected by a proceeding to make a request to appear before a judge similar to that afforded to the parties (Rule 5(5)). The judge as representative of the State's legal system is responsible for looking out for a young person's rights and establishing what is in his or her best interest. Accordingly, a young person should have the right to ask to appear before this judge and express his or her views;
- It should be expressly stated that the judge at the first appearance may make an order to have the views of a young person heard in the case (Rule 6(3)). If there is a failure to provide financial information, further information may be ordered in this respect. So too, if there is a decision to be made about a young person's best interests, the views of the young person where they are capable of expressing their views should be heard;
- While attendance at a Family Case Conference session is required if ordered by a judge, and includes attendance parties and a child's lawyer, this provision rings hollow for young people's participation in a system where it is exceptional that young people have legal representation (Rule 7(2)). Further, to have a young person's attendance be dependent on the judge's discretion opens the possibility for inconsistent application of the Rule as the judge would have the sole discretion to determine when it is appropriate for a young person to attend such a Conference (Rule 7(3)). A provision to require that the judge allow the participation of the young person at a Family Case Conference would be required. Such amendments would reflect the current situation where there is little legal representation for young people, it would recognize the rights of young people, the value and appropriateness of young people's contributions to this type of forum, and minimize the potential exclusion of young people who wish to attend. Adults, in particular the judge, would of course need to gauge whether attendance by the young person at only some or all of the Case Conference is appropriate;
- As with Family Case Conferences, having a young person's lawyer attend a Trial Prep Conference does not support their participation where they are not represented (Rule 8(2)). Perhaps it would be more appropriate for the young person to be given the option of having someone who is not a lawyer attend on their behalf;

- Rule 11(4) could be modified to recognize children as experts over their own lives, and accept reports provided of the young person's word-for-word views as evidence, without young people having to provide a "statement of qualifications" (Rule 11(5)).

Of course legislation and rules of procedure are only as good as the system's policy and practice that implement them. Several of the following suggestions speak to this concern.

b. A Dedicated, Integrated, Less Adversarial Family Justice Process

Supporting young people's meaningful participation while addressing concerns about lack of expertise, resources and time could be realized, in part, with the establishment of a dedicated family court with integrated services and less formal decision-making processes.

A Dedicated Family Court:

Establishing a dedicated family court, as the London model suggests, can save time and money because the decision-makers build their expertise and become more adept at making sound decisions about young people and their families. A dedicated family court could also provide an opportunity to adequately build a cohort of judges with expertise in young people's development, ensure that there are practices sensitive to young people's psychology and needs, and create a physical environment supportive of young people's meaningful participation.

An Integrated Approach

To truly serve the needs of young people this dedicated court would ideally take an integrated approach so that various key service providers would be available to the young people, as well as judges and decision-makers. For example, a family justice counsellor may be available to meet with a young person at the outset of a case to explain the procedures in a way that the young person understands. A duty counsel lawyer may be on site to provide bundled or unbundled legal representation if it becomes necessary in a case. A counselling (including referral) service would also be available on site should the therapeutic needs of the young person need to be addressed either immediately or over the long term. Through an integrated approach the young person as well as the judge or decision-maker could be adequately supported. Further, the caring adult referred to in this Report earlier would be available to the young person throughout their interaction with various service providers.

Less Adversarial, Informal Processes

In addition to a family court being dedicated and integrated, it would also need to draw on less adversarial, informal processes that are supportive of young

people and their families. These processes would be better equipped to address the underlying emotional dynamics of the family, as well as more easily incorporate young people's meaningful participation because of greater flexibility with procedural and evidentiary rules. Mandatory mediation, family group conferencing, or case conference processes would form part of the overall court process, with a formal trial becoming a last resort in matters affecting young people. However, every one of these processes must employ a "child-focused" approach to ensure early education and focus of families on the impact of decisions on young people, including adverse impacts of prolonged family disputes on young people.

c. An Array of Options to Support the Meaningful Participation of Young People

Given that some young people we spoke to wanted to speak to the decision-maker and that some adults did not believe it is appropriate for young people to participate in situations where violence or undue influence exist, an array of options to support young people's meaningful participation is required. While the presumption of young people's participation needs to be standardized, the way in which young people's meaningful participation is realized may be through any one, or a number of options including:

(i) Parenting After Separation Programs

An education session on "how to survive your parents' divorce" that runs parallel to the "Parenting After Separation" course may be a starting point for providing young people with information in a way that they understand early in the process in custody/access matters and support their meaningful participation. A similar education opportunity should be available to young people in care. Further, the "Parenting After Separation" course should be mandatory across BC and address the impact that decisions and prolonged disputes can have on children. This education can help get parents to focus on their children early in the process, and hopefully assist them in resolving disputes at that point.

(ii) "Hear the Child" Interviews (Kelowna Pilot):

This practice differentiates between hearing from the young people about their views and hearing from an expert who assesses their best interests. However, in this practice the interviewer does not build an on-going relationship with the young person or act as a long-term resource throughout the family court proceedings;

(iii) Presenting Young People's Views through a Family Advocate

Many people thought the views of young people should be provided through a third party advocate and young people themselves, who had experienced the assistance of an advocate, also supported this approach. There was resounding support the reinstatement of the Family Advocate's office, or a similar service. Use of an advocate can serve as a key method in supporting the participation of young people who have experienced severe trauma and require some special consideration in having their needs met.

(iv) Speaking to the Decision-Maker Directly:

Given the statutory responsibility of the courts to make decisions based on the best interests of children, a concept that requires account to be taken of their views, and the expressed desire by some young people to speak to the decision-maker directly, this practice should be retained and used where young people request to speak to the decision-maker directly.

(v) Legal Representation: Bundled and Unbundled Services

There are situations where the participation of young people may be best supported through legal representation, such as where the young person's views are not consistent with the views of either of the parents and the young person's rights have been severely impaired (e.g. situations of abuse). Regardless, legal representation needs to be available to young people, particularly given the procedural rights that are conferred on parties and their legal counsel in court proceedings under the current legislation and Rules of Court.

d. An Advocacy Role for the BC Representative for Children and Youth

The new Representative for Children and Youth in BC has a large role to play in supporting the meaningful participation of young people in family court processes. One key function must be to ensure effective advocacy is available to young people. This could involve the new Representative ensuring that one caring adult is available to work with every young person involved in family court processes, and making recommendations as to when legal counsel is required for a young person. The unique independence of the Representative lends itself well to working in the sole interest of young people and advocating for their interests accordingly.

A Concluding Word: Commitment to Respecting the Rights and Needs of Young People

Some of the recommendations in this Report will require legislative reform, involvement of the federal government or significant resource expenditures, and may take some time to achieve. Other recommendations, however, can be effected in the short term and without significant expenditures, provided that there is a commitment by those responsible for the administration of family justice to respecting the rights and needs of children and youth. Judges, lawyers, social workers, health professionals, politicians, civil servants, the media, parents, natural advocates and members of the public all have a role to play in changing attitudes and practices.

Thanks to the experiences of those involved in family court processes, the relevant research, and best practices in other jurisdictions, this Report presents a starting point in bridging the gaps in young people's meaningful participation in BC family court processes. Taking steps to bridge these gaps is not only pro-active, but also serves as a key protective measure in supporting vulnerable young people in BC through the difficult time of family breakdown, resulting in better outcomes for young people and their families in the immediate and long term.

SCHEDULE "A"
Meaningful Child Participation in BC Family Court Processes
A Project of the International Institute for Child Rights and
Development (IICRD)



Funded by the Law Foundation of British Columbia

Summary of Experts Session: August 30, 2004, Law Courts Inn, Vancouver

- I. **Introduction - Overview of Project**
 - a. Suzanne Williams (IICRD)
 - b. Judge Hugh Stansfield, BC Provincial Court
 - c. Debra VanGinkel, Canadian Bar Association, Vancouver Family Law Section

- II. **Hearing the Voices of Children**
 - a. Tarryl McNamara

- III. **International Perspectives**
 - a. Dr. Cindy Kiro, New Zealand Children's Commissioner
 - b. Jaap Doek, Chair, UN Committee on the Rights of the Child

- IV. **National Perspectives**
 - a. Nick Bala, Queen's University, Ontario and Alberta perspectives
 - b. Sylvie Schirm and Pascale Vallant, lawyers, Quebec perspective

- V. **British Columbia Practices and the Way Forward**
 - a. Jerry McHale, Assistant Deputy Minister, Justice Services, Attorney General of British Columbia
 - b. Justice Brian Joyce, BC Supreme Court
 - c. Judge Thomas Gove, BC Provincial Court
 - d. Kathy Breggren-Clive, BC Officer for Children and Youth Rep

- VI. **Concluding Remarks**
 - a. Lesley Dutoit, South Africa
 - b. Tarryl McNamara, young person

Appendix "A" Questions/Discussion Points Raised from the Day

Appendix "B" BC Practices and the Way Forward: Small Groups

Meaningful Child Participation in BC Family Court Processes
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Summary of Experts Session
August 30, 2004, Law Courts Inn, Vancouver

Attendees:

Justice Brian Joyce (BCSC)
Nick Bala (Ontario)
Kathy Berggren-Clive
(OCY)
Michael Egilson (OCY)
Judge Thomas Gove
(BCPC)
Judge Hugh Stansfield
(BCPC)
Pascale Vallant (Quebec)

Hilary Young (BCFYIC)
Debra VanGinkel (lawyer)
Jaap Doek (Netherlands)
Cindy Kiro (New Zealand)
Noreen O'Keefe (MCFD)
Jerry McHale (AG)
Kathryn Ferriss (lawyer)
Sylvie Schirm (Quebec)
Michael Bradshaw (lawyer)
Tarryl McNamara (youth)

Meera Thakrar (lawyer)
Lesley duToit (S. Africa)
Montoeli Mota (S. Africa)
Philip Cook (IICRD)
Jocelyn Helland (IICRD)
Andrew Wilcocks (IICRD)
Suzanne Williams (IICRD)
Michele Cook (IICRD)

I. INTRODUCTION - OVERVIEW OF PROJECT

a. Suzanne Williams, Managing Director, International Institute for Child Rights and Development (IICRD) - Project

The two-year Project began in the fall of 2003 and takes a UN Convention on the Rights of the Child perspective (especially Art. 12) in exploring how child participation is implemented (it is already in some provincial legislation) in BC. It builds on IICRD's recent work on child participation. How can we encourage participation for children?

Thus far a preliminary literature scan is complete and meeting participants are encouraged to suggest other sources to include. Several responses to a survey for the BC family law bar and judiciary have been received to get a sense of what is currently going on in BC. The Project plans to do focus groups with young people: two exploring youth participation and the impact of culture (aboriginal young people and new Canadians) and one general youth participation session, as well as develop and implement an impact assessment tool that may consist of a 'learning centre' where practices we want to support can be piloted. Finally, findings will be presented and shared with lawyers, judges, stakeholders.

b. Judge Hugh Stansfield, Provincial Court of British Columbia, Project Advisor - Involvement and Commitment to the Project.

He had been a judge for 11 years when he read 'Plight of the Voiceless Child', an article outlining the historical neglect of children's voices in disputes written by now Chief Justice of the Supreme Court of Canada Beverly McLachlin. This is reflected in civil law where adults are always included in

procedures that directly affect them but children are not. In BC a case requires a mediator-style case conference before it gets to court and many are successfully addressed this way. Judge Stansfield thinks of participation in these terms. He likes to ensure children are included and has found it to be a powerful tool to receive information from children.

Issues that challenge us in ensuring children's participation include: during trials, getting information from children in visible and open manner; testing (cross-examination) information; questions about ability to appeal; whether judges are trained to talk to children; in BC questionnaire there was a lack of confidence amongst lawyers in having judges talk to children; coached children (might judges be convinced by well-coached children); wide range of attitudes and practices amongst courts. The Project is exciting because we could establish a sense of the different approaches that are being taken. What are they? What are the barriers to inclusion? From judicial perspective, what changes should be made? There are already places in the world where there is proactive inclusion of children and youth.

c. Debra VanGinkel, Lawyer, CBA BC Family Law Subsection Chair, Project Advisor - Involvement and Commitment to Project

In years past, there were some means that existed to bring forth children's views. It is difficult to bring voices forward now (e.g. section 15 reports) due to elimination of legal aid programs, and few resources for families in BC. Generally, lawyers have confirmed this in the questionnaires the Project has received. There are very few instances where children can bring forth their views (Family Advocate, affidavit, etc.). How can we be creative to change the landscape in BC?

II. HEARING THE VOICES OF CHILDREN

a. Tarryl McNamara, Experiencing BC Family Court - Presentation

Child custody dispute in her family - very acrimonious and long (most of her childhood beginning at age 3) and included untrue allegations by one parent. She was clear on her views and wishes and tried to tell them to everyone but she felt no one listened. She spent a lot of time wanting to be 12 so someone would listen to her and hear her. She was under the impression that all would change when she turned 12 and this caused some anxiety for her. She was 'assessed' numerous times by various 'professionals' and yet none of them made her feel that her views were heard or considered. She was required to partake in supervised access and then finally, an advocate was appointed and she felt listened to and things improved. Her advocate was extremely helpful in bringing her voice forward. At a certain point, she felt she had to just agree to anything to stop the fighting and went to visit her mother despite the fact she didn't want to. The dispute has left its mark on Tarryl and her family: emotionally, psychologically and financially.

III. INTERNATIONAL PERSPECTIVES

a. Dr. Cindy Kiro, Children's Commissioner of New Zealand

[Copy of presentation attached to this summary]

In the last 5 years, government has examined how the court delivers justice in NZ with respect to the care and protection of young people. It requires judicial personnel to be up to date in child participation research/child development. Care of Children Bill, currently in final reading, places a strong emphasis on the rights and views of the child (they must be taken into account, and the requirement to appoint a lawyer to represent a child stronger).

In most cases, common practice and legislation requires appointment of lawyer to child in family law cases involving adoption, care of children, care and protection, domestic violence, mental health, (and others). Very comprehensive range of family matters. Court prefers that the child does not go to court but if they want to see the judge they can ask their counsel and the counsel must take that into consideration. Some of the difficulties: practice seems to be in some cases that the lawyer does not always meet with the child, child's views are mis-represented or not put forward at all. Despite the requirement by the law society to meet with the child, not all lawyers do. It is unclear as to how they know the child's views. It is a wide range of ages the lawyers don't meet with, not just young children. This is not acceptable as even the youngest of children should be met with.

Family Group Conferences have been very successful in NZ. This process is for families with children under 18 years and includes the child, immediate and extended family and government. The best interests of child is the first and foremost consideration - this requires the adults to hear the child's views directly. NZ has dedicated and trained individuals to provide this meditative service.

Commissioner's Recommendation: there could be a role for someone who is not necessarily a lawyer - but who is trained and can bring the child's views forward. There are other skills that can be utilized to bring children's views forward.

b. Mr. Jaap Doek, Chair of the UN Committee on the Rights of the Child

Chair of Committee that examines state compliance with the UN Convention on the Rights of the Child. All countries except US and Somalia have ratified the Convention. Convention is linked to cultural context.

Discussion of Article 12 -

Article 12 of the UN Convention on the Rights of the Child, which Canada has signed and ratified, states that:

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.

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.

“Shall assure” (very strong language for international conventions) is used with respect to obligations of the State. Note that the word ‘participation’ does not appear in the convention. “In accordance with age and maturity” is a source of interpretation. “In judicial proceedings” is explicit, but this doesn’t seem to include informal proceedings. The most crucial starting point for implementing this Article is information - adjusted to age and maturity. A child needs to be kept informed of the proceedings and what is going on. Note that when providing the child with information, this is the first opportunity to talk to the child.

With respect to children’s involvement in legal proceedings, it is strange that if children break the law, they are considered a full party to the proceedings. But in civil procedures, we suddenly change this mentality for some reason. Why do children who are age 12 or older only have a right to have their views considered in child protection matters? Why not custody and access cases as well? What is the difference?

“Capability of forming his or her views” - this is open to interpretation as well. Who judges this? In principle it is the judge, but how does the judge do this? Should do this through psychological assessments but they can be extensive. If we make a basic rule, based on age, where we assume child is capable, then the child will be more likely to be invited in and participate. How do you do that? How do we assure child is allowed to express his or her views ‘freely’? In front of parents, the child feels restrictions. The convention does not say how judge should operate here. Should be directive in our approach - again, if it is left to the full discretion of the judge, it is risking wide variety of practices that does not ensure child’s the right to be heard.

Giving due weight to the opinion of the child does not mean the child will decide how the case will play out. The link to maturity and age suggests that the weight of the opinion gets stronger with age. In addition, if you take the right of the child to be heard seriously, you don’t just ask a single question, you listen to a broad range of views. And you explain to the child that they don’t make the decision, but they can be heard.

Judges should be under the obligation to explain what they did with the views of the child, including what the views of the child are. This goes beyond a consistency of rules of the law. We must show the due weight and

consideration. It becomes complicated if the child is both affected by the circumstances, but also a witness (i.e. in child protection).

IV. NATIONAL PRACTICES SUPPORTING YOUNG PEOPLE'S PARTICIPATION

a. Nick Bala, Professor , Faculty of Law, Queen's University

Why hear from children? Child's perception; Views vs. best interests; Wishes vs. observations; Best interests in various contexts

Ontario Office of Children's Lawyer

- 1975, became involved in custody and access cases, keep a list - screened, lawyers and social workers trained together, monitored, etc.

Spend about \$10 million a year (\$1.00 per person in the province)

All serious contested child welfare cases have a child appointed a lawyer.

In family law, it is more restricted - when judge requested it, 70% of time it is appointed by Office (less than 100% because of financial restrictions).

Lawyer must meet the child at least three times (practice varies)

Lawyer can't give evidence about the child's wishes, unless the parties agree, but OCL also has social workers to assess and interview children.

Child's lawyers must always put the children's wishes before the court but also can put their own views forward if it is different. One example is a 13 year old who says she wants to live with mom, judge orders her to live with dad, but she ended up moving to mom after 2 years anyways.

Ways to hear from children

In court and in chambers very rare in Ontario. Most common in Ontario to have counsel or social worker from OCL. Also hearsay oral statement or video/audio (hearsay) and psychological assessments. If child has strong and clear wishes, likely to settle. Research studies suggest ignoring wishes can lead to later variation/distress.

Children as witnesses in criminal court

Memory, suggestibility, communication style, honest, recantation and false recantation issues

Common for child to testify in criminal cases - in abuse cases, there are support mechanisms, such as allowing to child to testify via closed circuit television. Videotapes of investigative interviews are admissible if child testifies

.In civil contexts, judges may admit videotapes instead of child testifying, if done by independent professionals

Manipulation concerns re: letters to judge.

In addition to having a lawyer, or instead, can bring views forward by assessment by psychologists but very expensive.

Office of Child Advocacy

Advocacy office, specifically for children who are in care of the state.

Effective post-court advocacy for children in state care

Concerns that this Office it is not independent enough, but it is very important.

In Alberta, increasing use of lawyers for kids in family courts - government pays but until 2005, no monitoring, screening, supervision or training. Education plan to be undertaken in 2005; mandatory for lawyers to have completed. Under-researched area but what research there is suggests that children really want to be heard. Must also figure out how to convince parents (non state parties) to listen to children. There should be a range of options based on the context. Should be training, research, evaluation of what is there,

b. Sylvie Schirm and Pascale Vallant, Quebec Lawyers specializing in children's representation

Custody and access procedure.

Pascale and Sylvie practice 100% family law and much of that is representing children.

Since 1994, the court must give the opportunity to child to put their views forward in decisions affecting them. Either party or the judge can appoint a lawyer for the child. Child can be a party to a hearing, must have capacity to give a mandate (if child is under 12, can be contested). Judge ended up deciding that the child did have the capacity to mandate a lawyer. Either government pays, or the judge can decide who pays the lawyers fees (e.g. when costs are awarded).

The age is not as important now - if the judge knows that the child wants to be heard, he or she hears the child.

The role of the child's counsel:

Preliminary matters: If the child is going to testify, why, how, who is going to question the child? Judges are no longer meeting children in chambers, rather children are in court testifying. One must prepare the child - explaining to the child what is going to happen, child-friendly training etc. All details are addressed in court so the parties know who is bringing the child to court, what is going on in the child's life such as leisure schedules that need accommodation etc. The child will then testify for example in the morning or after lunch so they can be there before court starts as usual with the adults. Sylvie makes a point of introducing the children to lawyers, etc. and ensuring that parents are not hanging around door, etc. when the child is present.

The Child Testifying: Some judges come down from the bench, or take off their robes. Lawyers for parents sit in the back of the court room. A child is questioned first with easy questions. The Judge may ask questions - talk to the child. After questions, child goes outside the courtroom, and lawyers debate which questions they have and they decide if further questioning is required. The parents still can stay outside - their lawyers can discuss it in a general way. (this process is part of their civil code in Quebec). The judge or the child's lawyers ask the cross-examination questions.

Appeal Issues: Ask the court that the tapes remain sealed - in case of appeal, he accessed the tape and so the court of appeal, listened to the tape and the judge decided that it wasn't damaging to the boys and so released the tape.

Must look at credibility of witnesses -

Most kids do not have a position on living with mom or dad - many cases are other stuff. Important for the judge to see the child and even in the worst cases, the kids are put under so much pressure why not let them have their say and then be relieved of it? Even if they don't get their way, they get to feel like they have a say.

When legal aid pays for representation, the pay is minimal - can go from \$275 to \$600 for the whole thing. Given the amount of preparation time and time working with the child, this is small. Surprisingly, this doesn't decrease the amount of lawyers representing children. The courts see what kind of money is available to the parents to decide if they can afford council for child.

Sylvie's perspective has changed - she argues that children are more than able to handle being in court - if done right. In child protection cases, the child (any age) is automatically appointed a lawyer (party to the proceedings), but the lawyer doesn't always see their client.

V. BC PRACTICES AND THE WAY FORWARD

a. Jerry McHale, Assistant Deputy Minister, Justice Services Branch, Ministry of Attorney General and Minister Responsible for Treaty Negotiations

Generally in the area of family law, BC has been very innovative in this area and responsive to the unique needs of families (case conferences). Private bar - there is a strong mediation community. There are some pangs of concern regarding the way forward in family law because we don't do what we know should be done. Through the last three years, there have been lots of resource reductions in our area (e.g. loss of Family Advocate program and reductions to family legal aid). There have been attempts to mitigate these losses in innovative ways but there is still a concern.

In March 2002, the Justice Review Task Force was created by the Province. It is composed of Chief Justice of Supreme Court, the Chief Judge of the Provincial Court, Deputy Minister for Attorney General, etc. This is to be a forum for constituents, giving them an opportunity to talk about the judicial process. There are four working groups including the Family Justice Reform Working Group on the civil side (a general civil working group will also soon be established). The family Law working group (of which he is the chair) has a mandate to try to come up with recommendations for fundamental change. In terms of reference, fundamental was emphasized so there is not a repeat old family law reports. There have been 13 reports in whole or in part addressing family law since the 1970s and they all say the same thing: court is a last

resort, take a client-centred approach etc. The Task Force must look at what this should mean for the court. The Task Force has been asked to explore the idea of a unified family court: is this the best way to organize family law services? If not, what should it be? They must also make recommendations on non-court services, collaborative approaches, and observe the following values: accessibility (prevailing view that the courts are not accessible to family litigants) oriented to the needs of families and children.

They have been working on this for about a year now. The Working Group on Family Law will be reporting out at the end of December, 2004. The Family Law Working Group has representatives from both courts, Legal Services Society, bar, and government. There are lots of ideas on the table at this point and the commonality of perceptions around the province was amazing.

Initially Jerry was concerned that this project and the Task Force had unfortunate timing, but on reflection it is okay. The task force is only to put forward recommendations for change and has to look at resources and the acceptability to people around the table. Ideas out of this project will have a forum.

b. Justice Brian Joyce, Supreme Court of British Columbia

He outlined opportunities that exist currently for child and youth participation. Up until two or three years ago, family law disputes resolved themselves without a trial. There were lots of interlocutory applications that resulted in a resolution without going to court. However, by the time the parties went into interlocutory proceedings, people were horribly positional and it wasn't working. When cases reached trial, costs had added up so high for litigants that many cases were resolved simply by lack of finances. There was no more money to fight.

Judicial case conference pilot projects were implemented to prevent this from happening. Essentially, the case conference is a mandatory procedure because parties have to do this first (before interlocutory proceedings or affidavits). The idea is to get the parties to identify early on what the issues are and resolve them. The case conferences have evolved and proved to be extremely productive to resolve disputes: either all matters are resolved, or some matters are resolved. The evaluation of the Project has indicated that they are useful. Litigants say they like it because they are very much a part of the process.

Three key opportunities for child participation:

Judicial Case Conferences: he is not aware of the parties involving the child at this stage for parts of the conference.

Interlocutory proceedings: there used to be a Family Advocate and now most section 15 reports are privately funded. The Court has the ability to order s. 15 reports but unless the parties have the money to provide them it is not practically possible to get them in advance of trial.

In the trial itself, the views of the children come before the court through a s. 15 report.

Occasionally, he has interviewed children in interlocutory proceedings. He has never interviewed children as a judge and private interviews seem to be very rarely employed. Children's views are brought to court through section 15 reports but it is extremely limited due to lack of funding.

c. Judge Tom Gove, Provincial Court of British Columbia

In the 1970s, lawyers were appointed by judge (ordered) and therefore paid for by the Attorney General. The Family Advocate program replaced this practice. Availability of funding effected program availability, but children had more representation than they do now.

There is an ability to have a lawyer appointed to a child in child protection cases. But in the area of FRA (custody and access), there is no ability. In 1996, family case conferences were introduced - every child protection case that is going to be contested, must go there first. They settle the vast majority of cases at that level. Children are often present but it depends on the judge and social workers. Volume of family case conferences is high and takes up a lot of time but it saves court time.

In FRA, there are more cases where there are absolutely no lawyers (neither parent nor child) due to legal aid and family advocate cuts. They do family case conferences with no lawyers or family court counsellor. Judge is in an interesting position. At one time, it was more common for judges to interview children privately. Less now, because less training. Then, what do you do with what you hear? If the parents don't have lawyers now because of budget cuts, then you can't follow the Quebec model. Training, is non-existent here. The judge is the mediator in a lot of these cases and so if the lawyers need training, then the judges need training as well.

d. Kathy Berggren-Clive, Associate Child and Youth Officer, Province of BC
Herself and Michael Egilson are two of eleven Associates that carry out the BC Child and Youth Officer's (Jane Morley's) mandate.

There three functions are to support, observe and advise on how to improve services. The work of the office is more systemically focused, but they do work individually. One specific goal of the office is around child participation. Most services they oversee are with the Ministry of Children and Family Development. There's a wide range but they do not include custody and access. With respect to child and youth participation, they are concerned with how children can become more involved individually in both services and decision making, and policy development, etc. They are very interested in this question and are currently working on projects involving children's rights, self-advocacy, workshops promoting advocacy and participation. They have a

particular interest in understanding what it looks like to hear and consider children's views.

VI. CONCLUDING REMARKS

Lesley Du Toit, CYCAD, South Africa

Lesley was brought in to advise Nelson Mandela's government on reforms to the child protection system in South Africa. Established innovative pilot projects re: children and the law.

Made a radical change from a medical model to a restorative approach. Justice, protection, divorce, all based on restorative and mediation. If you can avoid a child going through a legal process, that would be a priority. In order to accomplish this, they all work from a similar framework (judges, lawyers, social workers) a certain philosophy and certain principles. One of the tools for participation is that even before the child is involved in anything, there is a psychological assessment (child rights, strengths-based model). The early intervention assessment goes to the judge and the judge based on that makes a choice how to divert the child (to what system). Child and family is core of that decision. The very process itself is meant to be facilitative because it should assist itself in many of the problems that were brought up. This results in a plan and report for the child and family that must be signed off by the child. This avoids the problem of decisions being made by others for the child and the child not even being made aware of what is going on.

A central part of that whole process is talking to children. Lesley has been involved in training judges and lawyers to talk to children. They call it 'getting the children's story'. It is not hard: it requires basic skills and respect for the child's voice. She has given training that allows judges to get to the inner child in about 30 minutes. The entire system around the child must be restorative. They had the children who have been through this process evaluate them (government people).

With respect to this idea of 'damage' of children by including them in cases involving difficult subject matters, it is important to be aware that you can do very little damage to a child as long as you show respect and have a positive intention and really listen to what they say. Dependence on psychological reports is concerning because sometimes professionals are looking for something. It is possible to get the child's voice loud and clear without a need for professionals.

Tarryl McNamara, young person

Very enlightening discussion. Very frustrating to hear from around the world and then think about BC and how far we have to go. It shouldn't be a privilege to be heard because of lack of funding or because your circumstances are different than a child protection hearing. How hard is it really to just speak to the child involved? What would have happened if I hadn't had a Family

Advocate? A family is about the children and so it is frustrating to not put them in the centre of things, especially if professionals making these decisions have their career in family law. To bypass the court and not even have to involve a judge or lawyer is great so long as children can be heard in that process too. But if they have to go to court, they should have an absolute right to be heard. The people that matter should hear what they have to say.

Appendix "A"

Questions/Discussion Points Raised from the Day

I. INTRODUCTION

Open discussion around change to BC legislation with the introduction of the CFCS Act- age of 12 in consent to child protection custody order.

II. HEARING THE VOICES OF CHILDREN

Did cultural /societal bias in favour of mothers taking custody make this dispute drag out even longer/allowed accusations of abuse by father to fly? This could be the case.

Attitudes of adults towards children a problem. Children are accurate interpreters of what goes on in the family and court processes should not hinder the voice of children and youth.

Magic age of 12 - assumption that under the age of 12, children don't know what is going on. Fear of adults that children may be harmed by hearing what is going on prevents us from including them.

Discussion around differences between child protection cases and custody and access cases. Child custody and access cases have different connotations because to a certain degree, parents that are still in the picture and have somewhat of an idea of the interests and views of the child. In protection cases, the parents are removed from the picture and knowledge is gone. Even more call to have strict procedures to have children's views heard.

Family advocate had an attitude that led Tarryl to think that she was listened to and approached her somewhat as an equal. Someone for her and this was very important to her. Met with her by herself and her and her parents.

III. INTERNATIONAL PERSPECTIVES

Issues of disabilities effects the interpretation of 'capacity' and effects the ability to ascertain views of the child as well.

When can Family Group Conferences (FGC) be triggered in New Zealand? Police (special division), Child Welfare, Court.

After a review of NZ family court process due to allegations of institutional racism, FGC was created because of thought that rather than tearing away the child from the family, make the family own what they are doing to their children. All information brought out and explored. FGCs are led by FGC Coordinators who are specially trained. Cases that go to FGC don't go to court - it is mediated until it is resolved. Children's views are presented in both oral or written submissions.

Issue of child's lawyer bringing views of child forward - gets disputed because lawyer can't be cross-examined. Must be brought forward via a social worker or some other witness.

What are we talking about when we say views of the child? What if child opens up more information when speaking to the judge? It is important to have lawyers there to hear that.

What is the ethical role of council? Does council have simply an obligation to bring forward views only? Or views and interests? In NZ, the lawyer puts forward Best Interests.

Best interests opinions by children's lawyers being put forward by the lawyer is taking over a role of the judge that we are not allowing in other areas of the law. Child can request a mediation conference with a judge under the NZ equivalent of the CF&CS Act. Never been used - needs to be tested.

In BC, there is a pilot project called the judicial case conference project. The idea is to catch parties early before they get positional. Before court applications. Tremendously successful. Less formal, and lots of scope for the involvement of young people in that process.

Domestic violence NGOs in NZ have initiated a child impact project. Changed the focus in dealing with both parties, to look at the effects of each party's actions on the child. The NGOs are reporting to the NZ Commissioner that victims are leaving much, much earlier and perpetrators are changing their behaviour dramatically. This is an interesting point in thinking about family court proceedings. Has the potential that break through the adult behaviours.

When we hear of accounts of children's counsel resulting in good procedure and a feeling of inclusion by children, we think of how much good a lawyer could do. But, appointing every child to have a lawyer may result in many of them doing a bad job. It is important to ensure they (children's counsel) are trained and monitored to ensure they are doing a good job.

Bar committee in Quebec was asked to advise on the role of the child's attorney. Resulted in a series of guidelines - rights, age of the child for capacities - that everyone had a copy of and bought into it. The result was that it was auto-enforcing. Judges will apply it and call lawyers on it if they are acting outside the guidelines. Lawyers will do the same.

Some of these informal proceedings have the potential of depriving the child of the right to be heard - even more so that the formal processes in some places.

We are talking a lot of counsel for the child. We need to consider how we can help the child bring their views forth directly to the people who make the decisions.

Counsel in NZ has the right to appeal on behalf of the child. Issues to consider in hearing the child directly: Where are you hearing the child? If in chambers, it is recorded? Do the parents know about it? Is there opportunity to appeal on it?

IV. NATIONAL PERSPECTIVES

Lawyers don't have training in this area. There are real challenges in areas of special needs, FAS etc. In instructing lawyers - need assessment from professional.

Appointments of counsel for children are discretionary and about 2,000 appointed yearly (Quebec). Most family law cases - most training for children's lawyers are mediation because mostly what children want is a quick settlement. Much focus is put on mediation rather than having the dispute go to court so as a result, the appointments of children's lawyers are funnelled down.

Children's lawyers in Ontario told the government during budget cuts that they facilitated less court time and less legal aid bills.

In Custody and Access, the child's lawyer can bring voice forward and influence proceedings but can't singularly take a case to court on behalf of a child. In Child Protection, even if family and Children's Aid decide to settle on a matter, the child's lawyer can take the case to court if the decision is not agreeable to the child's interests.

There was a question raised about dragging the child through more if a case is 'resolved' at mediation level and then constantly comes back to mediation and never makes it to court. What happens to the evidence a child gives in a mediated case? Does the child have to give evidence all over again every time it goes to mediation? Is constant re-interviewing traumatizing the child?

Issue of children's lawyer having a lot of influence in the court raised again. If the children's lawyer has a lot of influence over the proceedings, if the judge defers to the children's lawyer much of the time, is the children's lawyer not almost like a 'pre-judge'? If so, is this really a bad thing (best interests)?

In Quebec, the function of the children's lawyer seems to have recently swayed to a 'children's views' position as long as the child can clearly instruct, regardless of age. But now there is backlash as the judges are saying, if you are just telling us what the child wants, why do we need a children's lawyer?

The child or someone else can bring forth their views. But this is missing the point of the child's right to have representation.

As part of the agreement to be ratified by the court, there should be a clear section in the court's decision about the views of the child and how they have been involved. If their views are different than the findings of the court, reasons why should be outlined.

Difficulty with a mediation process without a court order is there is no judicial scrutiny. How are children's views documented and clearly considered?

V. BC PRACTICES AND THE WAY FORWARD

Respectful disagreement with the attitude that interviewing children is difficult or dangerous. As judges deal with difficulties in law every day, this is another example that needs to be tackled - whether it is a modified Quebec version or otherwise.

If children have a right to be heard, why hasn't the court pursued/enforced that more?

Why do children rarely have a right to initiate proceedings? (these two questions were brought up earlier as well)

Appendix "B"

British Columbia Practices and the Way Forward - Small Groups

The large group split up into smaller groups to discuss the following questions:

- (1) What might meaningful child participation in BC family court processes look like? Do you think this Project could support this vision and if so, how?

- (2) How can we ensure that the voices of young people are supported and highlighted through this Project?

Group 1 (Debra VanGinkel, Justice Brian Joyce, Kathy Breggren-Clive, Lesley dutoit)

- #1) Query - "hearing" from the child or child "participation"
- "views of the child" report and/or section 15 report
 - o it would have to be a new vision
 - process to obtain views from child directly
 - o controlled and protected environment
 - reintroduction of family advocate process and/or appointment of lawyers privately
 - JCC involvement of children
 - o Adjudicator of JCC to allow the child to be involved
 - o Query: how to involve child at JCC level with or without counsel?
 - Mediation setting - child to be involved - is it responsibility of the mediator to do that?
 - Pilot project - learning centre to practice the principles and then to report on this?
- #2) Youth advisory group
- combination of personally affected young people and otherwise interested young people
 - Piggyback on existing meetings for young people
 - focus groups
 - family justice counsellor
 - possibly the FBCYICN (youth in care), presentation at their annual meeting to ask young people to participate

Group 2 (Kathryn Ferris, Michael Egilson, Sylvie Schirm, Judge Tom Gove)

#1)

- Children should be able to get correct information on the process - there should be transparency
- Children should be able to exercise their rights at court
- Must be pro-actively offered to the child
- Make it consistent across the board - not based on particular practice in particular court
- Yes, this project can help

#2)

- Challenge the assumptions that are out there
- What we think is true may not be
- Look at constitutional issues
- May require legislative changes

Group 3 (Michael Bradshaw, Cindy Kiro, Pascale Vallant, Noreen O'Keefe)

#1)

- Attitudes need to change - other jurisdictions have already struggled with these issues and need to be looked at to identify successful models.
- Outcomes for children and families likely to benefit from changing the model
- The professionals need to recognize the need to give up the power and give it to the child and families
- Inter-disciplinary - recognize each role in support child/family to reach decisions
- Funding assigned as per Quebec

#2)

- Currently not meaningful participation in BC
- Why meaningful participation of children?
- Models could be complemented that are already here - don't need to reinvent the wheel. Look to Quebec, international jurisdictions
- Innovate to comply with the UNCRC
- BC law - paramountcy and views of the child but practice doesn't follow this.
- Funding - judges can assign costs to parent if state doesn't pay

Group 4 (Nick Bala, Hilary Young, Tarryl McNamara, Jerry McHale, Judge Hugh Stansfield, Jaap Doek)

#1)

- Change in the culture of family law. In criminal law, the change has been to bring forth the voice of victims and support them and give them greater rights. Children are as victims of divorce and abuse.

- All levels have to recognize that children have a right to participate. Lawyers and judges must have the obligation to hear the child.
- Need to recognize child is a person entitled to respect and engagement
- Start with pamphlets, parenting after separation, social workers, as well as lawyers
- Cultural change requires legal framework - i.e. Quebec Civil Code: Right to be heard
- Divorce Act and Provincial Legislation - should state that lawyers and judges should ensure that parents and all decision-makers that children are heard and views are considered.

#2)

- Look beyond the courtroom and consider the role of various players in the processes. Other professionals being advocates for children.

SCHEDULE "B"

Questionnaires

Meaningful Child Participation in BC Family Court Processes
International Institute for Child Rights and Development (IICRD)
funded by the Law Foundation of BC

YOUNG PEOPLE'S QUESTIONNAIRE (Protection)

1. About You:

- * Gender? _____ * How Old Are You? _____
- * How Old Were You When You Were Taken Into Care? _____

2. Identifying Court Processes

- * What court processes have you been involved in?
- * Case conference with a judge? _____
- * A motion (mini hearing) where a temporary order was made by the court? ____
- * A full hearing/trial? _____
- * Anything else? (e.g. mediation) _____

3. Participation in Court Processes

- * Did you have a say in any of these processes? _____
- * Were any of the processes explained to you? _____
- * Were you ever given notice of a hearing and invited to attend? _____
- * Was there any other way that you participated? Please explain.

4. Anyone Looking Out for You?

Did you feel anyone was looking out for you in these processes? Who?

5. Plan of Care

- * Do You Have a Plan of Care? _____
- * How Old Were You When You Got Your Plan of Care? _____
- * Did You Participate in Creating Your Plan of Care? ____ In changing it? ____
- * Did you understand what your plan of care was? If not, were you able to ask question so that you could understand it?

6. Your Advice

If you could advise a young person going into care about the court process what would you say?

7. Anything else to add?

MEANINGFUL CHILD PARTICIPATION IN FAMILY COURT PROCESSES CHILDREN OF DIVORCED PARENTS

THIS IS A CONFIDENTIAL SURVEY. YOUR ANSWERS WILL BE COLLECTED ALONG WITH OTHER PEOPLE'S ANSWERS SO THAT NO ONE WILL KNOW HOW YOU ANSWERED THE QUESTIONS. THE INTERNATIONAL INSTITUTE FOR CHILD RIGHTS AND DEVELOPMENT (IICRD) WILL SHARE THE SURVEY ANSWERS IN ITS REPORT ON MEANINGFUL CHILD PARTICIPATION IN FAMILY COURT PROCESSES IN JANUARY, 2006. IT IS HOPED THAT YOUR PARTICIPATION AND THE REPORT WILL HELP MAKE THINGS BETTER FOR YOUNG PEOPLE WHOSE PARENTS ARE DIVORCING. THANK YOU TO THE LAW FOUNDATION OF BC FOR FUNDING THIS WORK.

QUESTIONS MARKED WITH A * ARE REQUIRED.

*1. HOW OLD ARE YOU NOW?

under 12 years old

12 - 15 years old

16 - 18 years old

18 - 25 years old

over 25 years old

*2. DO YOU LIVE IN BRITISH COLUMBIA?

Yes

No

*3. HOW OLD WERE YOU WHEN YOU FIRST FOUND OUT YOUR PARENTS WERE SPLITTING UP?

4. HOW MANY BROTHERS AND SISTERS DID YOU HAVE WHEN YOUR PARENTS SPLIT UP?

*5. HOW DID YOU FIND OUT YOUR PARENTS WERE SPLITTING UP (TELL US IN A FEW LINES)?

*6. WAS YOUR FAMILY LIVING IN BC WHEN YOUR PARENTS STARTED LIVING APART?

Yes

No

*7. DID YOUR PARENTS TALK TO YOU ABOUT HOW YOUR LIFE WOULD BE DIFFERENT ONCE THEY LIVED APART?

Yes

No

*8. DID YOU HAVE A SAY ABOUT WHAT YOU WANTED?

Yes

No

*9. DID YOUR PARENTS GO TO MEDIATION ABOUT THEIR DIVORCE?

Yes

no

not sure

*10. DID YOUR PARENTS GO TO COURT ABOUT THEIR DIVORCE (LIVING APART)?

Yes

no

not sure

11. IF YOU WERE TOO YOUNG TO BE ABLE TO SAY WHAT YOU WANTED WHEN YOUR PARENTS STARTED LIVING APART, HAVE YOUR PARENTS HAD TO GO TO COURT AT ANY TIME WHEN YOU WERE OLD ENOUGH TO SAY WHAT YOU WANTED?

Yes

No

12. IF YOUR PARENTS WENT TO COURT, DID YOU KNOW ABOUT IT AT THE TIME?

Yes

No

13. IF YOU KNEW YOUR PARENTS WENT TO COURT, HOW DID YOU KNOW?

14. DURING THE DIVORCE PROCESS, DID YOU SPEAK TO ANYONE ABOUT HOW YOU FELT OR WHAT YOU WANTED?

Yes

No

15. IF YOU DID SPEAK TO SOMEONE, WHO DID YOU SPEAK TO? (YOU CAN CHECK MORE THAN ONE)

parents

friends

Judge

lawyer

psychologist, psychiatrist
grandparent, aunt, uncle, cousin
brothers/sisters
coach or music teacher
school teacher
Other:

16. WHAT DID YOU SPEAK TO THEM ABOUT?

What would happen to your stuff (clothes, toys, CDs etc)
which house you wanted to sleep at on which nights
which school you wanted to go to
what extra-cirricular activities you wanted to do (for example, things like
soccor, swimming, piano, karate, etc.)
what you were feeling
Other:

*17. DO YOU FEEL LIKE YOUR VOICE WAS HEARD DURING YOUR PARENTS' BREAK UP?

Yes No

18. IF YOU ANSWERED YES TO THE LAST QUESTION, HOW WAS YOUR VOICE HEARD?

19. IF YOUR VOICE WAS NOT HEARD, WHAT WAS THE REASON THAT IT WAS NOT HEARD?

*20. HOW OLD WERE YOU WHEN THE DIVORCE PROCESS FINISHED?

*21. DO YOU THINK YOUR CULTURAL BACKGROUND INFLUENCED THE WAY YOUR FAMILY HANDLED THE DIVORCE?

Yes No Not sure

22. IF YOU THINK YOUR FAMILY'S CULTURAL BACKGROUND INFLUENCED THE DIVORCE PLEASE: (1) INDICATE YOUR CULTURAL BACKGROUND; AND (2) EXPLAIN ITS INFLUENCE (PROVIDE EXAMPLES IF POSSIBLE ESPECIALLY ABOUT THE WAY YOU HAD A SAY OR PARTICIPATED)

*23. WHAT ADVICE WOULD YOU GIVE TO PARENTS GOING THROUGH A DIVORCE NOW THAT MIGHT HELP THEIR CHILDREN?

*24. WHAT ADVICE WOULD YOU GIVE OTHER CHILDREN OR YOUTH WHOSE PARENTS ARE DIVORCING?

25. IS THERE ANYTHING ELSE YOU WOULD LIKE TO TELL US?

Submit Survey

Meaningful Child Participation in BC Family Court Processes
a project of the International Institute for Child Rights & Development
("IICRD")
funded by the Law Foundation of British Columbia

Questionnaire for British Columbia Family Lawyers

Introductory Note

Article 12 of the UN Convention on the Rights of the Child, which Canada has both signed and ratified, states:

3. 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.
4. 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.

Article 12 of the UN Convention on the Rights of the Child mandates that the views of children be heard and given due weight in matters influencing them. Some B.C. legislation addresses child participation in family proceedings: for example, s.24 of the *Family Relations Act* provides that the views of the child must be considered in determining the best interest of the child, if appropriate; the *Child, Family & Community Services Act* provides certain procedural rights for children 12 years of age and older.

While it is trite that the best interests of the child must determine matters of custody and access, it seems there is a range of opinion within the judiciary as to how best interests should be discerned generally, and particularly as to what weight should be given to the "views" of children and what procedures are appropriate to discern such views. For example, some judges may be willing to speak with children in confidence in chambers while others would not; some judges might be prepared to speak with children in the context of judicial case conferences, but not in trials. Further, there also seems to be a variety of experiences within the Bar, some counsel having the opportunity to involve children in the litigation process, while other counsel do not have such experiences.

Through this project it is hoped there may emerge a less anecdotal and more reliable "snapshot" of the ways in which children currently are or are not participating in BC family court processes. From that snapshot it may be possible to consider more effectively whether current practices are enabling children's views, where appropriate, to be considered meaningfully, and to

consider whether any statutory or other reform should be considered to facilitate children’s views being “given due weight in matters influencing them”.

Your time and interest in completing this questionnaire are appreciated.

NOTE: The information in this questionnaire is being collected for the purpose of the IICRD Meaningful Child Participation Project. Responses will be analysed and the data made public in relation to the Project’s outcomes. Where persons completing this questionnaire provide their identity, information will not be attributed to them publicly without their advance consent.

Please return questionnaires by email to swiicrd@uvic.ca or by fax to 250.472.4830. If you have any questions please contact Debra VanGinkel at dvanginkel@wgmlaw.com or Suzanne Williams at swiicrd@uvic.ca or 604.833.0196.

QUESTIONNAIRE

1. For how many years have you practiced as a lawyer? _____
2. What percentage of your practice is family law? _____
3. Of your family practice, what percentage is:
 - a) Provincial Court _____
 - b) Supreme Court _____
 - c) mediation or collaborative law _____
4. Of your family practice, what percentage involves:
 - a) guardianship and/or custody and/or access (“children’s issues”) _____
 - b) maintenance or division of property (“financial issues”) _____
5. What is your experience in having children involved in family proceedings?
In particular,
 - a) have you attempted to obtain legal representation for a child or children? If so, what procedures did you use?

b) have you personally involved a child or children in the legal proceedings?
If so, what procedures did you use?

c) has a Judge, Master or Mediator interviewed a child or children directly in cases where you were involved as counsel for one of the parents? At what stage of the process did this occur, the judicial case conference, interlocutory proceedings, or the trial or other final hearings? If so, what was your experience with this process?

6. What percentage of your cases are children's views presented to the court through a s. 15 FRA custody & access report, or through a privately commissioned report? How effective is this method in portraying the children's views?

7. In those cases where a child or children were interviewed by a Judge what procedures were used by the Judge and how often were these procedures used, as follows:

a) Did the Judge meet privately with a child or children, with only the clerk and not counsel or parents?
never _____ once or twice _____ frequently _____

b) If the Judge met privately, did the Judge first negotiate an agreement that had the potential of limiting disclosure to the parties of some or all of the discussion?
never _____ once or twice _____ frequently _____

c) Did the Judge meet privately with a child or children in the context of a trial, and make provision to preserve the substance of the conversation for appeal purposes?

never _____ once or twice _____ frequently _____

d) Did the Judge meet in chambers with a child or children, together with counsel and/or parents

never _____ once or twice _____ frequently _____

e) Did the Judge permit participation of a child or children in judicial case conferences?

i) with the other parties remaining in the room;

never _____ once or twice _____ frequently _____

ii) with the other parties excluded from the room

never _____ once or twice _____ frequently _____

f) Did the Judge hear from a child or children viva voce in a trial regarding their custody

never _____ once or twice _____ frequently _____

8. Do you think that Judges, Masters or Mediators should meet directly with children? In what circumstances do you think that it would not be appropriate to interview or involve children?

If you wish to volunteer the following information please complete this part:

Name:

Telephone: _____

Email: _____

Would you be interested in being interviewed in relation to this project?

Yes _____ No _____

Are you aware of any young person and/or the parent(s) of a young person who might be interested in being interviewed in relation to this project?

Yes _____ No _____

If so, please provide the names and contact information of the young person and/or the parent(s):

Any other comments:

THANK YOU FOR TAKING THE TIME TO COMPLETE THIS QUESTIONNAIRE.

PLEASE RETURN COMPLETED QUESTIONNAIRES TO swicrd@uvic.ca OR FAX TO 250.472.4830.

Meaningful Child Participation in BC Family Court Processes
a project of the International Institute for Child Rights & Development
("IICRD")

funded by the Law Foundation of British Columbia

Questionnaire for British Columbia Justices, Masters and Judges

Introductory Note

While it is trite that the best interests of the child must determine matters of custody and access, it seems there is a range of opinion within the judiciary as to how best interests should be discerned generally, and particularly as to what weight should be given to the "views" of children and what procedures are appropriate to discern such views. For example, some judges may be willing to speak with children in confidence in chambers while others would not; some judges might be prepared to speak with children in the context of judicial case conferences, but not in trials.

There is a relatively limited body of case law touching upon child participation in family proceedings (though a recent example is *L.E.G. v. A.G.* 2002 BCSC 1455, per Martinson J.) Some B.C. legislation addresses the issue: for example, s.24 of the *Family Relations Act* provides that the views of the child must be considered in determining the best interest of the child, if appropriate; the *Child, Family & Community Services Act* provides certain procedural rights for children 12 years of age and older.

Article 12 of the UN Convention on the Rights of the Child, which Canada has signed and ratified, states in part that:

5. 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.
6. 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.

Through this project it is hoped there may emerge a less anecdotal and more reliable "snapshot" of the ways in which the views of children currently are or are not being heard, whether directly or indirectly, in BC family court processes.

Your time and interest in completing this questionnaire are appreciated.

NOTE: The information in this questionnaire is being collected for the purpose of the IICRD Meaningful Child Participation Project. Responses will be analyzed and the data published in relation to the Project's outcomes. If persons completing this questionnaire choose to provide their name, information will not be attributed to them without their express consent.

Please return questionnaires by email to swiicrd@uvic.ca or by fax to 250.472.4830.

If you have any questions please contact Judge Hugh Stansfield at hstansfield@provincialcourt.bc.ca or 250.470.6898, or Suzanne Williams at swiicrd@uvic.ca or 604.833.0196.

QUESTIONNAIRE

1. For how many years have you sat as a
 - a) Justice of the Supreme Court _____ yrs
 - b) Supreme Court Master _____ yrs
 - c) Judge of the Provincial Court _____ yrs

2. What percentage of your judicial caseload is family proceedings? _____%

3. Of your family caseload, what percentage is
 - (a) judicial case conferences _____%
 - (b) interlocutory court applications _____%
 - (c) trials or other final hearings _____%

4. Of your family caseload, what percentage involves:
 - a) guardianship and/or custody and/or access ("children's issues")
_____%
 - b) maintenance or division of property ("financial issues")
_____%

5. In cases involving children's issues - those cases in which their "interests may be affected by the order sought" - in what circumstances do you perceive it to be necessary to hear the views of the children independent of the views of their parents or other parties? *If it is necessary to qualify your response, or to distinguish between categories of cases, by reference to age or other indicators of competence, or to particular kinds of proceedings or stages of proceedings, please feel free to do so.*

6. What procedural steps have you permitted or perhaps even initiated to hear the views of children? *Again, if it is necessary to qualify your response, or to distinguish between categories of cases, by reference to age or other indicators of competence, or to particular kinds of proceedings or stages of proceedings, please feel free to do so.*

7. In what percentage of family cases do you hear children's views through a s. 15 custody & access report, or through a privately commissioned report?

8. How effective are s. 15 or private reports versus other methods in discerning children's views?

9. Have there been proceedings in which you thought it might be helpful to your deliberations to hear the views of the children, but you perceived there to be procedural or other barriers to doing so? If so, what were those barriers?

10. What aspects of children's capacity do you consider in deciding whether or how to hear their views?

11. Do you perceive different considerations to apply to hearing from children in the following different processes and, if so, what are those considerations?:

a. judicial case conferences

b. interlocutory applications

c. trials or other final hearings

12. Without restricting the generality of question #6 above, have you:

a. met privately with a child or children, with only your clerk and not counsel or parents?

never _____ once or twice _____ frequently __several times

b. if you met privately, did you first negotiate an agreement which had the potential of limiting disclosure to the parties of some or all of the discussion?

never _____ once or twice _____ frequently _____

c. met privately with children in the context of a trial, and made provision to preserve the substance of the conversation for appeal purposes?

- never _____ once or twice _____ frequently _____
- d. met in chambers with a child or children, together with counsel and/or parents
- never _____ once or twice _____ frequently _____
- e. permitted participation of a child or children in judicial case conferences?
- iii) with the other parties remaining in the room;
- never _____ once or twice _____ frequently _____
- iv) with the other parties excluded from the room
- never _____ once or twice _____ frequently _____
- f. heard from children viva voce in a trial regarding their custody
- never _____ once or twice _____ frequently _____

In your experience which of the above methods have you found to be most effective?

If you wish to volunteer the following information please complete this part:

Name:

Telephone: _____

Email: _____

Would you be willing to be interviewed in relation to this project? _____

Any other comments:

MEANINGFUL CHILD PARTICIPATION IN BC FAMILY COURT PROCESSES: SERVICE PROVIDER SURVEY

THIS IS A CONFIDENTIAL SURVEY. YOUR ANSWERS WILL BE COLLECTED ALONG WITH OTHER PEOPLE'S ANSWERS SO THAT NO ONE WILL KNOW HOW YOU ANSWERED THE QUESTIONS. THE INTERNATIONAL INSTITUTE FOR CHILD RIGHTS AND DEVELOPMENT (IICRD) WILL SHARE THE SURVEY ANSWERS IN ITS REPORT ON MEANINGFUL CHILD PARTICIPATION IN FAMILY COURT PROCESSES IN 2006. IT IS HOPED THAT YOUR PARTICIPATION AND THE REPORT WILL HELP MAKE THINGS BETTER FOR YOUNG PEOPLE WHOSE PARENTS ARE DIVORCING OR WHO ARE BEING BROUGHT INTO THE CARE OF THE GOVERNMENT. THANK YOU TO THE LAW FOUNDATION OF BC FOR FUNDING THIS WORK.

QUESTIONS MARKED WITH A * ARE REQUIRED.

*1. WHAT INVOLVEMENT DO YOU HAVE WITH THE FAMILY LAW PROCESSES IN BC?

*2. WHAT INVOLVEMENT DO YOU HAVE WITH YOUNG PEOPLE AFFECTED BY, OR IN, BC FAMILY LAW PROCESSES? PLEASE PROVIDE AN EXAMPLE.

*3. WHAT ARE THE AGES OF THE CHILDREN YOU DEAL WITH THAT ARE INVOLVED IN THESE PROCESSES? (PLEASE CHOOSE ALL THAT APPLY)

under 12 years old 12 - 15 years old 16 - 18 years old

*4. WHEN YOU ARE WORKING WITH THESE CHILDREN: A. ARE THEY USUALLY AWARE OF WHAT IS HAPPENING?

Yes No

*5. B. WAS IT EXPLAINED TO THEM BY THEIR CAREGIVERS WHAT WAS HAPPENING?

Yes No

*6. C. ARE THEY USUALLY INVITED TO VOICE THEIR VIEWS ABOUT DECISIONS THAT WERE BEING MADE THAT AFFECTED THEM?

Yes No

*7. D. WERE DECISIONS AFFECTING THEM EXPLAINED TO THEM?

Yes No

8. WHAT ELSE DO YOU HEAR FROM THESE CHILDREN ABOUT THEIR PARTICIPATION IN THE PROCESS (OR LACK OF PARTICIPATION)?

*9. DO YOU THINK THERE ARE CULTURAL CONSIDERATIONS THAT INFLUENCE THE WAY YOUNG PEOPLE PARTICIPATE IN BC FAMILY LAW PROCESSES? IF SO, WHAT? CAN YOU GIVE AN EXAMPLE?

*10. HOW DOES YOUR ORGANIZATION/WORK SUPPORT MEANINGFUL CHILD PARTICIPATION IN BC FAMILY LAW PROCESSES?

*11. IN WHAT WAYS COULD YOUR OFFICE BETTER SUPPORT THESE CHILDREN?

*12. BASED ON YOUR EXPERTISE AND WHAT YOU HEAR FROM CHILDREN, WHAT WAYS COULD THE SYSTEM DO BETTER TO SUPPORT YOUNG PEOPLE INVOLVED IN BC FAMILY COURT PROCESSES?

13. IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD?

14. IS THERE ANYONE YOU WOULD RECOMMEND WE SPEAK TO?

*15. WOULD YOU BE WILLING TO TELL YOUNG PEOPLE ABOUT OUR PROJECT AND OUR DESIRE TO HEAR FROM THEM ABOUT THEIR EXPERIENCE ON THIS SUBJECT?

Yes No

Schedule “C”

“Meaningful Child Participation in BC Family Court Processes”

Literature Resources

A Project of the International Institute for Child Rights and Development
(IICRD)

Funded by the Law Foundation of British Columbia

Definition of Childhood & the Meaning of Child Participation

- **Andrew Aiers & Judith Kettle, *When Things go Wrong: Young People's Experience of Getting Access to the Complaints Procedure in Residential Care*, (London: National Institute for Social Work, 1998).**

“The Children’s Act (1989) for the first time gave young people the right to make complaints about the service they receive from social services departments. This study focuses on youth people in residential care and their experience of the complaints system: to what extent do they find it accessible, intelligible and effective in dealing with their concerns? Examination of the gateway to the complaints procedure was chosen since there was concern that children and young people neither had the knowledge nor the confidence to access the system and pursue a complaint.

A range of people involved in the making of a complaint was interviewed: residential workers, complaints officers, advocacy workers, as well as young people in residential care. The findings of the study revealed unsatisfactory policy, procedures and practice at Stage 1, the least visible and least publicly accountable part of the complaints process. A number of recommendations are made” (Summary)

- **“Involving Children: A Guide to Engaging Children in Decision Making”** (Unknown Date), online: Government of New Zealand, Ministry of Social Development, <http://www.msd.govt.nz/documents/publications/sector-policy/involving-children.pdf>. Gives basic principles of child participation and the barriers to implementing participation.

“Participation is more than just asking children for their ideas and views. It’s about listening to them, taking them seriously and turning their ideas and suggestions into reality. Involving children in decision-making means they can influence some of the things that affect them, and offer a different perspective from adults. It helps adults understand children’s issues, helps make sure policies and services are in tune with children’s needs, and acknowledges children’s important role in society. It also helps children and young people to gain new skills and knowledge and build their confidence in other processes, including democracy. This is a practical guide for organisations, government departments, community groups and individuals who want to engage children up to the age of 181 in effective decision-making. The Ministry of Youth Affairs has developed a companion guide, called *Youth Development Participation Guide: “Keepin’ It Real”*², on how to increase youth participation in policy development, programmes, services and organisations. We hope you’ll use both publications when you and your organisation are involving children and young people in decision-making.”

- **Alison Gray, “Increasing the Participation of Children, Young people and Young Adults in Decision-Making: A Literature Review, A Report for the Ministry of Social Development and Ministry of Youth Development” (2002)**, online: Government of New Zealand, Ministry of Social Development <<http://www.msd.govt.nz/documents/publications/sector-policy/increasing-participation-children-young-adults-in-decision-making-literature-review.pdf>>.

“This literature has been undertaken as part of the Ministries of Social Development and Youth Affairs’ Actions for Child and Youth Development work programme that combines work on the implementation of the Agenda for Children and Youth Development Strategy Aotearoa.

A particular emphasis of this work is on increasing the participation in decision-making processes of children, young people and young adults who are Maori; those from Pacific or other ethnic groups; and those with disabilities. The work covers issues specific to children, young people and young adults (0 to 24 years inclusive)...” (Background)

“This document reviews national and international literature and resources including good practice principles, practical guidelines and specific mechanisms for involving children and young people in decision-making processes. Available from the Ministry of Social Development, PO Box 12136, Wellington. Phone: (04) 916 3300. Fax: (04) 918 0099.” Online:

<<http://www.goodpracticeparticipate.govt.nz/resources/literature/engaging-specific-pop-groups.html>>

- **Jantine Hemrica & Frieda Heyting, “Tacit Notions of Childhood: An Analysis of Discourse about Child Participation in Decision-Making Regarding Arrangements in Case of Parental Divorce”, (2004) 11(4) *Childhood* 449 (Sage Publications).**

“An important issue, which plays an overt or covert part in discussions about granting or denying rights to children, are the questions in what respects and to what extent children are to be considered different from adults in specific context, and what consequences these differences should have for how they are to be treated in such contexts. As we do not have any indisputable criteria to answer such questions, we have to renegotiate definitions of ‘childhood’ and ‘adulthood’ time and again. Results vary depending on historical, cultural, and contextual circumstances... This variability makes childhood a construction... (Introduction, in part)

- **Adrian James, “Pump Up the Volume: Listening to Children in Separation and Divorce”, (1999) 6(2) *Childhood*, 189 (Sage Publications).**

This article looks at the role of law “ as a key influence in the social construction of childhood...”. (Introduction)

The article also examines children’s participation under the UK *Children’s Act*, which includes a provision requiring a “best interests” analysis with respect to custody and access decisions that is comparable to the *FRA*. The author asserts that the discretion afforded in the best interests analysis allows courts to easily ignore children’s views.

“...although s. 1(3)(a) requires courts in certain circumstances to have regard to the ‘ascertainable wishes and feelings of the child’, this is made conditional upon the court’s assessments of the child’s age and understanding. ...this is therefore ‘an open invitation to adults to use their values, life experiences, and understandings of “advocacy” to refuse to hear children’s opinions.’” (at 196)

The UK *Children’s Act* does not provide children with legal representation in custody and access disputes. “Welfare officers”, who hold positions similar to

those of family justice counselors in BC, may put children's views forward. In 1996, welfare officers wrote reports in approximately half of the divorces involving children.

"...in divorce proceedings... the court may order a welfare report to be prepared by a family court welfare officer. The welfare officer is not, however, appointed to represent the child's view but to investigate and report to the court - to act as the courts 'eyes and ears'. ...a large number of children involved in the divorce of their parents never even get to see a welfare officer." (at 196)

**Note - in BC, the percentage of custody and access reports completed in divorces involving children is likely much lower. For the period of July 1, 2002 to June 30, 2003, only 153 custody and access reports were ordered. Approximately 50 of those were "views of the child" reports (Interview of Dan VanderSluis, a policy analyst at BC Ministry of Attorney General Family Justice Services, by Marnelle Dragila, Fall 2004). Also see: "Inventory of Family Justice Services in British Columbia" at 5 (Dec. 2003), online: Government of British Columbia, Ministry of Attorney General
http://www.bcjusticereview.org/media_releases/2003/inventory_fjs_bc_12_21_03.pdf .

- Gerison Lansdown, *Promoting Children's Participation in Democratic Decision Making* (Italy: UNICEF Innocenti Research Centre, 2001).

The author discusses the importance of including children in decisions that affect their lives, and the potential harm of ignoring children's views. The author also dispels the arguments used to disregard children's views.

- Gerison Lansdown, *Evolving Capacities and Participation* (Ottawa: CIDA, 2004).

The author asserts that children's participation in decisions affecting them positively contributes to their development. Adult assumptions regarding child development often prohibits children from participating in these decisions despite their having the capacity to contribute.

"... more recent research has increased the awareness of patterns of child experienced by children in difference cultures and socio-economic environments, and has highlighted the limitations of using age as a proxy for assumptions of competence." (at 4)

"Four primary arguments arise for recognizing children's capacities to participate in their own protection. They suggest that it is not effective, morally acceptable nor practical to seek solutions to child protection without building on the resiliencies, capacities and contributions of children themselves. Over-protection can be every bit as harmful as under-protection. Of course children are entitled to protection from harm, and this does

necessitate the introduction of some legal age boundaries and provision of protective care and services. However, the right to protection is not inconsistent with the equal importance of respecting children's own participation and agency in initiatives designed to provide that protection... There is a growing body of research that testifies to the failure of many adult-designed strategies for protecting children where children themselves are not consulted or involved..." (at 15)

"Too many adult interventions are based on an adult understanding of the risks children face and the nature of protection they need. They are not informed by children's own perspectives and accordingly, often address the wrong issues with the wrong solutions". (at 16)

- "Learning to Listen: Consulting Children and Young People with Disabilities", (London: Save the Children, 2001) online:
http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/482_Learning_to_listen.pdf

"This report is based on a consultation with disabled children... The study consisted of two stages: the pilot stage, where the ideas and methods were developed with a small group of children; and the second stage, where these methods were used to consult with a wider group of children and young people.

The pilot stage took place over a three-month period, between January and April 2000. A total of 12 young people were consulted with - aged between 4 and 14 years old, and with a range of disabilities and communication needs. All the children were receiving a service from a respite care unit... The second stage took place over a four-month period, between September 2000 and January 2001. This stage focused on children and young people using a respite service (linking children with disabilities with adult carers in the community) and young people reaching transition (moving from child to adult provision). A total of 15 young people were consulted with. They were aged between 8 and 23 years, and they too had a range of disabilities and communication needs.

This report focuses on the methods and processes used to carry out the consultation. The main body of the report consists of a narrative account of the processes: looking at issues of consent; how to structure consultation sessions; and the tools used. It also addresses some of the difficulties encountered by workers. It is intended primarily as a tool for workers planning similar consultations with disabled children and young people. The checklist at the end of the report may also be useful for managers commissioning and planning similar consultations. The findings from the consultation are included in the accompanying report, *Will It Ever Get Sorted?* (Introduction)

"... there has been a growing awareness of the need to consult children and young people directly about matters concerning them, and an acceptance that such consultation is both important and practicable. This shift in attitude is due to challenges to two prevalent views:

1. that adults know and understand how children think and feel about an issue
2. that children are not mature enough to make judgements or develop opinions, they are suggestible and unreliable.

These challenges have led to the increased participation of children and youth in research that concerns their lives (Beresford, 1997). However, Cheston argues that this is much less true of disabled children, who remain an extremely neglected group (Cheston, 1994).” (Background)

- **Nick Lee, “The Challenge of Childhood: Distributions of Childhood’s Ambiguity in Adult Institutions”, (1999) 6(4) Childhood 455 (Sage Publications).**

...examines the difficulties that surround children speaking for themselves. The studies focus on... [one aspect] opportunities for children as witnesses in UK courtrooms. At each scale of analysis it is argued that rather than making clear and univocal assumptions about children’s capacities, adult institutions display an inability to decide on what status they should accord to children’s utterances, As bearers of ‘childhood’, children cut an ambiguous figure within adult institutions... Childhood’s ambiguity... is typically ‘managed’ by institutions by deferring the moment of its resolution... Deferral can push the burden of ambiguity onto children’s shoulders. It is through this deferral of ambiguity that children’s ability to speak for themselves in adult institutions is made problematic. ... [Possibilities for] increasing children’s opportunities for self-representation within adult institutions are explored”. (Executive Summary)

- **Bren Neale, “Dialogues with Children: Children, Divorce and Citizenship”, (2002) 9(4) Childhood 455, (Sage Publications).**

“The notion of listening to children so that they can participate in decision-making about their everyday lives has become an established principle of child law and policy in England and Wales. That there are fundamental constraints to putting this principle into practice, however, is widely acknowledged, particularly in the context of divorce and parental conflict. This article shows how the operation of the welfare principle in an English context constrains children’s participation within private law proceedings. It goes on to explore children’s own discourses around the issue of being listened to and reviews current debates about their participation in the light of this evidence. The children’s commentaries offer fresh insights into what it means to listen to children, along with some new ways of thinking about young people’s citizenship within and outside their families.” (Executive Summary)

- **Jeremy Roche, “Children: Rights, Participation and Citizenship”, (1999) 6(4) Childhood 475 (Sage Publications).**

“The article argues that, in addition to reconsidering what we think it is to be a child (for instance ideas about incompetence and irrationality associated with childhood), we need to rethink the value of the language of rights and the social significance of this language. Rights are not just about state-citizen relations but about how civil society should imagine itself; in this context the imagery of social conversation and participation is central to the rethinking of citizenship.” (Executive Summary)

- **David Shemmings, “Professionals’ Attitudes to Children’s Participation in Decision-Making: Dichotomous Accounts and Doctrinal Contests”, (2000) 5 Child and Family Social Work 235.**

The paper basically examines the “welfare approach” to child protection (the idea that protecting children involves keeping them from participating) as compared to the “rights-based approach” (the idea that voluntary children’s participation is in their best interest).

“The attitude of professionals to the involvement of children in decision-making is unclear. This paper discusses a recent research study that utilized qualitative and quantitative methods to explore the views of professionals working in family support and child protection about two different aspects of children’s participation in decision-making: the age at which children should make decisions and whether or not they should be involved in child protection conferences. The results showed that social workers tended to favour one of two diametrically opposed viewpoints about the age at which young people should make decisions and then in discussions with colleagues they sought to persuade others to change their perspective. Social workers who believed that young people should not make decisions until much older nevertheless thought that they should be involved in conferences whereas non-social workers did not make this distinction: for them, children who were not old enough to make decisions for themselves should not be involved in conference. The results are discussed in the light of some of the implications for practice. The paper concludes by outlining how the results informed the design of a training pack commissioned by the Department of Health concerning the involvement of young people.” (Abstract)

- Carol Smart, “From Children’s Shoes to Children’s Voices”, (July 2002) 40(3) Family Court Review 307 (Sage Publications).

“This article considers the sudden rush of enthusiasm to hear children’s voices in divorce proceedings in countries such as the United Kingdom, New Zealand, Australia, and elsewhere and points to the problems that are likely to occur if the family law system really does mean to treat children seriously. Notwithstanding the difficulties that flow from this development, it is argued that it is essential to include children’s understandings in the formulation of future policy and practice”. (Executive Summary)

International Law

Case Law

- *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2002] B.C.J. No. 2258 (B.C.C.A.), Saunders J.A.; reversed on appeal to the S.C.C on November 19, 2004, McLachlin C.J.C.

The CRC has moral force relevant to an application of s. 1 of the *Charter* (see para. 63) (which is also supported by *Slight Communications v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416). Lack of health care funding and services to autistic children violated s. 15 of the *Charter* and children’s rights under the CRC.

**Note - The Supreme Court of Canada found that the BC government’s refusal to fund a specific treatment for autistic children did not violate the children’s right to equality under the *Charter*. There was no mention of the CRC in their decision.

- *R. v. L (D.O.)*, [1993] 4 S.C.R. 419, [1993] S.C.J. No. 72 (S.C.C.), Lamar C. J. The S.C.C. cited the CRC in upholding laws that allowed children to testify by videotape in sexual assault cases.
- *G. (L.E.)v. G. (A.)*, 2002 CarswellBC 2643, 2002 BCSC 1455 (B.C.S.C.), Martinson J.

Madam Justice Martinson cited *CRC* Article 12 in support of a Provincial Court judge's decision to interview a child embroiled in a custody dispute to ensure the child's views were considered under a *Family Relations Act* s. 24 "best interest of the child" analysis. Martinson J. ordered that the views of the child should be heard, even though both parents did not consent.

- ***P.W.S. v. British Columbia (Director of Child, Family, and Community Services)***, [2000] B.C.J. No. 2656, 2000 BCSC 1754 (B.C.S.C.), Boyle J. Justice Boyle dismissed the father's appeal to add the children (ages 1 - 3) as parties to a child protection proceeding or appoint counsel for them and further held that this decision did not violate their rights under *CRC* Article 9 (children should not be separated from their parents) or the *Charter*.

Other Sources

- ***UN Convention on the Rights of the Child***, 1989, C.T.S. 1992/3, 28 I.L.M. 1456, 3 U.N.T.S.1577 [*CRC*]
See Article 12 and other related Articles
- **David Cruickshank, *The UN Convention on the Rights of the Child: Does Domestic Legislation Measure Up?*** (Vancouver: Society for Children and Youth of BC, 1998).
Includes BC Statutes and assesses how well the UN Convention on the Rights of the Child, Article 12 (child's right to have their views heard) is implemented in domestic legislation.
- **Robin M. Junger (Law Corporation), "Canadian Judicial Consideration of the United Convention on the Rights of the Child"**, April 2003 [unpublished] (Possibly available through IICRD)
Outlines 100 Canadian legal cases that have considered the UN Convention on the Rights of the Child.
- **Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes, 4th Eds.*** (Vancouver: Butterworths Canada Ltd., 2002) at 421.
Provides insight into how Canadian courts currently use international law in statutory interpretation.
- **UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*** (New York: UNICEF, 2002).
Describes the rights contained in the *UN Convention on the Rights of the Child* as interpreted by the Committee on the Rights of the Child.

Canadian Charter of Rights & Freedoms [Charter] & Natural Justice Rights

- See Sections 2, 7 and 15 of the *Charter*.

Case Law

- *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2002] B.C.J. No. 2258 (B.C.C.A.), Saunders J.A.; reversed on appeal to the S.C.C on November 19, 2004, McLachlin C.J.C.

The CRC has moral force relevant to the application of s. 1 of the *Charter* (see para. 63) (which is also supported by *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416). Denying services to children violated s. 15 of the *Charter* and children's rights under the CRC.

**Note - The Supreme Court of Canada found that the BC government's refusal to fund a specific treatment for autistic children did not violate the children's right to equality under the *Charter*.

- *R. v. L (D.O.)*, [1993] 4 S.C.R. 419, [1993] S.C.J. No. 72 (S.C.C.), Lamar C. J [cited to S.C.J.].

(Criminal law case) The accused was convicted of the sexual assault of a 9 year-old girl. S. 715.1 of the *Criminal Code* provided that in proceedings related to certain sexual offences, "in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape". This provision was upheld, as it did not violate the ss. 7 and 11(d) *Charter* rights of the accused. Chief Justice Lamar noted that s. 715.1 of the *Criminal Code* "is a response to the dominance and power which adults, by virtue of their age, have over children... s. 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth" (at para. 1). He went on to find that "The age limit of eighteen contained in s. 715.1 is not arbitrary, but rather is consistent with laws which define the age of majority to be eighteen years and with the special vulnerability of young victims of sexual abuse" (at para. 3).

- *P.W.S. v. British Columbia (Director of Child, Family, and Community Services)*, [2000] B.C.J. No. 2656, 2000 BCSC 1754 (B.C.S.C.), Boyle J.

Justice Boyle dismissed the father's appeal to add the children (ages 1 - 3) as parties to a child protection proceeding or appoint counsel for them and further held that this decision did not violate their rights under CRC Article 9 (children should not be separated from their parents) or the *Charter*.

- *Young v Young*, [1993] 4 S.C.R. 3; [1993] S.C.J. No. 112 (S.C.C.), McLaughlin J. (L'Heureux-Dube' J dissenting).

McLaughlin J.

[Regarding the Constitutionality of the Best Interest of the Child Test] “The first question is whether the *Charter* applies. Because of my conclusion later in these reasons that valid orders under the “best interests of the child” standard cannot violate the *Charter*, I find it unnecessary to decide whether the *Charter* applies to an action for access under the *Divorce Act* between two parents. For the purposes of this section, I assume that it does” (para. 25).

“...the guarantees of religious freedom and expressive freedom in the *Charter* do not protect conduct which violates the best interests of the child test” (para. 28).

“The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour of the exercise of the alleged parental right, but in favour of the interests of the child. An additional factor which may come into play in the case of older children is the “parallel right” of others referred to by Dickson J., “to hold and manifest beliefs and opinions of their own” ” (para. 33).

“I conclude that the best interests of the child test under the *Divorce Act* does not violate the *Charter* and is constitutionally valid” (para. 39).

Dissent

“It would seem to be self-evident that the best interests test is value neutral, and cannot be seen on its face to violate any right protected by the *Charter*”. (para. 173)

“...this Court has previously found that the mere existence of broad judicial discretion in a legislative provision is not in itself sufficient to attract the application of the *Charter*, nor can the presence or scope of such discretion alone give rise to an inference that *Charter* rights are thereby infringed” (para. 175).

“...it is clear that broad judicial discretion is crucial to the proper implementation of the legislative objective of securing the best interests of the child” (para. 176).

“This Court has held on occasions too numerous to require mention at this point that it will consider both the purpose and the context of a right when determining whether there has been an infringement of the *Charter*... The mere fact that the state plays a role in custody and access decisions in formalizing the circumstances of parent-child interaction does not transform the essentially private character of such interchanges into activity which should be subject to *Charter* scrutiny.

An examination of our traditional understanding of freedom of religion and expression reveals that those notions are inappropriate and ill-suited to the family, if only because of the differences in power and development and the nature of rights and obligations between parent and child. While legitimate questions may arise about the role of the state, and hence the application of the *Charter*, in regulating other aspects of family law, in my view, it is difficult to imagine that any valid purpose is served by importing the discourse of freedom of expression and religion into orders made in the resolution of custody and access disputes.

It follows that, once the best interests test itself has been found to accord with *Charter* values, the trial judge's order itself is not subject to further constitutional review, as the necessary state infringement of religious rights required to sustain a challenge based on the *Charter* is no longer present.

As s. 32 dictates, the *Charter* applies to governments and legislatures. Its purpose is to provide a measure of protection from the coercive power of the state and a mechanism of review to persons who find themselves unjustly burdened or affected by the actions of government. It is not meant to provide a means to regulate the affairs of private citizens. Thus, the sine qua non to any application of the *Charter* is the presence of state action, whether by legislation or other means" (paras. 217-220).

"In this case, there are other powerful competing interests which must be recognized, not the least of which, in addition to the best interests of the children, are the freedoms of expression and religion of the children themselves. There is cogent, persuasive evidence, found credible by the trial judge, that the children themselves do not want to discuss religion with their father or be subject to his comments about beliefs which are at odds with their own religious upbringing, whether they take the form of indoctrination, instruction or mere observations. Indeed, the letters written to the trial judge disclose that, not only do they not want it, but also that the prospect of such discussions has so profoundly disturbed the children and coloured the periods of access that they no longer wish to continue to see the respondent according to a schedule.

In such circumstances, it is obviously inadequate merely to invoke freedom of religion or expression of an access parent without considering the effect on the children and their inability to assert their own desires and rights" (paras. 239-240).

"Freedom of religion and expression are fundamental values protected by the *Charter*. However, the best interests of the child standard in the *Divorce Act* does not offend *Charter* values, but is completely consonant with the underlying objectives of the *Charter*. The *Charter* has no application to private disputes between parents in the family context, nor does it apply to court orders in the area of custody and access. While a child's exposure to different parental faiths or beliefs may be of value, when such exposure is a source of conflict and is not in the best interests of the child, such exposure may be curtailed" (para. 248).

Other Sources

- Susan B, Boyd, "The Impact of the Charter of Rights and Freedoms on Canada Family Law" (2000) 17 Can. J. Family L. 293-331 at para. 4.

"This article provides a snapshot as of 1999 of the substantially diverse ways in which the *Charter* has affected a significant field of Canadian "private law" - family law. The first part assesses the general impact of the *Charter* on family law. The second part reviews the most significant court challenges to family law based on the *Charter*. The final part offers a brief case study of the impact of the equality/anti-discrimination provisions of section 15 on family law in order to illustrate the diverse effects that the *Charter* can have. This final part also reveals the evolving approach to equality and

discrimination of the Supreme Court of Canada. Throughout the article, the complex and often contradictory ways in which rights discourse relates to legal regulation of familial relations are briefly highlighted”.

- His Honour Judge A.P. Nasmith, “The Inchoate Voice” (1991-1992) 8 C.F.L.Q. 43 at 49-51.

Judge Nasmith suggests that if a child’s non-party status in a custody proceeding reduced his or her right to be heard, it may trigger the application of the *Charter*. He points to natural justice principles as a rationale for respecting the child’s right to be heard and states that a child’s right to choose not to disclose their custodial preference should be protected.

Federal Legislation

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

BC Supreme Court has jurisdiction over divorces. The Superior Court’s discretion to interview children is based on *parens patriae* jurisdiction (inherent power to act in the best interests of children) and statutory duty to act in the best interest of children pursuant to *Divorce Act* s. 16(8).

Based on the Superior Court’s *parens patriae* jurisdiction, the court can appoint a lawyer to act as an *amicus curiae* (friend of the court), or guardian ad litem (litigation guardian) to protect the interests of a child/ The circumstances of the case will dictate which appointment, if any, is appropriate. “Factors such as the age and maturity of the child and the child’s capacity to instruct counsel, will have a bearing on which approach is best. It may be that in some cases the role of counsel will have to be a fluid one, one that changes as the case proceeds” (*Dormer, infra* at paras. 52-53). See: *Dormer v. Thomas* (1999), 65 B.C.L.R. (3d) 290 (B.C.S.C.), Martinson J [*Dormer*.]; and *A.J.L. v. L.B.L.*, [2002] B.C.J. No. 526 (B.C.S.C.), Kirkpatrick J at para. 6 [*AJL*].

Amicus Curiae - “is viewed as a neutral officer of the court whose role is to facilitate an informed judicial decision in custody and access proceedings and who ensures that all relevant evidence is before the court” (*Dormer, supra* at para. 45).

Litigation Guardian - “is appointed to protect the interests of the child and must decide what is in the best interests of the child and submit an informed opinion of those interests to the court. The opinion of the guardian need not be the same as the wishes of the child” (*Dormer, supra* at para. 46).

Child Advocate - “is in fact an advocate on behalf of the child. This is the more traditional role that lawyers play. The advocate must present and attempt to advance the child’s wishes” (*Dormer, supra* at para. 47).

Taking account of children’s views is not specifically mentioned in the *Divorce Act*, but judges often use the same “best interest of the child” criteria listed under *FRA* s. 24. See *G. (L.E.) v. G. (A.)*, 2002 CarswellBC 2643 (B.C.S.C.), Martinson J at para. 16.

Bill C-22: This Bill was a proposed amendment to the *Divorce Act*. It died on the Order paper when the 2nd session of the 37th Parliament ended on November 12, 2003. If the Bill had become law, the *Divorce Act* would have been amended to include a list of specific criteria to use when determining the best interest of the child. For example, pursuant to s. 16.2(2)(f), the court was to consider all the needs and circumstances of the child, including the child's views and preferences, to the extent that they could reasonably be ascertained.

BC Legislation

- **B.C. Reg. 221/90 -- Supreme Court Rules, Rules: 28, 38, 40, and 51.**
Permits evidence to be given by affidavit, or by filing a transcript of an out-of-court examination on oath before a court reporter or other person appointed by the court.

- ***Child, Family and Community Service Act*, R.S.B.C. 1996, C. 46 [CFCSA]**

Relevant Sections include:

- S. 2(d) Guiding Principle
- S. 4(f)-Child's Views Included as a Factor in Determining Their Best Interests
- S. 6-Voluntary Care Agreements
- S. 7-Special Needs Agreements
- S. 12.2(4)-Support Services for Youth
- S. 16(4)-Determining if the Child Needs Protection
- S. 21(3)-Plan of Care Explained to Child 12 years and older, Views Taken into Account
- S. 25(5)-Unattended Child's Right to Consent to Health Care
- S. 26(1)-Lost or Runaway Child- a director *may* take charge of a child for a period of up to 72 hours if it appears to the director that the child is lost or has run away.
 - Child's views appear to be irrelevant.
- S. 28(2)(b), S. 33.1(2)(a), S. 38(1), S. 42.1(3)(b), S. 42.2(1), S. 44(2), -Notice of Hearings if Child is 12 years or older
- S. 29(2)(b)-Child Who Need Essential Health Care/Notice of Hearing to Child if Capable of Consenting to Health Care
- S. 38(1)(d)(i)-For an aboriginal child, who is not a Nisga'a child, Notice of Protection Hearing must be served on a designated representative of an aboriginal community that has been *identified by the child, if 12 years or older*
- S. 39(4)-Court may order that a person be a party at any hearing
- S. 42.2(2)-If a person referred to in s. 42.2(1)(b-d) appears at the start of the hearing, they are entitled to be a party at the hearing.
 - Specifically excludes children, since children over 12 are referred to under s. 42.2(1)(a) [unless the court decides to make them a party under s. 39(4)].
- S. 60-Consent Orders
- S. 70(c)-Rights of Children in Care

Child Protection Mediation

S. 22 of the *CFCSA* - "allows parents and the Director to settle disputes about a plan of care or other issue by mediation or another dispute resolution"

process. Participation in mediation is voluntary and parties must choose a mediator from the roster of mediators established by *CFCSA* Regulation... Income is not a factor... The cost of mediation is borne by the Province of BC.” “Inventory of Family Justice Services in British Columbia”, online: BC Justice Review Taskforce at 11 <http://www.bcjusticereview.org/media_releases/2003/inventory_fjs_bc_12_21_03.pdf>

CFCSA S.23 - “allows judges to adjourn cases for up to 3 months so that mediation can proceed” (Q & A, *infra* at 1)

CFCSA S.24 - “requires mediation to be a confidential process” (Q & A, *infra* at 1)

CFCSA Regulation S.10 - “allows the Ministry to pay some or part of any day-to-day expenses families might have to attend mediation, such as day-care costs, food, and transportation”. (Q & A, *infra* at 1)

“A social worker will always attend mediation. A Team Leader/Supervisor may attend if the case is especially complex or difficult... The parents or guardians of the child will always attend mediation. Ideally, everyone who is required to be present for a court order to be made should be present... A child older than 12 years of age may attend mediation. However, experience in B.C. in child protection mediation suggests older children seldom attend mediation”. (Q & A, *infra* at 3-4)

“When it is not in the child’s best interests to attend the mediation, the mediator ensures the individuals participating in mediation are aware of and address the need for: the views of the child with capacity to be heard before the mediation; the views of the child with capacity to be represented during the mediation, which may involve selecting someone to attend the mediation in the child’s place; and either the Director or the mediator to discuss the outcome of the mediation with the child and obtain the child’s views about the outcome”. (Q & A, *infra* at 8-9)

“Child Protection Mediation Questions & Answers”, online: Government of British Columbia, Ministry of the Attorney General [Q & A]
< <http://www.ag.gov.bc.ca/dro/child-protection/documents/Qs&As.pdf> >.

It is not clear whether it is typical Ministry practice to expressly invite children to attend these mediations, or whether children who wish to attend are encouraged to do so. This is a relatively new service provided by the Ministry. (Information received from Child & Youth office by Marnelle Dragila, Fall 2004)

Other Sources

- **Judge Thomas J. Gove, *Judge-Mediated Case Conferences-A Meaningful Way of Hearing Children*** (unknown year) [unpublished].

“In child protection cases, [BC’s *CFCSA*] promotes a child-centered approach by giving any child 12 years of age or over the right to notice of and to participate in all court proceedings. A judge can order that anyone, including a child, be made a party to the proceedings, with the right to call witnesses, and make submissions. In addition to making a child a party, a Judge can also ask that counsel be appointed to represent the child during the proceedings. (at 2)

If an order under the [CFCSA] for custody or access is to be made by consent, consent of a child 12 years of age or older is necessary and the child is entitled to independent legal advice. This respects the principle that children should participate in a meaningful way, appropriate with their development, in designing the plan for their lives... (at 2)

In [BC], the [CFCSA] provides for Judges to be involved in judge-mediated case conferences. It is mandatory where the Director applies for the first order of protection. It is optional on other applications; however, Judges almost always order case conferences where there is not an agreement between the parties... (at 3)

Under the [CFCSA], when the Director applies to court for an order of custody or supervision, the Director presents a plan to the family. If the parents, or a child 12 years of older, do not consent to an order which includes the plan, a case conference is arranged within 30 days of the court appearance... (at 5)

Prior to the case conference a Judge would want to consider the ages of the children and, where appropriate, either make them parties or at least ask that they be invited to attend the conference... Case conferences are not open to the public. On some cases the Judge may allow other people directly involved with the family to be present. Because in [BC], a child over the age of 12 is entitled to be present, the Judge may expect an explanation if the child is not at the case conference. Also, a Judge may wish to inquire as to the child's maturity and interest and invite any child who is between ages 9 and 11 to be present. Children often are not in the room during the entire conference. Usually they can tell the Judge what part they want to be present for, and what part they would rather miss". (at 5)

- ***Family Relations Act, R.S.B.C. 1996, C. 128 [FRA]***

Relevant Sections include:

- S. 2(1)-AG can appoint Family Advocate, who may intervene at any stage of the proceeding to act as counsel for the interests and welfare of the child.
 - *Note - this section remains in the Act but no longer applies. There is no longer a Family Advocate in BC (see below).
- S. 3(1)-AG can appoint a family court counsellor
- S. 3(3)-Subject to Canadian Law, family court counsellor must keep information given by the child confidential unless the child consents.
- S. 4(2)-gives a child, who is or has been married, legal capacity to make, conduct or defend an application under the Act.
- S. 15 - Expert witnesses in family matters
 - 15(1)- In a proceeding under this Act, the court may, on application, including an application made without notice to any other person, direct an investigation into a family matter by a person who
 - (a) has had no previous connection with the parties to the proceeding or to whom each party consents, and
 - (b) is a family counsellor, social worker or other person approved by the court for the purpose.
 - 15(2) - A person directed to carry out an investigation under subsection (1) must report the results of the investigation in the manner that the court directs.
 - 15(3) - A person must not report to a court the result of an investigation under subsection (1) unless, at least 30 days before the report is to be given to the court, the person serves a copy of the report on every party to the proceeding.

- 15(4) - If satisfied that circumstances warrant, the court may grant an exemption from subsection (3).
- S. 24(1)(b)-*If appropriate*, the views of the child are taken into account to determine the best interest of the child.
- S. 30(2)-Appointment of a guardian by consent of child if the child is 12 years old or older OR if the appointment is in child's best interests.

Former Role of the Family Advocate (also called "Child Advocate" in case law)

The Family Advocate acted "as counsel for the interest and welfare of the child", but did not take instructions from children.

The Family Advocate advised the Court on matters concerning: guardianship of a child, or of the child's estate; custody of, maintenance for, or access to a child; and/or the *Child, Family and Community Service Act (CFCSA)*. Once the Family Advocate was appointed, they could intervene at any stage of the proceedings.

The Advocate's role was similar to that of a litigation guardian. A litigation guardian "is appointed to protect the interests of the child and must decide what is in the best interests of the child and submit an informed opinion of those interests to the court. The opinion of the guardian need not be the same as the wishes of the child" (*Dormer, infra* at para. 46 & 49). The Attorney General appointed the Family Advocate, not the court, however the court could recommend the appointment. It was a publicly funded position. The Family Advocate acted as an ad hoc official of the Crown, but not necessarily as an "agent" of the Crown. Once the Family Advocate was appointed, the advocate alone decided the appropriate course to follow, and did not take instruction from the Attorney General. See: *Gareau v. Superintendent of Family and Child Services for British Columbia et. al.* (1986), 2 B.C. L.R. (2d) 268, 1986 CarswellBC 109 (B.C.S.C.), Southin J at paras.4-20 [*Gareau*, cited to Carswell]; and *Dormer v. Thomas* (1999), 65 B.C.L.R. (3d) 290 (B.C.S.C.), Martinson J at paras. 46 & 49. Also see: "Family Court Manual" (ch. 1), online: Government of British Columbia, Ministry of Attorney General <<http://www.ag.gov.bc.ca/courts/manuals/fcm/1chapter/people.htm>>.

Judges stated their gratitude for the assistance of the family advocate in supporting the children, who were involved in the litigation, to express their viewpoints. See for example, *A.H. v. P.C.*, [2002] B.C.J. No. 589 (B.C.P.C.), Gedye Prov. Ct. J at para. 25.

Despite the fact that s. 2 of the *Family Relations Act* still refers to the Family Advocate, there is no longer a Family Advocate in BC. Currently, if "a judge indicates his or her intention to order a Family Advocate, the court clerk shall advise the judge that the Ministry of Attorney General no longer provides a Family Advocate Service, and that no similar alternative service is available". "Family Court Manual" (ch.2), online: Government of British Columbia, Ministry of Attorney General <http://www.ag.gov.bc.ca/courts/manuals/fcm/2chapter/appoint_fa.htm>.

Other Sources

- Madam Justice Carol Mahood Huddart and Jeanne Charlotte Ensminger, "Hearing the Voice of Children" (1991/1992) 8 C.F.L.Q. 108-109.

- Frank Maczko, “Some Problems with Acting for Children” (1979) 2 Can. J. Fam. L. 267.

*Dated but a potential starting point for understanding the former role of the Family Advocate in custody and access proceedings.

Family Court Counsellors (FJCs)

Family Relations Act (FRA) s. 3

“Family justice counsellors are part of the Family Justice Services Division of the Justice Services Branch, Ministry of Attorney General. They are located in the offices of Family Justice Centres. The Attorney General appoints counsellors under section 3 of the *FRA*, to provide counselling and mediation services for people who want help to resolve their family problems. They help parents negotiate their differences, and search for solutions that will meet the needs of both the parents and the children involved.” “Family Court Manual” (ch.2), online: Government of British Columbia, Ministry of Attorney General <http://www.ag.gov.bc.ca/courts/manuals/fcm/2chapter/appoint_fa.htm>

Family Relations Act (FRA) s. 15

“A judge [from Provincial or Supreme Court] may order a *Custody and Access Report* (under section 15 of the *FRA*) directing the counsellor to investigate a family matter. The counsellor completes the investigation, then submits the *Report* to the court to help the judge make a decision about custody, guardianship, access, or visitation rights.”

“Family Court Manual” (ch.2), online: Government of British Columbia, Ministry of Attorney General <http://www.ag.gov.bc.ca/courts/manuals/fcm/2chapter/appoint_fa.htm>

“A judge may also refer a case to a family justice counsellor for mediation, and may order a mediation report to be prepared.” “Family Court Manual” (ch.2), online: Government of British Columbia, Ministry of Attorney General <http://www.ag.gov.bc.ca/courts/manuals/fcm/2chapter/appoint_fa.htm>

S. 15 reports may be full child and access reports, or “views of the child” reports

Full Reports - The FJC focuses their report on the best interest of the child, using the factors set out under s. 24 of the *FRA*, including the views of the child. The FJC makes recommendations regarding custody and access.

“Views of the Child” Reports - The focus of the report is the views of the child/children on the issue being addressed in Court. These make up 1/3 of the reports ordered.

(Interview of Dan VanderSluis, a policy analyst at BC Ministry of Attorney General Family Justice Services, by Marnelle Dragila, Fall 2004)

FJCs “must assess factual information regarding each parent and her/his relationship with the child/children in the context of the issue being disputed by the [parties]”. FJC’s make recommendations regarding custody and access, in an objective manner, to assist the Court in determining what is in the best interests of the child. The Court may order a private report, but the parties pay for these themselves. Unless the Court specifically orders a private report,

a request for a custody and access report will be completed by an FJC. "Family Justice Services Manual of Operations" (ch. 6) (Last revised June 2005) online: Government of British Columbia, Ministry of Attorney General <<http://www.ag.gov.bc.ca/justice-services/publications/fjsd/policy/manual.pdf>>

There is a backlog of court-ordered reports due to limited government funding. "In 1997, the Ministry decided, based on its ADR strategic initiatives, to allocate 90% of family justice services resources to early opportunity/community-based family dispute resolution and 10% to reports for the court".

"Inventory of Family Justice Services in British Columbia", online: BC Justice Review Taskforce at 5 <http://www.bcjusticereview.org/media_releases/2003/inventory_fjs_bc_12_21_03.pdf>

Judges have expressed frustration with the institutional delay (see for example, *D.A. v. J.A.*, [2002] B.C.J. No. 850 (B.C.S.C.), Burnyeat JS). It is not possible to get around the institutional delay by ordering the report's completion by a specific deadline. The government's funding limitations with respect to custody and access reports have been explained to and accepted by the judiciary. (Interview of Dan VanderSluis, a policy analyst with BC Ministry of Attorney General Family Justice Services, by Marnelle Dragila, Fall 2004)

Upon receipt, FJCs determine the order in which the reports will be completed. "Priority is given to intractable disputes where safety of the children is in question, violence is or has been a factor in the relationship, repeated or extended denial or access if alleged, or one of the parties resides in another jurisdiction. Priority is given to assessments ordered where one or both parties are not represented by legal counsel or where legal counsel is appointed by the Legal Services Society".

"Family Justice Services Manual of Operations" (ch. 6) (Last revised June 2005) online: Government of British Columbia, Ministry of Attorney General <<http://www.ag.gov.bc.ca/justice-services/publications/fjsd/policy/manual.pdf>>

Due to the limited reports being completed, government financial constraints, and the priority structure, publicly funded s. 15 reports are probably not the most expedient means of putting a child's view in front of the Court.

Involvement of Children in Family Justice Centre Mediation

FJCs will only involve children if the FJC "has employer required training to address the involvement of children in mediation; in the [FJCs] judgment, involving the child is beneficial to the child and the [ADR] process; Both [parties] consent and they and the [FJC] agree how the child will participate and how the child's information and views are used in [ADR]; and the child consents to participate and understands his or her role in the process".

"Family Justice Services Manual of Operations" (ch. 4) (Last revised June 2005) online: Government of British Columbia, Ministry of Attorney General <<http://www.ag.gov.bc.ca/justice-services/publications/fjsd/policy/manual.pdf>>

Case Law & FRA s. 24 (1)(b)

- *Young v Young*, [1993] 4 S.C.R. 3; [1993] S.C.J. No. 112 (S.C.C.), McLaughlin J. (L'Heureux-Dube' J dissenting).

McLaughlin J.

"The evidence shows that the elder two daughters like their father but, as time went on, came to dislike his religious instruction" (para. 4).

"Wood J.A. noted that while it may be in the best interests of the child that the custodial parent be allowed to enforce religious practices against the child's wishes, that rationale did not extend to the access parent. Both limitations on the right to access found by the Court of Appeal are grounded in the best interests of the child" (para. 49).

"I do not share the view of the majority of the Court of Appeal that expert evidence is required in all cases. Nor am I convinced that the failure of the child to consent to instruction necessarily precludes the conclusion that such instruction by the access parent is in the best interests of the child. Apart from these caveats, I substantially subscribe to the views expressed by Wood J.A.

The majority of the Court of Appeal held that the evidence did not establish that harm was being caused to the children. On the issue of the children's consent, Wood J.A. concluded that no order was necessary because Mr. Young had confirmed under oath that he would respect his children's wishes with respect to the activities they objected to -- attending services with him and accompanying him on his proselytizing missions...

If one accepts, as did the majority of the Court of Appeal, that the issue of the children's accompanying Mr. Young to services and in his evangelical efforts is resolved by Mr. Young's undertaking -- and I see no reason not to do so given his record of compliance to date -- the only issue is whether the order forbidding Mr. Young to discuss religion with his children is valid"(paras. 50-52).

Dissent

"...it is important to emphasize the importance of the evidence of children in custody and access disputes, and I would not wish to suggest that their testimony alone might not be a sufficient evidentiary basis upon which to restrict access. Courts have increasingly come to accept and understand in the criminal context that children themselves can be a reliable source of evidence to the judge (*R. v. Khan*, [1990] 2 S.C.R. 531). To disregard their evidence when their own interests are directly at issue would, in my opinion, be at odds with this clear evolutionary trend in the law" (para. 209).

"it may be apparent to the judge from the evidence of the parties and often the children themselves that access should only be granted subject to certain conditions" (para. 212).

"Expert evidence, while helpful in some cases, is not routinely required to establish the best interests of the child. That determination is normally possible from the evidence of the parties themselves and, in some cases, the testimony of the children involved" (para. 247).

"The trial judge also had access to the direct testimony of the two older children who wrote letters to the judge which are most revealing of their state of mind. From the letters, it is evident that both are afraid to disclose their thoughts about the visits to their father for fear that he will make them feel guilty. Adrienne, the eldest, wrote that she did not want to visit him or sleep overnight because she thinks he will trick her into doing things and quiz her about the Jehovah's Witness religion. She expressed frustration regarding access, visitation and the court proceedings, saying "It's driving me crazy." Natalie, the middle child, evinced considerable distress about the family situation, stating that her

father makes her feel guilty and makes her cry when she wants to go home from access visits, and that she is afraid to tell him. She repeated that she wanted the court proceedings to be over.

...evidence amply demonstrates the stress the children were under, much of it related to the children's resistance to becoming involved in their father's religious practices. The trial judge can in no way be said to have erred in finding that the best interests of these children were served by removing the source of conflict, particularly as the ultimate purpose of the restrictions was to preserve the relationship between the respondent and his children.

Moreover, there was evidence leading the trial judge to conclude that the respondent would not respect the wishes of the children without an order to do so. As the family court counsellor reported, "it is of concern that Mr. Young does not acknowledge the choice of the older children to remain with their mother". Proudfoot J. found as a fact that the respondent wanted custody in order to control the religious upbringing of the children. In other words, she found that his interest was not simply to share or communicate these beliefs; rather, he fundamentally disagreed with allowing the appellant control over religious matters. This finding of fact is difficult to reconcile with the Court of Appeal's ruling that the trial judge was in error since, in their view, the respondent was bound to respect his children's wishes not to attend at his place of worship or accompany him on his proselytization efforts, which is exactly what the trial judge ordered. However, they discarded the evidence that the respondent was not willing to do so voluntarily. The trial judge had made a finding that the respondent could not be relied upon to act in the best interests of the children as regards his religious practices when exercising access. That finding should have been respected by the Court of Appeal" (paras 257-259).

"It is not the fact that the parents differ in their fundamental beliefs that warrants the restrictions in this case. It is the finding of fact made by the trial judge, on the basis of evidence she found credible, that continuing conflict over religion, including the respondent's repeated attempts to discuss religious matters with the children against their clearly expressed desires, profoundly disturbed the children and was contrary to their best interests. At the time of trial, the respondent was not engaging in other religious activities with the children, as they had already been curtailed by the interim order almost a year and a half earlier. Therefore, it is *precisely* these continuing "discussions" that were disturbing the children, causing the deterioration of their relationship with their father and which, therefore, had to be curtailed" (para. 265).

Case Law & s. 15 Reports

- ***Bjorge v Bjorge***, [2004] B.C.J. No. 927 (BCSC), Owen-Flood J.
The parties entered into a consent order to take part in a "Views of the Child" report to be performed by a psychologist.
- ***D.A. v J.A.***, [2002] B.C.J. No. 850 (BCSC), Burnyeat J.
The judge ordered a s. 15 report from Family Justice Services with a short deadline and expressed frustration with institutional delays of 10 months to 1 year in producing s.15 reports.
- ***Driver v Driver***, [2000] B.C.J. No. 1612 (BCSC), Coultas J.
The judge allowed a report that was not a s. 15 report into evidence for the limited purpose of relating the views of the children with respect to where they wanted to live.
- ***Marshall v Atwall*** Oct 3, 2002 Unreported Nanaimo No. ED026650
The judge wanted a s. 15 report instead of speaking the children directly.
- ***Mitchell v Mitchell***, [2000] B.C.J. No. 0551 (B.C.S.C.), Master Horn.
Master Horn ordered a s. 15 report to get the children's views as well as other limited findings

- ***Tobin v Ward***, [2002] B.C.J. No. 1670 (BCSC), Roger J.
There was no custody and access report. The judge noted that he only had self-serving evidence from the parents regarding the child's views.
- ***Young v Young***, [1993] 4 S.C.R. 3; [1993] S.C.J. No. 112 (S.C.C.), McLaughlin J. (L'Heureux-Dube'J dissenting).

McLaughlin J.

"Expert evidence, while helpful in some cases, is not routinely required to establish the best interests of the child. That determination is normally possible from the evidence of the parties themselves and, in some cases, the testimony of the children involved" (para. 247).

Dissent

"while the evidence of experts may form a valuable and necessary part of some custody and access decisions, most of the time they are unnecessary to an ordinary determination of the best interests of the child. Nor does the prospect of access restrictions inevitably require resort to expert opinion, as it may be apparent to the judge from the evidence of the parties and often the children themselves that access should only be granted subject to certain conditions" (para. 212).

"Expert evidence, while helpful in some cases, is not routinely required to establish the best interests of the child. That determination is normally possible from the evidence of the parties themselves and, in some cases, the testimony of the children involved" (para. 247).

Referring to a s. 15-type of report...

"Donna MacLean, in her report of January 30, 1989, essentially corroborated this finding. In the updated report of April 18, 1989, she noted that the children were unhappy with the access visits and that their relationship with their father was deteriorating because he was making the children feel guilty and uncomfortable by questioning them" (para. 256).

"Moreover, there was evidence leading the trial judge to conclude that the respondent would not respect the wishes of the children without an order to do so. As the family court counsellor reported, "it is of concern that Mr. Young does not acknowledge the choice of the older children to remain with their mother" (para. 259).

Other Sources

- **Judge Thomas J. Gove, *Judge-Mediated Case Conferences-A Meaningful Way of Hearing Children*** (unknown date) [unpublished].

"Case conferences are also provided for in the [FRA]. Parents are usually first asked to attend a "parenting after separation" course and meet with a family justice counselor for mediation. If the counsellor is not able to help the parties reach a resolution, a case conference before a Judge may be set to address any outstanding issues. If the judge-mediated case conference does not lead to a resolution of the issues, the case can be set for trial, hopefully with the issues now defined... (at 3)

Children and youth, whether formally made parties or not, can participate in the case conference. The extent of their involvement might depend on their age, maturity, and the resources that the adults make available to them... (at 5)

In cases involving custody and access disputes between parents, children may wish to tell those present how they best see their weeks or months structured. This may be more meaningful than asking them who they want to live with. (at 7)

- **Pauline O'Connor, "Voice and Support Programs for Children Experiencing Parental Separation and Divorce"**, online: Department of Justice Canada <<http://canada.justice.gc.ca/en/ps/pad/reports/2004-FCY-2/2004-FCY-2E.pdf>>. "Commentators and researchers are divided over whether, and how, children should be included in their parents' mediation and counselling concerning custody and access disputes. Proponents argue that including children gives them a sense of control over their fate, a place to express and deal with feelings they may not be expressing to their parents, and lets them know what is happening. In addition, they often argue that children have a right to be heard. Opponents say that including children makes them feel responsible for making the decisions, and exposes them to parental anger, retribution, manipulation and greater inter-parental conflict. More commentators endorse children's inclusion when it is indirect, for example, when children meet separately with the mediator, or meet with their parents in a group of children and parents, or when counsellors meet with parents at the conclusion of a program to help children's adjustment. A few commentators argue that the benefits of putting children directly into mediation at its most difficult moments (e.g. when breaking an impasse) outweigh the psychological costs to them. Many commentators caution that in whatever way younger children are involved, their wishes should always be balanced against other considerations, because their wishes may not be authentic.

Interviews with provincial court officials indicate that court-based practitioners rarely include children in mediation, especially younger children, and that many believe doing so harms them. The literature suggests most mediators are reluctant to include children and some think it puts them in a conflict of interest. Some preliminary evidence suggests that including children *indirectly* in mediation may not generally harm them and may serve their interests". (at v - vi)

- ***Office for Children and Youth Act, S.B.C. 2002, c.50.***

(BC) *Office for Children and Youth Act*

The Office for Children and Youth was established in September 2002 under the *Office for Children and Youth Act*. It "monitors services provided under *CFCSA* and *Adoption Act*; conducts investigations at the request of the Attorney General; provides information on services for children and families, provides government with advice on policy and practice; in extraordinary circumstances will advocate on behalf of children and youth to ensure that their views are heard and considered". "Inventory of Family Justice Services in British Columbia", online: BC Justice Review Taskforce at 14 <http://www.bcjusticereview.org/media_releases/2003/inventory_fjs_bc_12_21_03.pdf>

The *Office for Children and Youth Act* emphasizes assisting children and youth to advocate for themselves - see s. 3(2). The Office for Children and Youth does not generally provide individual advocacy services for children with respect to complaints (*Core Services Review, infra* at 6). Instead the office gives children information on

how to advocate for themselves. According to information provided by the Office for Children and Youth to Marnelle Dragila in December 2003, despite the wording of s. 3(2)(c) of the *Office for Children and Youth Act* (which states that the child and youth officer may “in exceptional circumstances, advocate on behalf of individual children and youth to ensure that their views are heard and considered”), legal advocacy for individual children is not provided by the Office.

Therefore, the Office for Children and Youth is not a means of putting children’s views before the Court.

Other Sources

- BC Government News Release Feb. 2002 at <http://www2.news.gov.bc.ca/nrm_news_releases/2002AG0029-000489.htm>
- Jane Morley, Q.C., “Core Services Review of the Children’s Commission and the Overlapping Services Provided by the Child, Youth and Family Advocate, the Ombudsman, the Coroner, and Ministry of Children and Family Development” (Dec. 2001) [*Core Services Review*], online: Government of British Columbia <http://www.gov.bc.ca/ajp/down/morley_childrens_comm.pdf>.

Legislation in other Jurisdictions

Ontario

- *Children’s Law Reform Act*, R.S.O. 1990, c. C.12 -deals with custody/access
- S. 24(2)-“Best Interests” Provision
- S. 64-gives judge discretion to interview a child without consent of parties. (See *G. (L.E.) supra* at 12 for similar provisions in other provinces).
 - *Courts of Justice Act*, R.S.O. 1990, c. C.43
- S. 89(3)-Children’s lawyer shall act as litigation guardian of a minor
- S. 112(1)-Office of the Children’s Lawyer can start an investigation and submit reports and recommendations to the court in a proceeding under the *Divorce Act* or *Children’s Law Reform Act*, where there is a question concerning custody/access.

Role of the Children’s Lawyer

“The Office of the Children’s Lawyer is a law office in the Ministry of the Attorney General which delivers programs in the administration of justice on behalf of children under the age of 18 with respect to their personal and property rights. Lawyers within the office represent children in various areas of law including child custody and access disputes, child protection proceedings, estate matters and civil litigation. Clinical investigators prepare reports for the court in custody/access proceedings and may assist lawyers who are representing children in such matters”.

Ontario Ministry of the Attorney General Home page online: Government of Ontario, Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl>>

Child Protection Cases

“Protection proceedings in court occur when children may be in need of protection for many reasons, including abuse and neglect, and therefore may be removed from their families by the Children's Aid Society (or Family and Children's Services) through a court order. The Children's Aid Society, the child's parents or other caretakers usually have their own lawyers to represent them in court. In these cases, the court may request the appointment of an independent legal representative for a child under the *Child and Family Services Act*. This happens when the court believes a lawyer for a child is necessary to represent the child's interests in protection proceedings”.
Ontario Ministry of the Attorney General Home page online: Government of Ontario, Ministry of the Attorney General
<<http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp>>

Custody and Access Cases

“Court proceedings about child custody and access are usually between the child's mother and father. In most cases, the parents have lawyers who represent them in the case. Where there is a dispute before the court about the child's custody or access, a court may request the appointment of the Children's Lawyer under the *Courts of Justice Act*. This happens when the court requires independent information and representation about the interests, needs and wishes of the child who is the subject of the proceedings. The Children's Lawyer's involvement in custody/access cases is to provide a legal representative (a lawyer) for the child or to prepare a report, or a combination of both. The Children's Lawyer does not represent children in child support matters in custody/access cases”.
Ontario Ministry of the Attorney General Home page online: Government of Ontario, Ministry of the Attorney General
<<http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp>>

Clinical Investigator Services

“The Office of the Children's Lawyer has some clinical investigators on staff as well as other clinical investigators hired on a fee-for-service basis throughout Ontario, who prepare Children's Lawyer reports in custody and access cases. The clinical investigators use alternative methods of dispute resolution to try to help parents to resolve their dispute. If the dispute is not resolved by the parties, a Children's Lawyer Report is filed with the court”.
Ontario Ministry of the Attorney General Home page online: Government of Ontario, Ministry of the Attorney General
<<http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp>>
The Children's Lawyer does not take all cases that are referred. For a list of intake criteria, see:
Ontario Ministry of the Attorney General Home page online: Government of Ontario, Ministry of the Attorney General
<<http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/intake.asp>>

Canadian Case Law

Supreme Court of Canada

Custody & Access

- ***Stevenson v. Florant***, [1925] S.C.R. 532, 4 D.L.R. 530, 1925 CarswellQue 71 (S.C.C.) [head notes cited to S.C.R.].

Family Law --- Habeas corpus involving children.

Wider jurisdiction with respect to infants than in other cases of habeas corpus -- Custody to be awarded, where child of tender years, to person legally entitled -- Inquiry by Court -- Constructive detention where child not in legal custody -- Different principles where child of sufficient age to choose -- Capacity determined solely by age -- What age required -- Civil Code of Quebec, art. 1114.

...If an infant, brought before the Court on habeas corpus, is old enough to exercise a choice as to where he wishes to live, the Court will not constrain him, but will leave him to select. If, however, he is too young to make this choice, the Court will then look to the principles of law [in Quebec, to the Civil Code] to see who is entitled to custody... The capacity to choose must be determined on the basis of the child's age, rather than of its mental capacity. The age at which a child should be deemed to have sufficient discretion was fourteen in the case of a boy, and sixteen in the case of a girl... The Court, in awarding custody, will consider the interest of the child, but the interest of the child is not to be confused with the wish or will of the child, which, in the case of children of tender years, will be disregarded.

- ***Young v Young***, [1993] 4 S.C.R. 3; [1993] S.C.J. No. 112 (S.C.C.), McLaughlin J. (L'Heureux-Dube' J. dissenting).

McLaughlin J.

"The evidence shows that the elder two daughters like their father but, as time went on, came to dislike his religious instruction" (para. 4).

"Wood J.A. noted that while it may be in the best interests of the child that the custodial parent be allowed to enforce religious practices against the child's wishes, that rationale did not extend to the access parent. Both limitations on the right to access found by the Court of Appeal are grounded in the best interests of the child" (para. 49).

"I do not share the view of the majority of the Court of Appeal that expert evidence is required in all cases. Nor am I convinced that the failure of the child to consent to instruction necessarily precludes the conclusion that such instruction by the access parent is in the best interests of the child. Apart from these caveats, I substantially subscribe to the views expressed by Wood J.A.

...the Court of Appeal held that the evidence did not establish that harm was being caused to the children. On the issue of the children's consent, Wood J.A. concluded that no order was necessary because Mr. Young had confirmed under oath that he would respect his children's wishes with respect to the activities they objected to -- attending services with him and accompanying him on his proselytizing missions...

If one accepts, as did the majority of the Court of Appeal, that the issue of the children's accompanying Mr. Young to services and in his evangelical efforts is resolved by Mr. Young's undertaking -- and I see no reason not to do so given his record of compliance to date -- the only issue is whether the order forbidding Mr. Young to discuss religion with his children is valid"(paras. 50-52).

Dissent

"...it is important to emphasize the importance of the evidence of children in custody and access disputes, and I would not wish to suggest that their testimony alone might not be a

sufficient evidentiary basis upon which to restrict access. Courts have increasingly come to accept and understand in the criminal context that children themselves can be a reliable source of evidence to the judge (*R. v. Khan*, [1990] 2 S.C.R. 531). To disregard their evidence when their own interests are directly at issue would, in my opinion, be at odds with this clear evolutionary trend in the law” (para. 209).

“it may be apparent to the judge from the evidence of the parties and often the children themselves that access should only be granted subject to certain conditions” (para. 212).

“Expert evidence, while helpful in some cases, is not routinely required to establish the best interests of the child. That determination is normally possible from the evidence of the parties themselves and, in some cases, the testimony of the children involved” (para. 247).

“The trial judge also had access to the direct testimony of the two older children who wrote letters to the judge which are most revealing of their state of mind. From the letters, it is evident that both are afraid to disclose their thoughts about the visits to their father for fear that he will make them feel guilty. Adrienne, the eldest, wrote that she did not want to visit him or sleep overnight because she thinks he will trick her into doing things and quiz her about the Jehovah's Witness religion. She expressed frustration regarding access, visitation and the court proceedings, saying “It's driving me crazy.” Natalie, the middle child, evinced considerable distress about the family situation, stating that her father makes her feel guilty and makes her cry when she wants to go home from access visits, and that she is afraid to tell him. She repeated that she wanted the court proceedings to be over.

...evidence amply demonstrates the stress the children were under, much of it related to the children's resistance to becoming involved in their father's religious practices. The trial judge can in no way be said to have erred in finding that the best interests of these children were served by removing the source of conflict, particularly as the ultimate purpose of the restrictions was to preserve the relationship between the respondent and his children.

Moreover, there was evidence leading the trial judge to conclude that the respondent would not respect the wishes of the children without an order to do so. As the family court counsellor reported, “it is of concern that Mr. Young does not acknowledge the choice of the older children to remain with their mother”. Proudfoot J. found as a fact that the respondent wanted custody in order to control the religious upbringing of the children. In other words, she found that his interest was not simply to share or communicate these beliefs; rather, he fundamentally disagreed with allowing the appellant control over religious matters. This finding of fact is difficult to reconcile with the Court of Appeal's ruling that the trial judge was in error since, in their view, the respondent was bound to respect his children's wishes not to attend at his place of worship or accompany him on his proselytization efforts, which is exactly what the trial judge ordered. However, they discarded the evidence that the respondent was not willing to do so voluntarily. The trial judge had made a finding that the respondent could not be relied upon to act in the best interests of the children as regards his religious practices when exercising access. That finding should have been respected by the Court of Appeal” (paras 257-259).

“It is not the fact that the parents differ in their fundamental beliefs that warrants the restrictions in this case. It is the finding of fact made by the trial judge, on the basis of evidence she found credible, that continuing conflict over religion, including the respondent's repeated attempts to discuss religious matters with the children against their clearly expressed desires, profoundly disturbed the children and was contrary to their best interests. At the time of trial, the respondent was not engaging in other religious activities with the children, as they had already been curtailed by the interim order almost a year and a half earlier. Therefore, it is *precisely* these continuing “discussions” that were disturbing the children, causing the deterioration of their relationship with their father and which, therefore, had to be curtailed” (para. 265).

BC Court of Appeal

Custody & Access

- ***Andrusiek v. Andrusiek*** (2002), 25 R.F.L. (5th) 8, 2002 CarswellBC 492 (B.C.C.A.), [head notes cited to R.F.L.].

Family law --- Custody and access -- Factors to be considered in custody award -- Wishes of child

Father and mother separated after ten years of marriage and extensive litigation ensued as to custody of and access to son -- After full trial, custody was granted to mother and father on almost equal basis -- In mother's application to vary custody, access by father was reduced to two weekends per month -- After contempt of court application by father, order was made for preparation of report under s. 15 of Family Relations Act -- In report, expert noted that child told her which parent he preferred to live with but told her not to disclose it to anyone -- Child prepared letter for applications judge which he wanted only judge to read -- Father's variation application for sole custody of child was granted -- With consent of parties, applications judge interviewed child alone in chambers -- Parties agreed that if child did not want contents of conversation revealed, applications judge would not reveal them -- Applications judge made notes of conversation with child and placed them in envelope sealed in court files -- Applications judge revealed that child wished to live with father, which was only one of factors taken into account -- Mother appealed -- Appeal dismissed -- Case was difficult -- Clear to parties that child did not want to hurt either of his parents and felt he was under pressure -- As applications judge made plain that child's wishes were only one factor and reviewed other evidence upon which he made decision, it could not be said that he relied on information which parties had no opportunity to meet -- Not open to mother to complain about procedure she agreed to at time of application -- Family Relations Act, R.S.B.C. 1996, c. 128, s. 15.

- ***O'Connell v. McIndoe*** (1998), 42 R.F.L. (4th) 77, 1998 CarswellBC 2223 (B.C.C.A.), Donald, J.A. [head notes and annotation cited to CarswellBC].

Family law --- Custody and access -- Factors to be considered in custody award -- Wishes of child

Parties were married for more than 20 years and had two children -- Upon separation, mother left matrimonial home and children resided with father -- Children had minimal contact with mother -- Mother was granted sole custody of younger child against child's wishes -- Father appealed -- Child was 13 years old -- Child ran away from mother's home on five occasions and was at undisclosed location at time of hearing -- Child could not be forced to reside with mother -- It was in child's best interest to reside with father.

Annotation

Donald J.A.'s reasons for judgment in *O'Connell v. McIndoe* confirm that as a general rule, a judge should allow an older child to decide where he or she wishes to live after family breakdown. The reality is that if a court does not comply with a child's

wishes, the child may not comply with the court order.

In *O'Connell v. McIndoe*, the trial judge adopted the assessor's recommendation that the younger son reside with his mother with limited access with the father. In doing so, he broke with the status quo and went against the clear wishes of the child.

The mother left the matrimonial home at separation in July 1996 and the parties' sons, aged 15 and 11 at the time, remained with the father. The children had minimal contact with the mother and eventually refused to see her. The trial judge found that the father had turned the children against the mother. His finding was based in part on the opinion of a psychologist who prepared a custody report under s. 15 of the *Family Relations Act*. The assessor concluded that the father could not get over the wife's rejection and that his anger and resentment towards the mother created a poor environment for the boys. The boys sided with their father and treated their mother with hostility and contempt, cutting her off from their lives. The assessor concluded that the older son was so closely identified with his father and his attitude so set that the situation could not be repaired and custody should be granted to the father. However, he was more optimistic about the younger child and recommended custody to the mother with short supervised access visits by the father and older brother.

The trial judge accepted the assessor's recommendations notwithstanding the younger son's clear desire to live with his father and older brother. The formal order also contained compulsory counselling and therapy for the father and older brother.

The younger son did not accept the judge's decision and ran away from the mother's home five times. He was returned to the mother's home by the police on the first four occasions. He had been at an undisclosed location for almost a month by the time of trial awaiting the outcome of the appeal.

The British Columbia Court of Appeal accepted the reality of the situation and allowed the appeal. Donald J.A. did not disagree with the trial judge's appreciation of the family dynamics. With a less headstrong child, the trial judge might have made the correct decision. As a general rule, a court will try to ensure that a child maintains meaningful contact with both parents. That one parent will interfere with the other parent's relationship with a child is an important factor in deciding who should have custody.

However, if a teenaged child is determined to live with a parent, there is little a judge can do. A court cannot force a determined teenager to live with a parent against his or her will. At some point, a child becomes too old to be forced to live with someone against his or her will. Donald J.A. recognized that in order for custody orders relating to children in their teens to be practical, they must conform with the wishes of the child. Donald J.A.'s decision not to make a custody order in respect of the older son is consistent with this analysis. "Custody" has little meaning for an adult child. No one really makes decisions for an adult child. The most a judge should do is to confirm an adult child's living arrangements.

Judges often state that judges decide custody, not parents or children. As Donald J.A. accepts, older children will decide where they live, regardless of what anyone else thinks or a court orders. It is not in a child's interest to live in a home where he or she is unhappy and frustrated. While 13 may seem young to allow a child to decide

custody, the child was fixed and determined in his views. If the father had indeed poisoned the child's mind against the mother, he had done such a good job that there was little a court could do about it.

Although courts dislike granting custody to a parent who discourages access and undermines the other parent's relationship with a child, sometimes a court has no choice. Custody is not awarded to reward a good parent or punish a bad parent. There may be a natural tendency to favour a parent who has behaved honourably and put the child's interests ahead of his or her interests. However, in the end, a judge must award custody to promote a child's best interests, not to redress parental conduct.

In *O'Connell v. McIndoe*, the younger son was settled into a daily life with his father and brother. This arrangement had continued since 1996 when the mother left. He was determined to live with his father and brother and there was nothing anyone could do about it. The British Columbia Court of Appeal order does no more than recognize the reality of the situation.

Donald J.A. also struck the provision in the trial judge's order that the father and brother seek counselling on the basis that compulsion was counter-productive. With respect, the British Columbia Court of Appeal should have restructured the order to direct some form of family counselling. A court can order counselling or therapy as a condition of custody. Even if the therapy or counselling does not help the father or older brother, it may help the younger son deal with his mother or the mother come to grips with the reality of her relationship with her sons. By ordering the father to pay the costs of family counselling, a court forces him to accept some responsibility for his actions.

The court disapproved of the father's conduct but recognized that it could not do much about it in a custody context. However, the court refused to award costs to the father even though he was successful on the appeal. As a general rule, costs follow the event on an appeal unless the order would impair a parent's ability to care for children. A court may deny costs if it disapproves of a parent's conduct of the appeal or, apparently, if it disapproves of a parent's actions outside the court room. There is no indication that the father misconducted himself in the litigation. He is punished in costs for turning the sons against the mother. In such cases there are not many other ways a court can express its disapproval of a parent's actions. James G. McLeod

Cases considered by Donald J.A.: *Alexander v. Alexander* (1988), 15 R.F.L. (3d) 363 (B.C. C.A.) - applied

Shapiro v. Shapiro (1973), 33 D.L.R. (3d) 764 (B.C. C.A.) - applied

- ***Jespersion v. Jespersen*** (1986), 48 R.F.L. (2d) 193, 1985 Carswell BC 564 (B.C.C.A.), Lambert, J.A. [head notes cited to R.F.L.].

Family Law --- Custody and access -- Factors to be considered in custody award -- Wishes of child.

Children -- Custody and access -- Factors governing award of custody -- Wishes of the child -- Judge conducting private interview with child with consent of counsel -- Child expressing wish to return to home community where father lived -- Child's wishes not necessarily corresponding with child's best interests -- No obligation on judge to divulge contents of private conversation -- Trial judge awarding custody to mother --

No error in principle -- Appeal dismissed.

Children -- Custody and access -- Procedure -- Judge conducting private interview with child with consent of counsel -- No obligation on judge to divulge contents of private conversation.

The parents were married in 1968, separated in 1976 and were divorced in 1982. In 1978 custody and maintenance of the parties' son, then aged 5, was awarded to the mother. In 1982 the father remarried and moved back into the matrimonial home and the mother moved to Vancouver Island with the child. A home study report made in September 1984 indicated that both parents would provide a good home for the child and that the child had a preference for living in Salmon Arm. The father applied to obtain custody and to terminate the maintenance order in favour of the mother in any event. By consent of counsel, the trial judge had an interview alone with the child. The trial judge ordered that custody remain with the mother and dismissed the variation applications. The father appealed.
Held: Appeal dismissed.

While it was true that the trial judge had not followed the child's expressed preference, the best interests of a child do not always correspond with the wishes of that child, and it was enough that the judge took those wishes into account. There was no obligation on the judge, who interviewed the child with the consent of counsel, to set out any details of the interview. Such interviews are conducted in the hope of obtaining a frank statement by the child without embarrassing the child or the parents and it was the trial judge's prerogative to decide whether anything should be said about the results of the interview. The trial judge exercised his judgment on the basis of all the evidence and no ground of principle was advanced to interfere with his judgment. Accordingly, the appeal from the custody order was dismissed. With respect to maintenance, the trial judge considered the mother's decision to work part-time justified to permit her to carry out her parental obligations. Both parents had suffered financially during the time since the order. The dismissal of the application to vary the maintenance order was a question of judgment, and there was no indication that the trial judge erred in principle. Accordingly, the appeal with respect to the maintenance order was also dismissed.

- *Alexander v. Alexander* (1986), 3 R.F.L. (3d) 408, 1986 CarswellBC 535 (B.C.C.A.), Carrothers, Hinkson, and Anderson, J.J.A. [head notes cited to R.F.L.].

Family Law --- Custody and access -- Factors to be considered in custody award -- Wishes of child.

Children -- Custody and access -- Factors governing award of custody -- Wishes of child -- Child living with mother since birth -- Custody transferred to father when child 11 years old largely on basis of expert evidence -- Child having successful year with father but still wishing to return to mother -- Appellate court unable to say trial judge erred, even though it may have reached different conclusion -- Evidence supporting continuation of arrangements in spite of fact no lasting relationship yet formed - Held: Appeal dismissed.

The parties were married in 1971 and separated in August 1974 when the husband left the home shortly after the child's birth. In September 1974 the parents entered into a separation agreement giving custody to the mother. The child was a gifted child but

had social and other problems in school. The mother became involved in difficulties with the school authorities. In the beginning, the father had nothing to do with the child but gradually developed a relationship with him and in 1984 decided to apply for custody. At trial it was clear that the child's preference was to remain with his mother. However, a psychiatrist nominated by the child advocate recommended custody to the father. The trial judge awarded custody to the father. Prior to the appeal, the child still indicated he preferred to live with the mother. The mother appealed.

Even though the appellate court might not have reached the same conclusion as the trial judge, the question was whether he erred in awarding custody to the father. Although the child really needed two parents working together, past experience in this case demonstrated that joint custody was not a realistic solution. Although the father had had a year to establish a lasting relationship with the child, he had not succeeded. On the evidence, the child had a successful year socially and scholastically. The evidence suggested the custodial relationship should continue despite the child's preference to live with his mother. Having regard to the best interests of the child, it was not appropriate to change the custodial arrangement.

- *Shapiro v. Shapiro* (1973), 33 D.L.R. (3d) 764, 1973 CarswellBC 290 (B.C.C.A), Branca, Nemetz, and Davey, J.J.A. [cited to D.L.R.].

Case involves the custody of two children ages 15 and 12. Court of Appeal awarded custody to father despite the trial judge's finding that the father had influenced the children's preference to live with him through "manipulation and maneuvering".

"... there is one decisive element which controls the disposition of this case. In the appeal against the refusal to vary, that decisive element is the wish of the 15-year-old girl, on the verge of womanhood, who seems, from what has appeared before us, to be a person of some maturity of judgment, to be placed in the custody of her father. The son has expressed the same wish. The girl has not only expressed the wish, but she has filed an affidavit, the contents of which would indicate that the chances of her establishing a satisfactory relationship with her mother are now very remote. In saying that, I express no opinion on the fairness of the grounds upon which the daughter has reached that opinion, but nevertheless, it is there" (Shapiro at paras. 5-7)

"I proceed simply upon the fact that this wish of the daughter to be with her father is a rational wish, it's an honest wish and on the fact that the father loves his daughter, his children, as the learned Judge has found. I assume for the moment that the learned trial Judge is right in finding that the father, by his conduct and his relationship with the children, has turned them against the mother, that he has secured their confidence by manipulation and by manoeuvring... But nevertheless, no -(m)atter how that feeling on the part of the daughter was induced, it is present and real, and the daughter now honestly wishes to be with her father." (Shapiro at para. 10).

BC Supreme Court

Custody & Access

- **Dove v. Dove**, 2002 CarswellBC 601 (B.C.S.C.), Edwards J. [cited to CarswellBC].

Custody case; Custody remained with mother. Child's views were not sought or taken into account.

"Vanessa's views on the proposed move are not disclosed in the affidavit material. The preference of a child of nine may be given some weight but it is not determinative. It is a matter of discretion as to whether the court takes the views of any child into account. The court is not bound by the preference of a child where it appears the best interest of the child lies in granting custody elsewhere. See Gullett v. Gullett, 2001 BCSC 1207 (B.C. S.C. [In Chambers]); Sam v. August, [1998] B.C.J. No. 2879 (B.C. S.C.) ; Alexander v. Alexander (1986), 3 R.F.L. (3d) 408 (B.C. C.A.) and Jespersen v. Jespersen (1985), 48 R.F.L. (2d) 193 (B.C. C.A.).

I find that even if Vanessa expressed a view that she would prefer to reside with her father, that view would not be determinative in light of the fact she has not resided with him continuously for any extended period since the parties separated, but only during holidays and weekends, and therefore Vanessa has no appreciation of what the home routine with her father would be if her primary residence was with him" (Dove at paras. 42-43).

- **Mamchur v. Mamchur** (1987), 11 R.F.L. (3d) 66, 1987 CarswellBC 546 (B.C.S.C.), Robinson L.J.S.C. [head notes cited to R.F.L.].

Children -- Custody and access -- Factors governing award of custody -- Wishes of child -- 12-year-old child living with father -- Child expressing desire to live with mother -- Inappropriate to interview child given age, lack of maturity and possible trauma -- Father to retain custody.

The parties separated in 1983 and were divorced in 1985. The father, a businessman, had custody of the 12-year-old son. However, the son wished to live with his mother, a recovering alcoholic. Both parties were willing to have the judge interview the child. The mother claimed custody.

Held: Father to retain custody.

It was undesirable to interview the child given his age, lack of maturity and the trauma the interview could cause. The mother's alcoholism, although a factor in the determination, was not determinative. All things considered, notwithstanding the expressed desire of the child to live with the mother, there was insufficient evidence to justify disturbance of the status quo.

Cases considered: *Burgmaier v. Burgmaier* (1986), 50 R.F.L. (2d) 1, 46 Sask. R. 1 (C.A.)-considered

- **Gullett v. Gullett**, 2001 CarswellBC 1895, 2001 BCSC 1207(B.C.S.C [in Chambers]), Shabbats J [cited to CarswellBC].

Family law --- Custody and access -- Variation of custody order. Children were ages 7, 9 and 12.

"That the wishes of the children should be considered is noted by Chief Justice McLachlin in Gordon v. Goertz (supra). It is a factor referred to in s. 24(1)(b) of the [FRA]. The wishes of these children were placed before the court in this manner. Each of the parties, in affidavit material, expressed their respective opinions that the children wish to live with each of them" (Gullett at paras. 30-31).

"Following a hearing before a master of the court, the children were interviewed by Mr. Ralph F. Frank, a registered clinical counsellor, who filed an independent report by way of a letter dated August 13, 2001. Mr. Frank had short separate interviews with each of the plaintiff and the defendant, and an hour-long interview with the three children together. Mr. Frank said that the children were capable of verbalizing their respective thoughts, and that they had arrived at a consensus about their wishes. He said that the children expressed a closeness to each of their parents, and that they liked the ability to spend time at both of their parent's houses. Mr. Frank said that the two older children were adamant that they did not want to have to leave Port McNeill. They were concerned about losing their friends, and about not seeing their grandparents. All three children said they wanted to remain together" (Gullett at paras 32-33).

"Although the children might want things to be as they were before, circumstances have changed. The concerns of the children about reduced access to the parent with whom they will not be living, and to their extended families, is legitimate" (Gullett at para. 35).

"In my opinion, the weight to be given to the wishes of a child in respect of his or her care and control, depends on the age of the child, the reasons why the child wishes to live with a particular custodian, and the firmness with which the child prefers one place over another" (Gullett at para.38).

"In my opinion, Christopher is of an age where his views should be considered. Steven and Jaymie-Lynne are of so young an age that their views are of little consequence. There is no doubt that it would be better if these children were not separated from each other. Christopher should not be permitted to determine the future of his two younger siblings. I am of the opinion that the wishes and preferences of these children are of little assistance. Christopher expressed no strong preference to live with either parent. Although the children may be apprehensive about the unknown, there is no reason to think that, if they were to move, they would not soon adapt to a new community" (Gullett at paras. 39-41).

- **Sam v. August: In the Matter of the Family Relations Act (BC)**, [1998] B.C.J. No.2879, 1998 CarswellBC 2715 (B.C.S.C.), Burnyeat J. [head notes cited to B.C.J.].

Family law --- Custody and access -- Appeals -- General

Six and nine year-old children removed from natural mother's care over five years previously -- Trial judge awarded custody of children to respondent couple who cared for children for several years and mother appealed -- Award of custody could not be interfered with on appeal as trial judge made no manifest error which made decision clearly wrong, made no error in principle and did not draw conclusions which were unsupported by evidence -- Trial judge did not err in determining it was inappropriate to consider wishes of one of children as contained in statement

allegedly made to mother -- Always discretion with court as to whether court should take views of any child into account and court not bound by preference of child if best interest of child lies in granting custody elsewhere -- Trial judge did not err in refusing to allow affidavit evidence of social worker which was unfavourable to respondents, as it was outdated, social worker unavailable for trial and respondents' counsel not afforded opportunity to cross-examine on affidavit -- Trial judge not required to accept affidavit evidence and exercised discretion properly in refusing to admit affidavit evidence in question -- Trial judge considered all relevant factors, including ability of respondents to maintain children's cultural connections with their native band and made conclusions based on evidence -- Trial judge did not fail to be guided by relevant case law and gave serious consideration to mother's parental claim which was not lightly set aside -- Appeal dismissed.

- **G. (L.E.) v. G. (A.)**, 2002 CarswellBC 2643, 2002 BCSC 1455 (B.C.S.C.), Martinson J. [head notes cited to CarswellBC].

Family law --- Custody and access -- Factors to be considered in custody award -- Wishes of child

In divorce action, mother requested judge to interview her children outside courtroom and in absence of both her and father, to ascertain children's wishes on issue of custody -- Father did not consent to interview of children in manner requested by mother -- Judge ruled on whether she had jurisdiction to interview children in private and in absence of consent of one or both parents -- Jurisdiction to interview children existed, even in absence of parental consent, but in circumstances of case, interview was not necessary -- Discretion to interview children in private and in absence of parental consent was based on *parens patriae* jurisdiction and on statutory duty to act in best interests of children -- Judge had to consider, on case by case basis, whether conducting such interviews was in best interests of child in question -- Judge could consider general purposes of interview and general benefits of and concerns relating to judge interview process -- Judge could also consider case specific factors by looking at relevance of information that would be obtained to issues that had to be decided, reliability of information, and necessity of conducting interview rather than obtaining information in another way -- While parent could not simply veto interview, parent's specific reasons for withholding consent could be important to determination of relevance, reliability, and necessity.

Treaties considered: Convention on the Rights of the Child, 1989, C.T.S. 1992/3, 28 I.L.M. 1456, 3 U.N.T.S. 1577; Article 12 - considered

- **Wubben v. Lang-Ernst**, 2000 CarswellBC 2592, 2000 BCSC 1546 (B.C.S.C.), McEwan J. [head notes cited to CarswellBC].

Family law --- Custody and access -- Terms of custody order -- Removal of child from jurisdiction

Swiss-resident father had custody of child -- Father brought application under Hague Convention on Civil Aspects of International Child Abduction for order for return of child to Switzerland -- Application dismissed -- Article 13 of Hague Convention gives court discretion to refuse to order return of child if child objects to being returned and has attained age and degree of maturity at which it is appropriate to take account of child's views -- Child almost fifteen years old -- Child's objection to returning to Switzerland articulated in mature and reasonable manner and did not arise from

undue influence, duress or improper inducement -- Child's views entitled to considerable weight in circumstances

Treaties Considered: Convention on the Rights of the Child, 1989, C.T.S. 1992/3, 28 I.L.M. 1456, 3 U.N.T.S. 1577; Article 12 -- considered

- **Loewen v. Loewen** (1982), 29 R.F.L. (2d) 25, 1982 CarswellBC 547 (B.C.S.C.), McLachlin J. [head notes cited to R.F.L.].

Infants and children -- Custody -- Principles governing award -- Relevant circumstances -- Wishes of child -- Custody of 11-year-old girl awarded to father -- Child at 14 wishing to live with mother -- Appropriate to consider wishes -- Custody awarded to mother.

Infants and children -- Access -- Father having custody for three years -- Fourteen-year-old girl wishing to live with mother -- Father-daughter relationship hostile -- Custody awarded to mother -- Reasonable access awarded to father -- Court suggesting exercise if access not advisable prior to improvement of father-daughter relationship.

The child's emotional health was better served in the mother's home than in the father's. It was appropriate to consider the views of the child, which were calmly expressed and carefully considered. Her desire to be with the mother was not an immature flight from discipline and responsibility. Although the father was given reasonable access, it was not in the child's best interest that he exercise it until the father-child relationship became less hostile.

- **Knowles v. Knowles** (1977), 2 R.F.L. (2d) 396, 1977 CarswellBC 266 (B.C.S.C.), Cashman L.J.S.C. [cited to R.F.L.].

The overriding consideration when dealing with the custody of children is the best interests of the children. As a general rule, where children are of an age where they might be termed of tender years and assuming all things are equal the mother should have custody. Moreover, it was in the best interests of the child to be with her mother where she could enjoy a relationship with her sister.

Although a recommendation and evaluation may be submitted and received from the Superintendent of Child Welfare, it must be evaluated by the judge in light of all circumstances as known to him. The preference of the child as to custody should not be considered at the age of six.

Cases considered: (Distinguished): *Shapiro v. Shapiro* (1973), 33 D.L.R. (3d) 764 (B.C.C.A.).

- **Saxon v. Saxon**, [1974] 6 W.W.R. 731, 17 R.F.L. 257, 1974 CarswellBC 230 (B.C.S.C.), Bouck J. [cited to R.F.L.].

It is not improper on a custody application for the presiding judge to interview privately the children whose custody is in issue, if both parties consent, and provided that he does not allow the comments of the children to be the sole basis of his decision. He may, also, pursuant to s. 63 of the Supreme Court Act, call for a report from the Superintendent of Child Welfare but is in no way bound by any recommendation contained therein. Copies of such a report should be given to the parties...

BC Provincial Court

Child Protection

- ***L., Re: Child, Family and Community Service Act and Family Relations Act (BC)***, [1999] B.C.J. No. 629, 1999CarswellBC 1559 (B.C. Prov. Ct.), Collings J. [head notes cited to B.C.J.].

Evidence --- Witnesses -- Child witnesses -- General.

Cases considered: *Jespersen v. Jespersen* (1985), 48 R.F.L. (2d) 193 (B.C. C.A.) -- applied RULING by court as to procedure for interview of child witness in application by Director of Family Services for continuing custody of 11 year-old girl.

- ***British Columbia (Superintendent of Family & Child Service) v. S.H.***, [1995] B.C.J. No. 932 (B.C. Fam. Ct.), Stansfield J [head notes cited to QL].

Guardian and ward – Termination of guardianship – Grounds for termination of order – The hearing – Evidence – Professional reports – Witnesses, competency and compellability – Competency – Child of tender years.

This was an application for an interlocutory ruling as to... whether the children, nearly seven and three years old, should be permitted to be called as witnesses or to speak to the judge in chambers. Hearsay evidence dealing with the boys' preferences, the circumstances and behaviour of the mother and Mr. D on access visits and with treatment in foster homes was admitted. There was no evidence of the impact upon the boys were they to be called as witnesses.

Held: Either of the boys could be called as a witness, in part because there already was hearsay evidence tendered beyond the issue of preferences and in part because the judge believed that the events, which had already transpired equipped them to cope with the experience, so long as stringent controls were imposed on the process.

Other Provinces

Alberta

Custody & Access

- ***LeBlue v. LeBlue*** (1997), 209 A.R. 227, 33 R.F.L. (4th) 118, 160 W.A.C. 227, 1997 CarswellAlta 1026 (Alta. C.A.), Bracco, Cote, and Conrad JJ.A. [head notes cited to A.R.].

Family law --- Custody and access -- Variation of custody order -- Practice and procedure

Mother had custody of child -- Child failed to return from access visit with father -- Father was granted custody [of daughter, age 12] on affidavit evidence of child -- Mother appealed custody order on ground that viva voce evidence was not heard -- Custody should not have been determined solely by wishes of child -- Custody should have been determined after viva voce hearing.

- *Tonowski v. Tonowski*, 2002 CarswellAlta 1478, 2002 ABQB 1018 (Alta. Q.B.), Veit J. [cited to CarswellAlta].

Family law --- Custody and access -- Factors to be considered in custody award -- Wishes of child.

Cases considered by Veit J.: (*among others) *G. (L.E.) v. G. (A.)*, 2002 BCSC 1455, 2002 CarswellBC 2643 (B.C. S.C.) -- followed

After nearly a decade of living primarily with their mother, and a few months of living half time with their father, the parties' two older children, aged 16 1/2 and 15 1/2, have told their mother that they would prefer to live primarily with their father. The mother... proposes that the children's wishes not be implemented until the parents and the children have seen a counsellor.

...The materials provided by the children also make clear that the children have been made aware, by each of the parents, of a dispute between the parents concerning a child support issue...

The primary residence of the two older children will be with their father. The mother will have the usual access to the second oldest child... The court will not impose any access in relation to the oldest child; however, it is to be hoped that... the eldest of the children will re-establish a relationship with her mother...

The two older children are at an age when their wishes in this matter are relatively weighty factors in making decisions about where the children will live. The court is satisfied that the evidence of their wishes represents their real wishes at this time. Acceding to the children's wishes will not be against their interests, and will not destabilize their lives. The children's wishes have not been produced as a result of a plan or practice of parental alienation.

Child Protection

- *Alberta (Director of Child Welfare) v. B. (C.T.)* (1993), 139 A.R. 250, 1993 CarswellAlta 810 (Alta. Q.B.), Dixon J. [head notes cited to A.R.].

Children not to be given notice of access application -- Children's opinions to be otherwise determined -- Child Welfare Act, S.A. 1984, c. C-8.1, s. 2(d).

Two children, aged 8 and 11, were living in a foster home, having been placed in the permanent custody of the Director of Child Welfare. Mother made an application for access to the children. The Provincial Court Judge ordered that the children be given notice of mother's application and be given an opportunity to appear and be heard. Director brought an application for certiorari, quashing the order of the Provincial Court Judge. Held, the application was allowed. Children under 12 were not entitled to be given notice under the Act. Their opinions were to be considered under s. 2(d) of the Act but it was inappropriate for the children to assume an active role in the proceedings. Counsel were directed to prepare documentation reflecting the opinion and wishes of each of the children.

- *A., Re* (1989), 103 A.R. 241, 23 R.F.L. (3d) 121, 1989 CarswellAlta 393 (Alta. Prov. Ct. Youth Div.), Fitch J. [head notes cited to A.R.].

Children -- Representation for children -- Child advocate -- Director requesting permanent guardianship in protection proceeding -- Children wishing to return to mother -- Child's counsel supporting director -- Counsel not acting improperly -- Child Welfare Act

The three children, now aged 12, 11 and 8, were apprehended, largely as a result of abuse by babysitters. The mother's parenting skills were poor. The children were declared in need of protection and the director was granted temporary guardianship. Social agencies continued to work with the mother and the abusers were no longer involved with the family. The mother had recently married a man with a grown family and stable work record.

The director applied to review the temporary guardianship order and sought permanent guardianship. The children's counsel supported the director. The children wished to return to the mother.

Held: Further order for nine months' temporary guardianship.

Counsel for the children did not act improperly in supporting the director's application. It is common practice for counsel appointed pursuant to s. 78 of the Child Welfare Act to form their own opinion as to what is in the best interests of the children, even though that position may be different from the views of the clients, the children...

The director had not established that it could not anticipate that the children could be returned to the mother within a reasonable time. The abusers were gone and the husband might help with parenting. As well, given the ages of the children, their wish to return to live with the mother should be considered. Therefore, no order for permanent guardianship should be made.

Northwest Territories

Custody & Access

- *M. (T.), Re*, [1989] N.W.T.R. 169, 1989 CarswellNWT 16 (N.W.T.S.C.), de Weerd J. [head notes cited to N.W.T.R.]. *First Nations child

Family law -- Children -- Representation of children -- Amicus curiae -- Court having power under *parens patriae* jurisdiction to appoint amicus curiae -- Appropriate means to represent interests of child in absence of statutory or other guardian to act as guardian ad litem or next friend.

Family law -- Children -- Custody and access -- Parties -- Standing to apply -- Applicants seeking standing to proceed with application for custody -- Applicants residing outside Northwest Territories, and applying on basis of friendship with child -- In circumstances, court exercising discretion and granting applicants standing to proceed.

The applicants, residents of Nova Scotia, were well off and enjoyed a happy and stable relationship. In 1988 the female applicant came to Yellowknife for a one-week visit, staying with her sister, who was providing foster care for M., a 12-year-old child of Chipewyan descent. The female applicant developed a close relationship with M., and M. asked if she could come and live with the applicants. After returning to Nova Scotia, the female applicant remained in contact with M. The applicants sought an order granting standing to proceed with an application for M.'s custody.

Held: Order granted.

The bond of friendship is a sufficient basis upon which the court may exercise its discretion to grant standing to proceed with an application for child custody. There is no legislation specifically governing such an application... In circumstances such as here, the court should exercise its discretion to grant the applicants standing to proceed: there appeared to be no one else prepared to put forward the child's wishes... The court has the power, in the exercise of its *parens patriae* jurisdiction, to appoint an *amicus curiae* to inquire into and independently represent the interests of a child before the court where, in the interests of justice, it is necessary to do so. Accordingly, here, in the absence of a statutory or other guardian to act as guardian *ad litem* or next friend, an *amicus curiae* should be appointed to represent the interests of the child.

Ontario

Custody & Access

- *Lidkea v. Jarrel*, [1999] O.J. No. 773, 49 R.F.L. (4th) 324 (Ont. C.A.), Osborne J.A. [head notes cited to R.F.L.].

Family law --- Custody and access -- Access -- Factors to be considered -- Wishes of child

Father's access rights to daughter were suspended -- Father appealed -- Appeal was dismissed -- Child did not wish to see her father -- Child resisted all attempts at access by father -- Father did not take daughter's wishes seriously -- Access by father was not in child's best interest.

- *Lougheed v. Sillet*, [1999] O.J. No. 773, 6 R.F.L. (4th) 10, 1994 CarswellOnt 430 (Ont. C.A.), Robis, Labrosse, and Abella J.J.A. [head notes cited to R.F.L.]. *First Nations children

Family Law --- Custody and access -- Factors to be considered in custody award -- Wishes of child.

Children -- Custody and access -- Assessments -- Trial judge satisfied that assessment reflecting "full appreciation of all that was required" -- Assessor concluding that children not preferring one parent over other -- Father awarded custody -- Mother appealing, arguing that views of children not fully ascertained -- Views and preferences of children adequately investigated -

The mother left the matrimonial home in 1991. Since that time the two children have resided with the father. The parents realized that the joint custody arrangement provided for in their 1992 separation agreement was no longer tenable. Each sought an order for sole custody. During the trial the father deposed by affidavit that he had been told by the children that they wished to reside with him. The mother alleged that the children had told her that they wished to reside with her. The assessor concluded that the children did not have a clear preference for either parent. The trial judge held that the evidence of the children, then 6 and 9 years old, was not helpful and refused to appoint the Official Guardian to represent them.

The mother appealed the order awarding sole custody to the father and applied to introduce fresh evidence with respect to the way in which the Inuit heritage looked at

the issue of parenting. She argued that an order of joint custody pursuant to the separation agreement could have been imposed and that the views of the children should have been more fully ascertained.

Held: The application to admit fresh evidence was dismissed; the appeal was dismissed.

The parents admitted that the joint custody arrangement to which they had agreed was no longer feasible. Therefore, the mother's contention that an order of joint custody pursuant to the separation agreement was warranted was untenable. The parents had consented before the trial to the hearing being based on affidavit evidence. The mother could not plead otherwise after having agreed to such a procedure. The trial judge's view of the adequacy of the assessment was correct. It was helpful, and the psychologist made no error in the approach he took in making his report and did not show any lack of objectivity.

The proposed evidence concerning the Inuit approach to parenting was available before the trial and its admissibility would not have affected the decision of the trial judge that the children required the more structured parenting available in the father's house.

On the issue of the failure of the trial judge to determine the views and preferences of the children, Robins and Labrosse J.J.A. found that the trial judge had made no error in his determination. Neither party had challenged the assessor's conclusion. The judge was correct in holding that the appointment of the Official Guardian would serve no useful purpose. Abella J.A. was of the view that the trial judge erred in holding that the children's views should be given little weight. She would have invited submissions on the propriety of appointing the Official Guardian to ascertain the views and preferences of the children.

- *Docherty v. Beckett* (1989), 21 R.F.L. (3d) 92, 1989 CarswellOnt 254 (Ont. C.A.), Zuber, J.A. [head notes cited to R.F.L.].

Children -- Custody and access -- Factors governing award of custody -- Wishes of child -- Father applying to vary custody -- Father's expert recommending variation based on child's preference -- Child being inconsistent in preferences -- Evidence being insufficient to warrant variation.

Saskatchewan

Custody & Access

- *Wakaluk v. Wakaluk* (1976), 25 R.F.L. 292, 25 R.F.L. 19, 1976 CarswellSask 4 (Sask. C.A.), Woods J.A. [cited to R.F.L.].

The children's lawyer wanted the children, ages 12 and 10, to testify about their custodial preference, notwithstanding this, the trial judge did not allow their testimony based on fear of harming the children. On appeal, the Saskatchewan Court of Appeal found that it would have been better if the

children had been allowed to give evidence, however, it was within the trial judge's discretion to disallow it.

Resources

Charter & Natural Justice Rights

- **Susan B. Boyd, "The Impact of the Charter of Rights and Freedoms on Canada Family Law"** (2000) 17 Can. J. Family L. 293-331 at para. 4.

"This article provides a snapshot as of 1999 of the substantially diverse ways in which the *Charter* has affected a significant field of Canadian "private law" - family law. The first part assesses the general impact of the *Charter* on family law. The second part reviews the most significant court challenges to family law based on the *Charter*. The final part offers a brief case study of the impact of the equality/anti-discrimination provisions of section 15 on family law in order to illustrate the diverse effects that the *Charter* can have. This final part also reveals the evolving approach to equality and discrimination of the Supreme Court of Canada. Throughout the article, the complex and often contradictory ways in which rights discourse relates to legal regulation of familial relations are briefly highlighted".

- **His Honour Judge A.P. Nasmith, "The Inchoate Voice"** (1991-1992) 8 C.F.L.Q. 43 at 49-51.

Judge Nasmith suggests that if a child's non-party status in a custody proceeding reduced his or her right to be heard, it may trigger the application of the *Charter*. He points to natural justice principles as a rationale for respecting the child's right to be heard and states that a child's right to choose not to disclose their custodial preference should be protected.

- **D.A. Rollie Thompson, "A Family Law Hitchhiker's Guide to the Charter Galaxy"** (1989) 3 C.F.L.Q. 315.

Child Participation in Case Conferences & Mediation

- **Gary W. Austin, Peter G. Jaffe & Pamela Hurley, "Incorporating Children's Needs and Views in Alternative Dispute Resolution Approaches"** (1991/1992) 8 C.F.L.Q. 69.

Written by mental health professionals, the article discusses methods that mental health professionals can use to incorporate children's needs and wishes into custody and access assessments, and mediation and arbitration of custody, access, property and financial issues, so that children may have a direct impact on the process. Examines conditions, which may lessen the weight given to a child's views and preferences.

- **"The Involvement of Children in Divorce and Custody Mediation: A Literature Review"** (March 2003), online: British Columbia Ministry of Attorney General, Justice Services Branch, Family Justice Services Division

www.ag.gov.bc.ca/justice-services/publications/fjsd/children/mediation

Themes include: the goals and impacts of involving children in mediation; age considerations; structure for involving children in mediation; and the training and qualifications of mediators.

- **Sue Buckley & Lynne Cummings, "Eliciting Children's Voices in Mediation: A Collaborative Approach"** (Paper presented at the 6th National Mediation

Conference, National Convention Centre Canberra, Australia, September 20, 2002),
online: <http://www.leadr.com.au/BUCKLEY.PDF> >.

The authors assert that parents are not reliable sources of information regarding their children's views post-separation and that mediators must take a more active approach to ensure that children's needs and views are considered and remain the central focus of mediation.

"...mediators are working with an increasing number of highly conflictual and litigious parents. The personalities and behaviours of these parents can make it exceedingly difficult for them to hear and understand their children's voices. They have frequently experienced difficult separations and intense marital conflict often continues power separation. They can be caught in protracted litigation that is very expensive and anxiety provoking. In this hostile climate children can be alienated from the non-residential parents and contact often breaks down. ...our aim is to try and ensure the involvement of children in the making of decisions that directly impact on their lives. ...There is now wider community and societal recognition that children have rights separate from their parents, and research suggests that parents are not always a reliable voice from the children's needs power separation (Wallerstein and Kelly, 1980). ... We will look at a range of interventions in conjunction with a collaborative approach that is being developed to work with these challenging and vulnerable families. We will conclude with an overview of various issues and dilemmas facing mediators today". (Abstract)

- **Judge Thomas J. Gove, *Judge-Mediated Case Conferences—A Meaningful Way of Hearing Children*** (unknown date) [unpublished].

"...Judges have found that a Judge-Mediated case conference can be an effective alternative to the traditional approaches to decide custody cases. Although the term "mediation" is used to describe these proceedings, they are clearly different from the interest-based resolution process used in commercial mediation. Because a Judge is not a mediator but a judicial officer using mediation as a process to achieve an outcome, he or she still has a responsibility to intervene if the "resolution" does not respect "the best interests of the child". Any order of the court must always be in a child's best interests and protect the child. With that understanding, mediation conducted by Judges has proven to be a positive change in how child custody cases are conducted. The process can allow for frank, disciplined discussion between all the players in a child's life and a consensual resolution in many cases.

Children and youth, whether formally made parties or not, can participate in the case conference. The extent of their involvement might depend on their age, maturity, and the resources that the adults make available to them".

- **Jennifer McIntosh, "Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study"** *Mediation Quarterly*, Vol. 18, no. 1, Fall 2000.

“Research into the unique needs and interests of children in the light of parental separation has provided the impetus for many family law mediation practices to include children’s voices in divorce mediation. This chapter describes a model of child-inclusive practice in family law mediation (McIntosh, 1998) and its pilot implementation in two diverse Australian contexts. Encouraging findings from the first group of families to work through the model are presented, indicating both anticipated and unanticipated gains for both children and parents”. (Executive Summary)

- Ernest A. Sanchez & Sherrie Kibler-Sanchez, “Empowering Children in Mediation” (2004) Family Court Review, Vol. 42 No. 3 at 554-575.
“The available research in the mediation arena regarding child custody disputes indicates a lack of and growing need for effective intervention techniques. The authors present practicing mediators with a specific intervention model for interviewing, safeguarding, and empowering children in the process of mediating custody dispute. The mediation model utilizes a structured, strategic, and process-oriented approach with family systems theoretical orientation and may be used in private or court-connected settings. The model presented here goes beyond the child-centered interview norm to the inclusion of the child in the process to assist parents in decision making. The model supports the current California statute under Family Code Section 3023, which states that ‘if a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification.’ The model does, however, maintain the position that the final decision continues to lie with the parents or the courts and not the child.” (Executive Summary)

Definition of Childhood & the Meaning of Child Participation

- Andrew Aiers & Judith Kettle, *When Things go Wrong: Young People’s Experience of Getting Access to the Complaints Procedure in Residential Care*, (London: National Institute for Social Work, 1998).

“The Children’s Act (1989) for the first time gave young people the right to make complaints about the service they receive from social services departments. This study focuses on youth people in residential care and their experience of the complaints system: to what extent do they find it accessible, intelligible and effective in dealing with their concerns? Examination of the gateway to the complaints procedure was chosen since there was concern that children and young people neither had the knowledge nor the confidence to access the system and pursue a complaint.

A range of people involved in the making of a complaint was interviewed: residential workers, complaints officers, advocacy workers, as well as young people in residential care. The findings of the study revealed unsatisfactory

policy, procedures and practice at Stage 1, the least visible and least publicly accountable part of the complaints process. A number of recommendations are made” (Summary)

- **“Involving Children: A Guide to Engaging Children in Decision Making”** (Unknown Date), online: Government of New Zealand, Ministry of Social Development, <http://www.msd.govt.nz/documents/publications/sector-policy/involving-children.pdf>. Gives basic principles of child participation and the barriers to implementing participation.

“Participation is more than just asking children for their ideas and views. It’s about listening to them, taking them seriously and turning their ideas and suggestions into reality. Involving children in decision-making means they can influence some of the things that affect them, and offer a different perspective from adults. It helps adults understand children’s issues, helps make sure policies and services are in tune with children’s needs, and acknowledges children’s important role in society. It also helps children and young people to gain new skills and knowledge and build their confidence in other processes, including democracy. This is a practical guide for organisations, government departments, community groups and individuals who want to engage children up to the age of 181 in effective decision-making. The Ministry of Youth Affairs has developed a companion guide, called *Youth Development Participation Guide: “Keepin’ It Real”*², on how to increase youth participation in policy development, programmes, services and organisations. We hope you’ll use both publications when you and your organisation are involving children and young people in decision-making.”

- **Alison Gray, “Increasing the Participation of Children, Young people and Young Adults in Decision-Making: A Literature Review, A Report for the Ministry of Social Development and Ministry of Youth Development” (2002)**, online: Government of New Zealand, Ministry of Social Development <<http://www.msd.govt.nz/documents/publications/sector-policy/increasing-participation-children-young-adults-in-decision-making-literature-review.pdf>>.

“This literature has been undertaken as part of the Ministries of Social Development and Youth Affairs’ Actions for Child and Youth Development work programme that combines work on the implementation of the Agenda for Children and Youth Development Strategy Aotearoa.

A particular emphasis of this work is on increasing the participation in decision-making processes of children, young people and young adults who are Maori; those from Pacific or other ethnic groups; and those with disabilities. The work covers issues specific to children, young people and young adults (0 to 24 years inclusive)...” (Background)

“This document reviews national and international literature and resources including good practice principles, practical guidelines and specific mechanisms for involving children and young people in decision-making processes. Available from the Ministry of Social Development, PO Box 12136, Wellington. Phone: (04) 916 3300. Fax: (04) 918 0099.” Online:

<<http://www.goodpracticeparticipate.govt.nz/resources/literature/engaging-specific-pop-groups.html>>

- **Jantine Hemrica & Frieda Heyting, “Tacit Notions of Childhood: An Analysis of Discourse about Child Participation in Decision-Making Regarding Arrangements in Case of Parental Divorce”, (2004) 11(4) Childhood 449 (Sage Publications).**

“An important issue, which plays an overt or covert part in discussions about granting or denying rights to children, are the questions in what respects and to what extent children are

to be considered difference from adults in specific context, can what consequences these differences should have for how they are to be treated in such contexts. As we do not have any indisputable criteria to answer such questions, we have to renegotiate definitions of 'childhood' and 'adulthood' time and again. Results vary depending on historical, cultural, and contextual circumstances... This variability makes childhood a construction... (Introduction, in part)

- **Adrian James, "Pump Up the Volume: Listening to Children in Separation and Divorce", (1999) 6(2) *Childhood*, 189 (Sage Publications).**

This article looks at the role of law " as a key influence in the social construction of childhood...". (Introduction)

The article also examines children's participation under the UK *Children's Act*, which includes a provision requiring a "best interests" analysis with respect to custody and access decisions that is comparable to the *FRA*. The author asserts that the discretion afforded in the best interests analysis allows courts to easily ignore children's views.

"...although s. 1(3)(a) requires courts in certain circumstances to have regard to the 'ascertainable wishes and feelings of the child', this is made conditional upon the court's assessments of the child's age and understanding. ...this is therefore 'an open invitation to adults to use their values, life experiences, and understands of "advocacy" to refuse to hear children's opinions.'" (at 196)

The UK *Children's Act* does not provide children with legal representation in custody and access disputes. "Welfare officers", who hold positions similar to those of family justice counselors in BC, may put children's views forward. In 1996, welfare officers wrote reports in approximately half of the divorces involving children.

"...in divorce proceedings... the court may order a welfare report to be prepared by a family court welfare officer. The welfare officer is not, however, appointed to represent the child's view but to investigate and report to the court - to act as the courts 'eyes and ears'. ...a large number of children involved in the divorce of their parents never even get to see a welfare officer." (at 196)

**Note - in BC, the percentage of custody and access reports completed in divorces involving children is likely much lower. For the period of July 1, 2002 to June 30, 2003, only 153 custody and access reports were ordered. Approximately 50 of those were "views of the child" reports (Interview of Dan VanderSluis, a policy analyst at BC Ministry of Attorney General Family Justice Services, by Marnelle Dragila, Fall 2004). Also see: "Inventory of Family Justice Services in British Columbia" at 5 (Dec. 2003), online: Government of British Columbia, Ministry of Attorney General
http://www.bcjusticereview.org/media_releases/2003/inventory_fjs_bc_12_21_03.pdf .

- Gerison Lansdown, *Promoting Children's Participation in Democratic Decision Making* (Italy: UNICEF Innocenti Research Centre, 2001).

The author discusses the importance of including children in decisions that affect their lives, and the potential harm of ignoring children's views. The author also dispels the arguments used to disregard children's views.

- Gerison Lansdown, *Evolving Capacities and Participation* (Ottawa: CIDA, 2004).

The author asserts that children's participation in decisions affecting them positively contributes to their development. Adult assumptions regarding child development often prohibits children from participating in these decisions despite their having the capacity to contribute.

"... more recent research has increased the awareness of patterns of child experienced by children in difference cultures and socio-economic environments, and has highlighted the limitations of using age as a proxy for assumptions of competence." (at 4)

"Four primary arguments arise for recognizing children's capacities to participate in their own protection. They suggest that it is not effective, morally acceptable nor practical to seek solutions to child protection without building on the resiliencies, capacities and contributions of children themselves. Over-protection can be every bit as harmful as under-protection. Of course children are entitled to protection from harm, and this does necessitate the introduction of some legal age boundaries and provision of protective care and services. However, the right to protection is not inconsistent with the equal importance of respecting children's own participation and agency in initiatives designed to provide that protection... There is a growing body of research that testifies to the failure of many adult-designed strategies for protecting children where children themselves are not consulted or involved..." (at 15)

"Too many adult interventions are based on an adult understanding of the risks children face and the nature of protection they need. They are not informed by children's own perspectives and accordingly, often address the wrong issues with the wrong solutions". (at 16)

- "Learning to Listen: Consulting Children and Young People with Disabilities", (London: Save the Children, 2001) online:
http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/482_Learning_to_listen.pdf

“This report is based on a consultation with disabled children... The study consisted of two stages: the pilot stage, where the ideas and methods were developed with a small group of children; and the second stage, where these methods were used to consult with a wider group of children and young people.

The pilot stage took place over a three-month period, between January and April 2000. A total of 12 young people were consulted with - aged between 4 and 14 years old, and with a range of disabilities and communication needs. All the children were receiving a service from a respite care unit... The second stage took place over a four-month period, between September 2000 and January 2001. This stage focused on children and young people using a respite service (linking children with disabilities with adult carers in the community) and young people reaching transition (moving from child to adult provision). A total of 15 young people were consulted with. They were aged between 8 and 23 years, and they too had a range of disabilities and communication needs.

This report focuses on the methods and processes used to carry out the consultation. The main body of the report consists of a narrative account of the processes: looking at issues of consent; how to structure consultation sessions; and the tools used. It also addresses some of the difficulties encountered by workers. It is intended primarily as a tool for workers planning similar consultations with disabled children and young people. The checklist at the end of the report may also be useful for managers commissioning and planning similar consultations. The findings from the consultation are included in the accompanying report, *Will It Ever Get Sorted?* (Introduction)

“... there has been a growing awareness of the need to consult children and young people directly about matters concerning them, and an acceptance that such consultation is both important and practicable. This shift in attitude is due to challenges to two prevalent views:

3. that adults know and understand how children think and feel about an issue
4. that children are not mature enough to make judgements or develop opinions, they are suggestible and unreliable.

These challenges have led to the increased participation of children and youth in research that concerns their lives (Beresford, 1997). However, Cheston argues that this is much less true of disabled children, who remain an extremely neglected group (Cheston, 1994).” (Background)

- **Nick Lee, “The Challenge of Childhood: Distributions of Childhood’s Ambiguity in Adult Institutions”, (1999) 6(4) *Childhood* 455 (Sage Publications).**

...examines the difficulties that surround children speaking for themselves. The studies focus on... [one aspect] opportunities for children as witnesses in UK courtrooms. At each scale of analysis it is argued that rather than making clear and univocal assumptions about children’s capacities, adult institutions display an inability to decide on what status they should accord to children’s utterances. As bearers of ‘childhood’, children cut an ambiguous figure within adult institutions... Childhood’s ambiguity... is typically ‘managed’ by institutions by deferring the moment of its resolution... Deferral can push the burden of ambiguity onto children’s shoulders. It is through this deferral of ambiguity that children’s ability to speak for themselves in adult institutions is made problematic. ... [Possibilities for] increasing children’s opportunities for self-representation within adult institutions are explored”. (Executive Summary)

- **Bren Neale, “Dialogues with Children: Children, Divorce and Citizenship”, (2002) 9(4) Childhood 455, (Sage Publications).**

“The notion of listening to children so that they can participate in decision-making about their everyday lives has become an established principle of child law and policy in England and Wales. That there are fundamental constraints to putting this principle into practice, however, is widely acknowledged, particularly in the context of divorce and parental conflict. This article shows how the operation of the welfare principle in an English context constrains children’s participation within private law proceedings. It goes on to explore children’s own discourses around the issue of being listened to and reviews current debates about their participation in the light of this evidence. The children’s commentaries offer fresh insights into what it means to listen to children, along with some new ways of thinking about young people’s citizenship within and outside their families.” (Executive Summary)

- **Jeremy Roche, “Children: Rights, Participation and Citizenship”, (1999) 6(4) Childhood 475 (Sage Publications).**

“The article argues that, in addition to reconsidering what we think it is to be a child (for instance ideas about incompetence and irrationality associated with childhood), we need to rethink the value of the language of rights and the social significance of this language. Rights are not just about state-citizen relations but about how civil society should imagine itself; in this context the imagery of social conversation and participation is central to the rethinking of citizenship.” (Executive Summary)

- **David Shemmings, “Professionals’ Attitudes to Children’s Participation in Decision-Making: Dichotomous Accounts and Doctrinal Contests”, (2000) 5 Child and Family Social Work 235.**

The paper basically examines the “welfare approach” to child protection (the idea that protecting children involves keeping them from participating) as compared to the “rights-based approach” (the idea that voluntary children’s participation is in their best interest).

“The attitude of professionals to the involvement of children in decision-making is unclear. This paper discusses a recent research study that utilized qualitative and quantitative methods to explore the views of professionals working in family support and child protection about two different aspects of children’s participation in decision-making: the age at which children should make decisions and whether or not they should be involved in child protection conferences. The results showed that social workers tended to favour one of two diametrically opposed viewpoints about the age at which young people should make decisions and then in discussions with colleagues they sought to persuade others to change their perspective. Social workers who believed that young people should not make decisions until much older nevertheless thought that they should be involved in conferences whereas non-social workers did not make this distinction: for them, children who were not old enough to make decisions for themselves should not be involved in conference. The results are discussed in the light of some of the implications for practice. The paper concludes by outlining how the results informed the design of a training pack commissioned by the Department of Health concerning the involvement of young people.” (Abstract)

- **Carol Smart, “From Children’s Shoes to Children’s Voices”, (July 2002) 40(3) Family Court Review 307 (Sage Publications).**

“This article considers the sudden rush of enthusiasm to hear children’s voices in divorce proceedings in countries such as the United Kingdom, New Zealand, Australia, and elsewhere and points to the problems that are likely to occur if the family law system really does mean to treat children seriously. Notwithstanding the difficulties that flow from this development, it is argued that it is essential to include children’s understandings in the formulation of future policy and practice”. (Executive Summary)

Evidence from Children & Hearsay Evidence

- **Nicholas Bala & Joanna Harris, “The Voice of Children in Canadian Family Law Cases”,** (Paper presented to the National Judicial Institute Family Law Program, Vancouver, B.C., February 9, 2005).

“There have been dramatic changes in the past two decades in the treatment of children’s evidence in Canada’s criminal justice system. Major reforms have made the criminal justice system more sensitive to the capacities and needs of children. The criminal courts now recognize that even young children can be effective witnesses, and offer special accommodations to receive the evidence of children. The way in which family courts receive the evidence of children has also changed, but often in subtle and less publicized ways. This paper explores how the evidence of children is received in family law proceedings in Canada.

While children are often not consulted by adults who are making voluntary arrangements for their care, for the high-conflict family law cases that are likely to be resolved by litigation, the views, preferences and perceptions of children are often important considerations. It is now accepted by Canadian courts that in family law proceedings, those cases which most directly affect the future care of a child, the “voice of the child” should in some way be “heard” by the court. These proceedings are intended to be resolved based on an assessment of the “best interests” of the child. A child-centered decision about what arrangements will best meet the needs of the child should take account of *information from the child* about the child’s perceptions of his or her interests, needs, experiences and relationships with adults. This paper discusses the *different methods for receiving the evidence of children* in family law proceedings, arguing that *in some cases this type of evidence is now received in ways that are not sensitive to the needs and capacities of children*.

Canadian courts have long accepted that while a child’s wishes and views are not determinative of the child’s “best interests,” they are a relevant factor, whose weight is dependent on such factors as the child’s age, maturity and motivation. Even if a child does not have clear wishes or preferences about custody or access, the child may have views and perspectives on family relationships that are important for a court to learn about.

It is also sometimes argued that children who are capable of articulating views have the *right* to have those views considered by the court that is making a decision about their future. This type of rights-based claim is most likely to succeed in a child protection case, where a state-sponsored child welfare agency is threatening the child’s relationship with parents and siblings.

In private family law litigation between separated parents, outside of Quebec courts in Canada have generally rejected a *rights-based* approach to the wishes of children; rather the dominant approach continues to be on the *promotion of a child’s best interests* by having the child’s views shared with the courts, but not determinative. In Quebec, however, the *Civil Code* adopts a rights-based approach to a consideration of the views of children:

Art. 34 The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it.

As discussed more fully below, as a consequence of Article 34 and this more rights-based approach, Quebec courts have ruled that children should be entitled to come to court to tell the judges about their views, and children not infrequently testify in family law proceedings in that province. Further, the Quebec courts have taken a different view from courts in the rest of Canada to the role of counsel for children in family cases, holding that they are to advocates for their young clients.

Canadian provincial and territorial legislation generally now provides that in making decisions about the “best interests of a child” in a custody or access dispute between separated parents or in a child welfare proceeding, a court should take into account the “*views and preferences*” of the child, where they “can reasonably be ascertained.” Further, a child may have important evidence to provide about *issues of fact* that may be in dispute in a family law case, in particular about allegations of child abuse or domestic violence. While it is clear that the “voice of the child” should be heard by the court in family law cases, there is considerable controversy about how this is to be done.

There are a number of different methods that can be used in family law proceedings to bring before the court evidence of the child’s views, preferences, observations and perspectives:

- Testimony by the child, in court or in the judge’s chambers;
- Hearsay evidence, related by another witness, or by videotape or audiotape;
- The testimony of a mental health professional after an assessment;
- Written statements from a child in the form of a letter or affidavit; and
- Counsel for a child.

There are advantages and disadvantages to each of these methods of introducing a child’s evidence. Which method is used in a particular case will initially depend on the circumstances of the case and the attitudes of counsel, often with input from the parents and perhaps from the children. In litigated cases, the judge may have a central role in deciding how the evidence of a child is to be received. In deciding how to “hear the voice of the child,” a judge is likely to weigh a number of sometimes competing objectives:

- Wanting the court to have as much accurate information as possible;
- Minimizing trauma to the child;
- Ensuring a fair process for the parents;
- Ensuring a fair process for the child; and
- Resolving disputes in a way that is as cost effective as possible for the parties and court.

The circumstances of a case affect how judges in family law cases weigh these factors and make their rulings on the admission of the evidence of children. ... in some places in Canada, such as British Columbia, there is a lack of government funded resources for social workers or lawyers for children, and judges have fewer alternatives than in Ontario and Alberta where there is some funding for lawyers and social work assessments. It must also be recognized that there are differences of opinion among judges about how to balance these different objectives. For example, some judges place a greater emphasis on minimizing trauma to the child and obtaining as much information as possible for the court, while other judges may place a greater emphasis on fairness to the parents or the efficiency of the court process.

Hearing from children about both their wishes and their experiences is a very important part of determining their best interests. A central argument of this paper is that the *best interests of the child* should govern both substantive outcomes and *how children are involved in the litigation process*; children may be deeply affected by the way that they are involved in the legal process, as well as by the outcomes that are achieved by negotiation or imposed by a judge. Counsel and judges should, *at an early stage*, be considering how *the child's voice will be brought into the process*. Children must be *involved in a sensitive fashion*, one that takes account of such factors as the degree of conflict between the parents, and the clarity or ambiguity of the child's preferences." (Introduction)

- **Bryce A. Dyer, "Views of Children: How to Best Put Them Before the Courts"**, (Paper presented to the CBA, B.C. Branch, Vancouver Section Meeting Held May 21, 2002) [unpublished].

The author summarizes BC court decisions that dealt with taking account of children's views in custody proceedings. Lists options for putting children's preferences before the court.

- **Madam Justice Carol Mahood Huddart & Jeanne Charlotte Ensminger, "Hearing the Voice of Children"** (1991-1992) 8 C.F.L.Q. 95.

Emphasizes that taking account of children's views is "child-centred" and necessary to determine their best interest. The article examines "*various methods available in Canada for eliciting the views of children and placing them before a court. It will also attempt an assessment of the quality and reliability of these methods. It will suggest that the particular nature of the case should determine the method to be used; that no method should be adopted slavishly by any court or participant in the decision-making process; and that in every contested case the full range of alternatives should be considered. It will make some tentative suggestions as to how the process of choice might be structured*" (at 96).

- **Beverly McLachlin, "Children and the Legal Process: Changing Rules of Evidence"** (1992) 50 The Advocate 727.

Discusses children giving evidence in civil and criminal proceedings.

"Divorce brings with it the corollary dispute of who should get the kids. As children become the subjects of such judicial proceedings they often become active participants as well. In order to find out what is in the best interests of the children, it seems logical to find out what the children think. After all, they and they alone know what life is like with one parent of the other. But how to do this? Some judges took the child into their chambers, or in one case I recall, to a bench in Stanley Park, for a private chat. Later on, the vogue was for social or medical professionals to interview the child and report to court. This sometimes obviated the need to call the child as a witness, but involved the possibility that the expert's report my have been affected by allegiance to one side or the other. And there was always the hearsay problem lurking in the wings. Sometimes the search for impartiality led to children's advocates being appointed-a lawyer charged with representing the interest of the child alone. Nevertheless, despite all these devices, it remained necessary in many cases-to call children as witnesses in custody proceedings. Trials are always stressful. They are particularly stressful for witnesses and for people directly affected by the outcome. The stress which testimony in

custody proceedings must place on a child who is both witness and party affected is difficult to calculate. But the damage which may be done by leaving the child out of the process may be even greater". (pgs 727-728)

- Eugene Rossiter, "Children as Witnesses in Civil Proceedings" (1992) 13 Advocate Quarterly 222.

The article presents a summary of the law concerning children giving evidence in civil proceedings and, in particular, proceedings involving the custody and welfare of children" (at 222). *Dated, but good historical background regarding children giving evidence.

- D.A. Rollie Thompson, "Children Should be Heard, but Not Seen: Children's Evidence in Protection Proceedings" (1991-1992) 8 C.F.L.Q. 1-42.

Examines the admissibility of children's evidence in protection proceedings, although the author states that the "principles discussed are equally applicable to private custody and access proceedings".

- D.A. Rollie Thompson, "Are There Any Rules of Evidence in Family Law?" (2003), 21 C.F.L.Q. 245.

Discusses the admissibility of hearsay evidence with respect to a child's views and preferences in child protection and custody and access proceedings.

- D.A. Rollie Thompson, "Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings-Part I" (1988) 7 Can. J. Fam. L. 11 at 26.
- D.A. Rollie Thompson, "Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings-Part II" (1989) 7 Can. J. Fam. L. 223.

International Law

- *Convention on the Rights of the Child*, 1989, C.T.S. 1992/3, 28 I.L.M. 1456, 3 U.N.T.S.1577 [CRC]
See Article 12 and other related Articles
- David Cruickshank, *The UN Convention on the Rights of the Child: Does Domestic Legislation Measure Up?* (Vancouver: Society for Children and Youth of BC, 1998).
Includes BC Statutes and assesses how well the UN Convention on the Rights of the Child, Article 12 (child's right to have their views heard) is implemented in domestic legislation.
- Robin M. Junger (Law Corporation), "Canadian Judicial Consideration of the United Convention on the Rights of the Child", April 2003 [unpublished] (Possibly available through IICRD)
Outlines 100 Canadian legal cases that have considered the UN Convention on the Rights of the Child.
- Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Eds. (Vancouver: Butterworths Canada Ltd., 2002) at 421.

Explains how Canadian courts currently use international law in statutory interpretation.

- **UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*** (New York: UNICEF, 2002).

Explains the rights contained in the UN *Convention on the Rights of the Child* as interpreted by the UN Committee on the Rights of the Child.

Judicial Interviews & other Methods of Obtaining the Child's Views

- **Bala & Fagnan, *Judges Handbook on Child Witnesses*** (Edmonton, Alta: Alberta Court of Queen's Bench, Dec. 2001).

This resource appears to be available only to judges.

- **Barbara Chisholm, "Obtaining and Weighing the Children's Wishes; Private Interviews With a Judge or Assessment by an Expert and Report"** (1976), 23 R.F.L. 1.

The author asserts that children should be provided with legal counsel in custody disputes, judicial interviews are fraught with problems, and experts should be retained to provide assessments, testimony, etc. While the article is dated, the author's reasoning for her view that children should be included in the decision-making process and her discussion of the problems with judicial interviews are still relevant and useful.

- **Justice Brian. M. Joyce, "Interviewing a Child: Legal and Practical Considerations"** (Paper presented on October 9, 2003) [unpublished].

"Not infrequently, a judge (in that term I include a master) hearing a custody or access dispute is asked to interview a child to ascertain the child's wishes. The request may come from one or both parents or may originate with the child. At times the judge may have a strong desire to hear directly from the child, particularly if there is a conflict in the evidence of the parents as to the child's wishes. However, the judge may be reluctant to stray from being strictly an adjudicator and assume the role of investigator, particularly if the judge thinks he or she lacks the necessary training or experience. A request to interview a child raises important and, at times, difficult issues for the judge: [such as...]...

The following remarks are not intended to provide answers to all of these questions or to provide a treatise on the law. Rather, I hope to identify some of the issues you should consider when asked to interview a child and to outline some legal and practical considerations that might assist.

... I have drawn heavily upon the recent judgment of Madam Justice Martinson in *L.E.G. v. A.G.*, (2003) 37 R.F.L. (5th) 111, [2002] B.C.J. No. 2319 (B.C.S.C.) which contains a comprehensive review of these issues and of the law that bear upon them..." (Introduction)

- Fiona E. Raitt, “Judicial Discretion and Methods of Ascertaining the Views of the Child” (2004) 16(1) Child and Family Law Quarterly 1.

“There is an expectation in the UK, endorsed by legislation, that in many types of family proceedings the wishes and feelings of the child should be ascertained. How those wishes and feelings should be ascertained is entirely dependent upon the approach taken by the judge in the case. Thus, the way that judges exercise discretion in family justice proceedings profoundly affects the extent to which children’s voices can be heard in those proceedings. This article explores one particular dimension of the judicial exercise of discretion: the method that is chosen to give children an opportunity to be heard in cases concerning contact. The exercise of discretion, by its very nature, lacks transparency and it follows that the award of discretion to an individual is both a mark of trust and a leap of faith. The territory of judicial discretion is on that is closely defended, particularly by the judiciary, and legislative attempts to limit discretion are usually met with resistance. The proper exercise of discretion is an essential component of procedural and substantive justice and ought to be reasoned and principled, as opposed to arbitrary and capricious. When judges are required to exercise discretion in the context of decision-making based on evidence, subsequent challenge is only available through the appellate courts which will be loath to interfere with decisions other than on grounds of law, unless they are ‘plainly wrong’. Discretionary decisions by judges at first instance are therefore largely insulated from review, making it all the more pressing that discretion be exercised fairly and appropriately.

Although considerable attention has been given to how children’s participation in legal proceedings is being interpreted and facilitated by various legal and welfare professionals, very little research appears to have been undertaken to explore how judges interpret and facilitate the child’s role. Given the wide discretionary powers that judges have to shape children’s participation, their decisions obviously impact significantly both on children and on the practice of those professionals working with them. Discretion is a property that cannot, of necessity, be reduced to a set of guidelines. Instead, discretion is designed for those circumstances that are contingent, unpredictable or fluid, intended to supplement the law ‘in those recesses of justice into which the law is too solid to flow’.

...if we are to provide children with meaningful participatory rights then more attention should be given to their experience of participation in the legal process, rather than to whether there has been formal compliance in ascertaining their wishes and feelings” (Introduction)

➤ Tools for Communicating with Children & Youth

- Nicholas Bala, Lee & John Philippe Schuman, “Developmentally Appropriate Questions for Child Witnesses” (1999) 25 Queen’s Law Journal 251.

This paper explores one aspect of the questioning of children in court: asking questions that are appropriate for the age and capacity of the witness... The first section of this paper explores the concepts and language that children at different levels of development find difficult to understand. This section also discusses the types of questions that children at different levels of

development should not be asked. We offer specific suggestions with respect to age-appropriate questioning of children...

The second section of the paper considers the role that courts should play in assessing the level of development of child witnesses and the impact that such findings should have on the way children are questioned. We argue that judges have a duty to intervene when a child is questioned in a manner inconsistent with that child's level of development. Such an intervention would ensure that the child is asked questions that she can answer.

The main focus of this paper is the questioning of children in courts, especially in criminal proceedings, which is the context in which children most frequently testify in Canada. However, the courtroom is not the only forensically significant setting in which children may be asked questions. Investigators, physicians, social workers, and mental health professionals frequently question children about abuse allegations. In cases in which a court is making a "best interests" decisions (such as a parental dispute over custody or access), it is common for an assessor to question a child. In these situations, the child's out-of-court answers may form the basis of an opinion offered by the questioner in court. A child's out-of-court statement may also be admissible as hearsay... or if they are videotaped the video may be admissible in court if the child is also a witness... Concerns about age-appropriate questioning of children are also highly relevant to the investigative and assessment processes, as are related issues of suggestibility. Issues related to non-court questioning of children, however, are beyond the scope of this paper". (at paras. 7-9)

- Nicholas Bala, Janet Lee & Erin McNamara, "Children as Witnesses: Understanding their Capacities, Needs and Experiences", (2001) 10 Journal of Social Distress and the Homeless 41.

"This paper traces the evolution in psychological and legal thought and practice towards children as witnesses, especially in the context of child sexual abuse prosecutions, which is the type of case in which children most frequently testify. The common law regarded children... as inherently unreliable. The common law made it very difficult for children to testify. Few cases of child abuse were prosecuted, feeding into a cycle of denying of abuses as a serious problem. Starting about 1975 the woman's movement and increased professional awareness of the abuse of women and children led to better understanding of the scope and effects of child sexual abuses. Psychological research established that children can be reliable witnesses and can accurately report on their victimization and abuse.

In the 1980s, legal reforms were introduced to make it less difficult for children to testify. We discuss some of the most significant reforms and report on the results of our recently

completed survey of victim-witness workers, who are the professionals who most closely support children as their cases proceed through the courts. Although there are many more prosecutions for child abuse now than in the past, children too often still experience a justice system that disregards their needs and capacities.

While the increase in reports child abuse and prosecutions is resulting in many more children being protected, it is important to recognize that there have been some cases of false allegations of abuse, often as a result of well-intentioned but poorly trained professionals engaging in inappropriate interviews of children. As a result, a relatively small number of cases of false allegations were brought to the courts; the children in these cases were harmed by the poor investigations, and the falsely accused suffered injustice. Deliberately false allegations are rare, and almost always the result of fabrication by adults rather than by a child. Therapists, assessors, investigators, police, judges, and lawyers must receive appropriate education and training on how to properly question children.

Legal and systemic reforms are needed to improve the way children are dealt with in the courts. We propose a number of reforms including (a) elimination of present child competency questions about concepts such as “truth” and “lie”; (b) ensuring that children are asked developmentally appropriate questions; (c) increasing use of closed circuit television to facilitate children testifying; (d) permitting greater use of hearsay evidence; (e) allowing for a child to make videotaped deposition relatively soon after the disclosure and the subsequent use of this tape instead of having a child testify; and (f) having more “child friendly” courts with their focus on providing appropriate supports for children. Any reform must respect the rights of accused persons and recognize the potential for unfounded allegations, while ensuring that children are treated in a manner appropriate to their development level.

Education and training for justice system professionals is critical. Although further research into the capacities of child witnesses is needed, dissemination of existing knowledge through better education and training about the needs and capacities of children and the dynamics of child abuse will substantially improve the way child abuse cases are dealt with by the justice system, ultimately leading to less child abuse and less injustice.

Much of the discussion in this paper relates to our survey data and is set in the context of the Canadian legal system, though there is consideration of similar developments in the United States, and the section of the paper that proposes further reforms draws on innovations in England, Australia and Israel”. (Introduction)

- **Michael F. Elterman, Ph.D. (Clinical Psychologist), “Interviewing Children”** [unpublished].

The author provides developmentally appropriate methods for interviewing children.

“When one adult interviews another, both parties generally knows the nature of the facts that are to be communicated. The relevance or irrelevance of material is generally appreciated by an adult interviewee. This is not the same for a child. As a result of cognitive and language development, limited experience, deference to adults, and the relative value that is given to different observations, fact finding questions need to be generally more specific and direct with children”. (Introduction)

- **Anne Graffam-Walker, *Handbook on Questioning Children: A Linguistic Perspective*** (Washington, D.C.: American Bar Association Center on Children and the Law, 1994).

The author wrote the book with lawyers and judges in mind and sets out, in easy to understand language, what adults need to know about children’s age specific linguistic abilities when

questioning them. Included are lists of important linguistic characteristics to keep in mind for each age group. The author stresses that “children of all ages can tell us what they know if we ask them the right questions in the right way”, in effect, if adults structure their questions/language so that children are better able to understand what they are being asked. Some of the basic principles of the book include: children and adults do not speak the same language, inconsistencies in children’s statements are normal, children are very literal in their approach to language, even very young children can be competent witnesses in a court of law. A very useful resource for legal professionals who communicate with children.

Legal Resources: Child Protection, Custody and Access & Divorce Law

- **Bernstein, Bernstein & Kirwin, *Child Protection Law in Canada***, looseleaf (Toronto, Ont.: Carswell, 1990).
Sets out child protection law applicable throughout Canada.
- **Canada, *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access*** (Ottawa: Supply and Services Canada, 1998) online: <http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm>

Recommendations for amendments to the *Divorce Act*, which included provisions for taking account of child’s views.

- **James McLeod, *Child Custody Law and Practice (Canada)***, looseleaf (Scarborough, Ont.: Carswell, 1992).

Sets out custody law applicable throughout Canada. Chapter 5(4) “Views and Preferences of the Child”, is especially helpful.

- **Jeffrey Wilson, *Wilson on Children and the Law***, looseleaf (Markham, Ont.: LexisNexis Canada 1994).

Focuses on the law as it pertains to children. Chapter 6, “The Child & the Courtroom”, is especially helpful.

Legal Representation for Children

- **Nicholas Bala, “Child Representation in Alberta: Role & Responsibilities of Counsel for the Child”** (presented at Representation of Children programs of Legal Education Society of Alberta, Edmonton & Calgary, April 2005).

“This paper discusses the different roles that may be adopted by counsel appointed to represent a child in a family proceeding: the child advocate, the best interests guardian, or the friend of the court. I review varying approaches to the resolution of the controversy over the role of counsel, with legislatures, courts, law societies, and government departments playing a central role in different jurisdictions.

I argue that no role is appropriate for all cases, and that in Alberta, in the absence of a clear direction from the court at the time of appointment, counsel for children must make their own decisions about the role that they will adopt, depending on the specific circumstances of each case. When deciding what role to play and how to represent a child, counsel must assess the

child's capacity, and consider the child's views, the nature of the case and such factors as whether the other parties are represented. I also discuss the responsibilities of counsel for children, and consider the implications both for the lawyer and the child of different roles that counsel may adopt. A key question is whether the child has the legal capacity to instruct counsel, as counsel is obliged to advocate based on the instructions of a client with capacity. The *Code of Professional Conduct* of the Law Society of Alberta provides that individuals only have capacity to instruct counsel if they can make "*reasonable judgements* respecting [their] affairs." This requires that counsel is to be satisfied that the child has the ability to exercise that judgement without undue adult influence and that the child has made *a* reasonable choice.

The paper concludes with a brief discussion of some important issues that should be addressed by the government of Alberta and the Law Society if they are to meet their responsibilities to the children of the province. The child representation program in Alberta was quite large in the late 1980s, but in the early 1990s there was a change in government policy and a marked decline in the appointment of counsel for children. In recent years, however, sparked by changes in government policy, legislative reform and the *Charter*, there has again been an increase in the number of cases in which counsel are appointed to represent children. While the government of Alberta is spending significant sums on child representation, primarily through Legal Aid, there is not an organized child representation program in the province, and significantly less is being spent on legal representation for children on a per capita basis than in some other provinces like Ontario. It is time for the Government of Alberta and the Law Society to coherently address a range of issues related to child representation, including the issue that is the subject of this paper, the appropriate role and standards for counsel appointed to represent a child". (Introduction, in part)

- **Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings*** (Department of Justice Canada, 2002).

The author asserts that children involved in family proceedings should be empowered in protective settings to influence decisions that will have a significant affect on their lives. The paper largely focuses on the role and importance of legal representation for children in divorce, custody and access proceedings, however, the arguments in favour of appointing counsel for children (at 17 & 18) may be applicable to judges taking account of children's views in their decisions more generally.

- **His Honour Judge A.P. Nasmith, "The Inchoate Voice"** (1991-1992) 8 C.F.L.Q. 43. Focuses on the details of representing children in custody proceedings, including receiving instruction from the child-client regarding the child's custodial preferences, the issues the child's lawyer must face in bringing the child's preference forward at the hearing (including determining their proper role) and preparing for the hearing.

While this article's main focus is on the legal representation of children, the author discusses misguided fears about harming the child by including them in the decision-making process (at 45, 54, 55-56), emphasizes that young children can give reliable evidence regarding their views and preferences (at 52-53) and states that it is preferable to err "on the side of inclusion rather than exclusion of child's views and preferences". The author suggests that if a child's non-party status reduced his or her right to be heard, it may trigger the application of the *Charter* (at 51) and points to natural justice principles as a rationale for respecting the child's right to be heard (pg. 50) as well as reminds readers that a child's right to choose not to disclose preference should be protected (at 49).

Other Resources

- **A.J. Bradbrook, "An Empirical Study of the Attitudes of the Supreme Court of Ontario Regarding the Workings of the Present Child Custody Adjudication Laws"** (1971) 49 Can. Bar Rev. 557.

The author interviewed Ontario judges. The study showed that, among other things, Ontario judges varied widely in their opinions as to when children's views should be taken into account. Dated, but likely still useful and informative.

- **Olive Stone, "The Child's Voice in the Court of Law"** (Toronto: Butterworths, 1982).

Referred to in *Strobridge v Strobridge*(1992), 10 O.R. (3d) 540, appealed to the Ontario Court of Appeal (1994), 18 O.R. (3d) 753.

- **Justice R. James Williams, "If Wishes Were Horses, Then Beggars Would Ride: Child Preferences and Custody/Access Proceedings"**, *National Family Law Program, National Justice Institute. Nova Scotia, 1999.*

The author examines some of the issues faced by judges when taking a child's views and preferences into consideration to determine their best interests. Lists the means by which a child's preference may come before the court,

issues to consider when deciding whether to conduct a judicial interview, and factors influencing how much weight a child's preference should be given.

Provides a historical background by looking at very old court decisions to show that the way in which judges take account of children's views today are not dramatically different from the way in which courts took account of children's wishes over a century ago. The author emphasizes that judges have a very wide discretion with respect to determining the best interests of the child, and that provincial statutes do not set out when a child's wish can be "reasonably ascertained". Points out that the age at which children are given responsibilities/rights varies widely and depends on the province, e.g., voting, driving, age of criminal responsibility, age of required consent for adoption, at no age are children required to have party status in custody proceedings, etc.

- **Justice R. James Williams (Nova Scotia Supreme Court), "Children's Wishes in Custody Cases" (1999), Canadian Judges' Forum, Vox Judicia at 5, online: Vox Judicia http://www.cba.org/CBA/Judges_Forum/pdf/voxjune99.pdf**

The author states, "the issue of children's wishes might be better dealt with if judges took a proactive role at the pre-trial state of proceedings..." . The author gives judges a "to do" list to improve their pre-trial preparation with respect to children's wishes and preferences and includes factors that may be considered in weighing children's preferences.

This short article includes summarized portions of his longer paper, "If Wishes Were Horses, Then Beggars Would Ride: Child Preferences and Custody/Access Proceedings", *supra*.

Schedule "D"

Kelowna Pilot Information

Meaningful Child Participation in BC Family Court Processes

Notice to the Profession

Meaningful Child Participation Pilot

From now to December 9, 2005 [subsequently extended to March 31, 2006 and October 1, 2006] the Kelowna family court system (BC Provincial and Supreme Courts) will be participating in the Meaningful Child Participation Pilot. The pilot is part of the *Meaningful Child Participation in BC Family Court Processes* project of the International Institute for Child Rights and Development (IICRD), based at the University of Victoria, and funded by the Law Foundation of BC. This pilot will test a practice that provides young people with an opportunity to share their views in custody/access matters and have them shared with the court to assist adults in making decisions about the children.

Who Can Participate?

Persons involved in custody/access cases in Kelowna. It is recommended that children aged 8 -18 years be given an opportunity to share their views through this process.

The Pilot Process

The following process will form the basis of the pilot:

1. Parties, lawyers, or Judge/Master may ask to have the child's views considered, and to be part of this pilot. This can happen at any stage of a family custody/access case;
2. Parties agree on interviewer from roster and contact Interviewer;
3. Information Intake form about the child and consent forms completed and sent to the Interviewer before the interview;
4. Interviewer contacts parties to arrange interview with child/children;
5. Child/children attend interview where interviewer records views;
6. Interviewer provides children's views in writing to the Judge/Master, counsel, parties, and IICRD

The parties and court will have the child's views to consider when making custody/access decisions about the child. Legal Aid is available to qualified parties for this process (tell the interviewer you are interested). Parents are encouraged to provide each child with information about the final decision made by settlement or by the court about their custody/access.

IICRD will contact some of the pilot participants in early 2006 for feedback on their experience with the process, so it can form part of the final Project report that will be released in 2006.

More Information: Visit: www.iicrd.org/childparticipation; If you have any questions or require additional information contact: Suzanne Williams at IICRD at swiicrd@uvic.ca or 250.472.4762.

MEANINGFUL CHILD PARTICIPATION IN BC FAMILY COURT PROCESSES
KELOWN PILOT

Interviewer Roster

The following people volunteered to interview children for their views in family law (custody/access) cases in Kelowna. Interested people can contact any one of these people to arrange an interview for the child(ren) in their case. The interviewer provides interested parties with further information about setting up an interview. Information is also posted at www.iicrd.org/childparticipation.

1. Barbara Young (L)
2. Eric Watson (L)
3. Lisa Holmes Wyatt (L)
4. Ron Smith (L)
5. Jeff Peterson (L)
6. Cori McGuire (L)
7. Nancy Johnson (L)
8. Roberta Jordan (L)
9. Paul Henry (L)
10. Cathy Heinrichs (L)
11. Virginia Hallonquist (C)
12. Brenda Forster (C)
13. Terry Dunn (C)
14. Beverly Churchill (L)
15. Valerie Bonga (L)

The interviewers are either lawyers (L) or clinical counselors (C).

A very big thank you to these volunteers!

Information for Pilot Interviewers

Kelowna Orientation: September 22, 2005

- 1. General Information Document - Kelowna Pilot (2)**
- 2. Pilot Process for Obtaining Children's Views (1)**
- 3. Notes to Pilot Process Steps (1)**
- 4. Participant Consent Form (3 plus schedule)**
- 5. Interview Stages (1)**
- 6. Interview Tips (1)**
- 7. Child Development (2)**
- 8. Information on Questioning Children (2 p)**
- 9. Suggested Instructions to Parents (1)**
- 10. Parenting After Separation Information (5)**

* Note: numbers in brackets represent the number of pages of the document

MEANINGFUL CHILD PARTICIPATION IN BC FAMILY COURT PROCESSES
GENERAL INFORMATION DOCUMENT - KELOWNA PILOT

I. The Project

The International Institute for Child Rights and Development (IICRD) based at the University of Victoria is working on, *Meaningful Child Participation in BC Family Court Processes*, a project funded by the Law Foundation of BC. The project team includes representatives from IICRD as well as the bench and bar in British Columbia. The project is focused on examining the current state of child participation and identifying strengths within the existing legal framework to support meaningful child participation. Project activities include a literature review, surveys and interviews of young people, lawyers and judges, focus groups with young people and piloting a practice supportive of meaningful child participation.

Legal Underpinnings

The project's legal underpinnings of the project are:

1. Article 12 of the UN Convention on the Rights of the Child, ratified by Canada and BC (children who are capable of forming their own views should have an opportunity to do so in judicial and administrative hearings, with the weight of these views being dependent upon the child's age and maturity); and
2. relevant provincial legislation such as section 24 of the *Family Relations Act* (if appropriate, the views of the child are taken into account to determine the best interest of the child).

Meaningful Child Participation

Meaningful Child participation in this project is generally about:

- creating enabling environments that give children an opportunity to share their views on matters that affect them;
- having someone listen carefully to children's views and providing these views to decision-makers;
- having the child's views considered, along with other relevant factors, when adults make decisions about their best interests; and
- providing information to children, in a form that they understand, about what is going on in matters that affect them.

II. Kelowna Pilot

A component of this project is a pilot scheduled to begin in Kelowna in October 2005. The pilot will run to December 9, 2005 and is intended to test a streamlined practice of providing young people with an opportunity to share their views in custody/access matters and have them put before the court to assist adults make decisions about the children. This builds on an existing ad hoc practice within BC courts as well as a practice used in collaborative law processes.

Who Can Participate?

Parties whose cases are in the Kelowna family court system (BC Provincial or Supreme Court) and involve custody/access matters. We recommend that children from 8 -18 years of age be given an opportunity to share their views through this process. We recognize however, that this is only a guide, as some children younger than 8 years are capable of expressing their views, while others older than 8 may have difficulty doing so. We make special note of encouraging parties to permit children with disabilities to share their views wherever possible.

The Pilot Process

The following process will form the basis of the pilot:

1. Parties, lawyers or Judge ask to have the child's views considered, and to be part of this pilot. This can happen at any stage of a family custody/access case.
2. Parties, lawyers, and judge/master (as applicable) and children agree to be part of the pilot
3. Parties agree on interviewer from roster and contact interviewer: address interviewer fee, and interview process
4. Information about the child, agreed to by the parties, sent to the interviewer
5. Interviewer contacts parties to arrange interview with child/children
6. Child/children attend interview
7. Interviewer provides children's views to the judge, parties, & IICRD

It is hoped that the child's views will then be considered by the parties and court in making custody/access decisions about the child, and that parents will provide each child with information about the final decision made by them through settlement or by the court.

IICRD will contact some of the pilot participants for a follow-up interview in early 2006 for feedback on their experience with the process.

The views expressed by children, and the experiences of interviewers, young people, lawyers and judges will be captured and form part of IICRD's final report on Meaningful Child Participation in Family Court Processes that will be released in 2006.

More Information

To fill out a survey visit: www.iicrd.org/childparticipation

For a Pilot consent form or interviewer roster visit:
www.iicrd.org/childparticipation

If you wish to be interviewed contact: iicrd@uvic.ca

If you have any questions or require additional information contact:
swiicrd@uvic.ca or 250.472.4762.

**PILOT PROCESS FOR OBTAINING CHILDREN'S VIEWS
IN CUSTODY/ACCESS MATTERS**

- 1. Initiate Child Participation**
 - a. Done at any stage of custody/access proceeding
 - b. Judge, Master, Party or Counsel may initiate
 - c. Recommend done at earliest stage of matter but anytime okay

- 2. Judge, Parties, Counsel and Child agree to process**
 - d. Pilot Consent form completed by parents and child
 - e. Consent form available at www.iicrd.org/childparticipation

- 3. Parties Agree on Interviewer from Roster and Counsel Contacts Interviewer**
 - f. Payment for interview addressed;
 - g. Roster located at www.iicrd.org/childparticipation

- 4. Counsel provides information to Interviewer and Parents**
 - h. To Interviewer: provide background information sheet that includes each child's age, name, school, pets, names of other close people, activities
 - i. To Parents: instruct them not to coach, or pressure child/children before or after the interview

- 5. Interviewer contacts Family to arrange interview with child/children**
 - j. Interviewer advises IICRD that interview scheduled (swiicrd@uvic.ca)

- 6. Child/children attend interview**
 - a. Interview approximately 1 hour

- 7. Interviewer provides children's views**
 - k. Views are put in writing
 - l. Provided to Judge, and Counsel (provide to parties)
 - m. Provided to IICRD project (swiicrd@uvic.ca)

- 8. Child's views considered by the parties and court in custody/access decisions**
 - n. Considered in determining the child's best interests

- 9. Parents provide child with information about final decision of the court and give child an opportunity to ask questions**

FOLLOW-UP

10. IICRD contacts a sample of participants for follow-up interviews about their experiences with the pilot practice. This will take place in early 2006.

Notes to Pilot Process Steps

1. Any party may initiate the proceedings. This can be done by communicating with the other parties and judge/master through informal or formal channels.
2. All parties (e.g. parents), children, the judge/master and legal counsel must agree to be part of the pilot process. The Children **MUST** choose to be a part of the process. This may mean that where more than one child is involved in a case, one or more of the children may participate. Consent forms are provided at www.iicrd.org/childparticipation for adults and children to sign.
3. The parties must agree on an interviewer from the roster, also available at www.iicrd.org/childparticipation. The interviewer then must ensure that he or she has no conflicts. How the interviewer is going to be paid must be determined. If a party is eligible for legal aid funding, they may have access to this support. Otherwise, the parties will be expected to cover the cost of the interviewer's time (about 3 hours/interview).
4. Counsel is required to provide information to: (1) the interviewer - in the form of a short brief approved by both counsel (include for each child their name, age, names of family members, close friends and pets, name of school, grade level, activities); (2) parents/adults - advise them verbally and/or in writing that they are not to pressure the child before the interview, or pump the child for information after the interview.
5. The interviewer will contact the family to arrange an interview. It may be that the interviewer arranges to have one parent drop the child off and another parent pick the child up. In exceptional cases, there may be two interviews where each parent has an opportunity to drop off and pick up the child. The interviewer will also contact IICRD to advise that an interview has been set up and also advise if the interview will be covered by legal aid funding.
6. The child will attend the interview and share his or her views with the interviewer. The interviewer will listen carefully and ensure that the child's views are captured. This is not an assessment of the child. It is merely an opportunity for the child to tell the interviewer about his or her views. With the permission of the child, the interviewer will then collate the child's views.
7. The interviewer will put the children's views in writing, and provide a copy to the Judge/Master and legal counsel where possible. The views will then be shared with the parties (e.g. parents). The interviewer will also share the views with the IICRD project. These views will be kept confidential by IICRD.
- 8-9. It is hoped that the children's views will be considered by the adults making decisions about the child, and that when decisions are made that the child will be provided with information about the decision in a way that he or she can understand, and that the child will have an opportunity to ask questions.

10. IICRD will review the children's views and they will form party of IICRD's report on the pilot. IICRD will also follow-up with a sample of pilot participants in early 2006.

Consent Agreement to Hear the Views of the Child(ren)

This must be completed and sent to the Interviewer before the Interview date.

Between:

_____ (the "parent")

And:

_____ (the "parent")

And:

_____ (the "interviewer")

And:

And:

A. The parties wish to have the views of the child(ren) heard in their case:

NAME(S): (last, first, middle; e.g., Brown, Jonathan Gordon) BIRTH DATE:
(year, month, day)

1)

2)

3)

B. The interviewer is a neutral and impartial person who will listen to the views of the child(dren) and report them back to the parties and the court to assist them in making decisions about the child(ren).

THEREFORE THE PARTIES AGREE THAT

1. Without taking sides, the interviewer will listen to the views of the

child(ren) to assist the parties and the court to make good decisions about the child(ren).

2. Hearing the views of the child is voluntary, unless a court orders otherwise.

3. The children must agree to share their views. They will not be forced to share them.

4. The views of the child(ren) will be put into writing.

5. Each party acknowledges that if the child discloses information during the interview that indicates the child is in need of protection as set out in section 13 of the *Child, Family and Community Services Act* (attached as Schedule "A") then the interviewer must immediately report this to the Superintendent of Family and Child Services.

6. The interviewer is free to share the child(ren)'s views with:

- * a lawyer for any party;
- * the Court;
- * a lawyer for a child (if applicable);
- * the International Institute for Child Rights and Development (IICRD) for research

and evaluation purposes.

But the parties agree that the information will only be shared if the party receiving it keeps the information confidential.

7. All parties agree to keep the child(ren)'s views confidential as between themselves, unless the child(ren) consent otherwise.

9. The interviewer will meet with the child together with a neutral party who will act as an observer. The neutral party can be selected with the agreement of the parties, or the interviewer will arrange for the neutral party.

The neutral party who will attend the interview, and keep the interview discussions confidential, will be (if left blank, the interviewer will arrange for a neutral):

Name of Neutral Party

Occupation

Telephone number for neutral party

10. The parties agree that they will tell the child about the interview

beforehand, but not tell the child(ren) what to say, or press the child(ren) for details after the interview.

11. The parents agree to participate in the transportation of the child to or from the interview.

Dated: _____ at _____, British Columbia.

The following consent to the child(ren) being interviewed. Signed by:

party

witness

party

witness

party

witness

party

witness

party

witness

party

witness

Schedule "A" to Consent Form

When protection is needed

13 (1) A child needs protection in the following circumstances:

- (a) if the child has been, or is likely to be, physically harmed by the child's parent;
- (b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;
- (c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;
- (d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;
- (e) if the child is emotionally harmed by the parent's conduct;
- (f) if the child is deprived of necessary health care;
- (g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment;
- (h) if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care;
- (i) if the child is or has been absent from home in circumstances that endanger the child's safety or well-being;
- (j) if the child's parent is dead and adequate provision has not been made for the child's care;
- (k) if the child has been abandoned and adequate provision has not been made for the child's care;
- (l) if the child is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force.

Meaningful Child Participation in Family Court Processes: Interview Structure for Discussion

NOTE: Never ask the same question twice!!! Give the child lots of time to respond.

Interview Stages/ Purpose	Sample Questions	Considerations
<p>1.INTRODUCTION</p> <p>Review names, reason child is there, child's participation, interviewer's role, observer role</p> <p>Go over consent form with child and ensure they want to participate.</p>	<p>Do you know why you're here?</p> <p>What have your mom and dad/anyone else told you about coming here?</p> <p>I am here to listen to what you want to tell the judge, and your parents.</p> <p>I want to go over why you are here. <Go over consent form and have child sign>.</p> <p>What you say is very important. I don't want to forget anything so I'm going to try to write it all down.</p> <p>Do you have any questions before we begin?</p>	<p>Assure the child that they are NOT making the decision. Helping adults to make decision. Assure the child:</p> <ul style="list-style-type: none"> - interview is private - only share information they want shared - can ask questions at any time - can take a break
<p>2.ESTABLISH RAPPOR</p>	<p>How are you feeling now that Mom and Dad are living apart?</p>	<p>Be empathetic (lots of kids feel sad when Mom and Dad decide to live apart) / ask general questions</p>
<p>3. SEPARATION SPECIFIC INFO</p>	<p>What's happened since Mom and Dad stopped living together?</p> <p>How are things at school?</p> <p>How are things with your friends?</p>	
<p>4. EXPLORE</p> <ul style="list-style-type: none"> - Living arrangements - child's thoughts, reactions, suggestions 	<p>Are you living sometimes at Mom's house and sometimes at Dad's house? How is that going?</p> <p>What do you do at Mom/Dad's house?</p> <p>How do you feel when you're at Dad's/ Mom's house?</p> <p>What do you like to do at Mom's/ Dad's house?</p> <p>What things don't you like at Mom's/Dad's house?</p> <p>Is anyone at Mom/Dad's house when you're there?</p>	<p>The brief from counsel may indicate a specific issue to address.</p> <ul style="list-style-type: none"> - consider any changes in living - views of each parent & communication - advice or specific requests for parents -raise issues of what might help child (e.g. less conflict, stop demeaning other parent, be flexible)

	<p>What is it like doing homework at Mom/Dad's house?</p> <p>What do you do with your friends at Mom/Dad's house?</p> <p>What clothes/toys do you keep at Mom/Dad's house? How do you decide what to keep at Mom/Dad's house?</p> <p>Do you have any suggestions of how things could work for you living between Mom and Dad's house?</p>	
<p>5. REVIEW (this can be done periodically or at the end of the interview)</p>	<p>I've written down what you said. Can I read back to you what you have said to me? Is there anything that needs to be changed?</p> <p>Is it okay if I share this with Mom, Dad, and the Judge? (if yes - okay, if no - clarify what parts okay)</p>	<p>Ensure the child's views are written down word for word - this has a much greater impact on the receiver of the information.</p> <p>Ensure the child knows he/she is not making the decision. Info will help adults make decisions about child</p>
<p>6. DEBRIEF QUESTIONS</p> <p>Please ensure you ask these precise questions.</p>	<p>PLEASE ASK THE CHILD THESE QUESTIONS:</p> <ol style="list-style-type: none"> 1. Who do you talk to when you want to talk or have questions about what's going on with Mom or Dad? 2. We have spent the last (1/2 hour 1 hour) talking about your feelings, about what is going on with where you have been living, how much time you want to spend with Mom and Dad. <ol style="list-style-type: none"> A. How has this talk been for you? B. Is there anything you want to add to what you have already said? 3. What do you think the adults will do with what you have said today? 4. Do you have any concerns or worries? 	<p>These are mandatory debrief questions for all interviews.</p> <p>Please ensure that they are asked.</p>

<p>7. CLOSURE</p> <p>Ensure child knows what happens next.</p> <p>Give child an opportunity to ask any final questions.</p> <p>Give child your phone number.</p> <p>Thank child for coming.</p>	<p>We are just about finished:</p> <p>What are you doing when you leave here?</p> <p>Would it be useful if I send you what I wrote down for you to review before I send it off to your mom and dad and judge?</p> <p>If that would be a useful thing, where would you like me to send it: your school, your home, or to some other person that you could review it with?</p> <p>Once you have reviewed it, it would be important for you to get back to me if there are any mistakes.</p> <p>Here is my telephone number. If you forgot to tell me something today you can call and tell me.</p> <p>Do you have any questions?</p> <p>Thank you for coming today.</p>	<p>Tell child what will happen next. Don't end abruptly.</p> <p>Provide the child with your phone number if they want to tell you something they forgot to say</p>
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INTERVIEW TIPS

- Create a child-friendly space for the interview (e.g. comfortable chairs, non-structure toys (e.g. slinky), drawing materials, low table)
- Be direct and open
- Be emotionally supportive
- Be aware of your own influences as an interviewer on questions, demeanor etc:
 - Your own "stuff"
 - Personal values and life experiences
 - Culture
 - Old child development research
 - Alliance with one parent or lawyer
- Listen, listen, listen
- Tolerate pauses, tears and anger
- Use simple language - avoid jargon and legal terms
- Keep questions simple and direct - use noun-verb-object structure
- Avoid using negatives, complex or conditional sentences
- Concentrate - ensure you are available to the child

- Be patient in words and body language - children often take time to find words, or formulate ideas
- Be respectful and polite
- Match your conversation with the child
- Never press the child to tell things he or she does not want to tell
- Never leave a child with a sense of failure because he or she cannot/have not answered the question
- Record the children's views in writing word for word.
- Clarify - don't interrupt
- Let the child know he or she should tell the questioner when he or she does not understand a word or question.

CHILD DEVELOPMENT

What is child development?

Child development refers to the growth of the child. It is a process of change in which a child develops his or her skills of moving, thinking, feeling, and relating to others. This means that development includes not only the physical aspects of growth, but also the mental, emotional, spiritual and social. All factors of development are interrelated. For example, emotional development affects physical development. If a child is emotionally stressed (due to a death, tragic events, bullying at school etc.) they may experience delayed physical development like regularly tripping and falling or wetting the bed.

Development is also continuous. It starts before birth and continues throughout life.

How a child develops when they are young affects them throughout their life. Future behavior and accomplishments are related to childhood development.

Children learn from their environment, they react and relate to the people and things around them, and eventually they try to affect their surroundings. Children will adapt their behaviour and skills so they can control their environment and develop positive relationships. Thus, providing stimulation for children is very important, as is responding to them, and providing them with love, care and a safe and supportive environment.

What are the stages of child development?

Children pass through various stages of development as they grow up. Children's development will follow general stages, but it is unique to each individual. How quickly a child develops, how well they develop, and the personality that emerges will depend on the context in which they grow up (culture, society, family, circumstances etc). There are 4 main stages of child development:

0-23 months (Infancy)

When children are born, they are physically helpless and completely dependent on others for their physical and emotional well-being. They require constant supervision, as they have no sense of safety. In the first two years of their life, they begin to develop skills that they continue to work on throughout their lives.

At first, children:

- Bond with the care givers and develop feelings of love and trust.
- Feel emotions such as fear and separation anxiety, especially when their needs are not met.
- Learn to move their bodies, holding up their head, sitting up, feeding themselves, talking and walking.
- Learn to use their hands and eyes together and develop their senses, hearing, seeing, tasting.

Over the course of the first two years they begin to:

- Understand that they are separate from other people and things, especially their mother.
- Understand what is being said to them and follow simple requests.
- Learn about the consequences of their actions.
- Understand how objects work and the names of familiar things.
- Begin to become independent, as they start to do things on their own.

2-5 years (Early Childhood)

Children at this age are working hard to fine-tune all the skills that they have learned up to this point. They:

- Have a lot of energy
- Develop most of their language skills and understanding
- Think they have a greater affect on the world than they really do.
- Learn social rules. For example, the expectations within their families, schools, and communities and general routines.
- Learn right from wrong and the consequences of their actions.
- Develop self-care skills. For example, dressing, feeding, and toileting.
- Try to understand what is real and what is fantasy (imagination).
- Think in the present and may have difficulty understanding things in the future.
- Ask a lot of questions and experiment with ideas and concepts.
- Often begin school.

6-12 years (Middle Childhood)

At this age, children continue to work on their skills and need a great deal of emotional support and a secure environment in which to do this. They:

- Begin to understand that another person's point of view may be different from their own.
- Gain a greater understanding of emotions and how people are feeling.
- Begin to think logically.
- Have an increased understanding of social roles and norms. For example, a man can be a father, a son, and worker.
- Begin to understand how objects relate to each other. For example, a tomato, a cucumber, and an eggplant are all vegetables.
- Are better able to solve problems as their memory skills greatly improve.
- Can understand most concepts that are explained to them.

- Can learn skills such as reading, writing, and mathematics.
- Have increased responsibility around the house.

13 year - adulthood

Children or youth in this age are becoming young adults. Youths:

- Begin to think about the future.
- Think mostly of themselves (self-centred).
- Relationships with peers are very important.
- Develop an idea of how they relate to the rest of the world.
- Experience a stronger division in the roles of males and females.
- Begin to think about abstract things like social class and how their behaviours affect their family or community.
- Gain an increased understanding of moral issues and what is right or wrong.
- Experience intense physical changes in the body (puberty).
- Have increased emotional needs and insecurities, but often act boldly and confidently.
- Practice being an adult and may be initiated into adulthood by getting married.

Is child development different for vulnerable children?

Yes, it is important to mention that vulnerable children are exposed to different environments and circumstances than other children and may, therefore, develop at a different rate. As a result, many of these children grow up very quickly in some areas, while remaining very young in others. For example, a young boy who must work to provide for his family may do his job very well, but emotionally he may have a difficult time coping with his responsibility.

How can we support children's healthy development?

We can help to support the healthy development of children, by understanding the important stages children pass through as they grow up, and identifying key adults to help children grow and thrive. This understanding will help us to provide opportunities for children to meet their full potential at each stage of their development.

Information on Questioning Children
(from Schuman, Bala & Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999), 25 Queen's L.J. 251-302)

Children of all ages have troubles with use of negatives.

Ages 7 - 10 years (middle childhood)

- Sometimes their use of language and understanding appear to be similar to adults
- Have difficulty with use of negatives and passive voice
- Difficulty with use of more than one verb tense in a question
- Difficulty with less common words, jargon, legal terms
- Often misinterpret abstract or vague terms
- Can carry out logical reasoning but only at concrete levels
- Memory is susceptible to suggestion
- Difficulty understanding time and space in unfamiliar/complex situations
- Difficulty establishing causal relationships

Linguistic Development

- Have difficulty with the conditional and passive voices which may lead to misunderstanding questions
- During this period a child's vocabulary grows by 5000 words, indicating that they do not yet have the vocabulary of adults
- Adults must be careful to ensure children understand the words they're using
- If the word is not common, have the child use the word in a sentence
- Avoid legal or jargon terms
- Frequently misinterpret questions involving negatives
 - until 9 years a child may apply a negative to the wrong part of a sentence (e.g. "Could you see that he was not home" may be interpreted as "You could not see that he was home")
 - may not understand that the negative is different from its usual form (e.g. "unresponsive" may be interpreted as "responsive")
- Complex sentences pose problems
 - May lack ability to put all the parts of the sentence together correctly
 - Short term memory may not be developed enough to allow them to remember the beginning of a long question, once the end is reached
- Keep sentences simple and to the point
- Phrase sentences in the subject-verb-object order.
- Likely can't interpret pronouns that precede the referring noun.
- Frequently misunderstand complex sentences that contain "Do you remember?"
- Understand generalizations and can give more than one meaning to a word
- Understand that a person's house can be an apartment, or you can "touch" something with a part of their body other than their hand
- Become aware of different perspectives so they can consider more ideas
- Develop logic: able to predict events and foresee some consequences; however they cannot apply logical processes to abstract ideas - this means child can reason about the consequences of crossing the street but cannot theorize about the importance of traffic laws

- When asking questions that require logical thinking to predict events or consequences, giving examples is important: “What if you told a lie?” is better than “What happens when people tell lies?”
- Can say whether something was “like” something else
- Can say a person was “taller” or “shorter” than someone else
- Know the seasons and the differences between them
- Cannot accurately estimate distances or sizes
- Have troubles comparing time periods - may relate events out of chronological order

Age 11 - 18 years (Adolescence)

- May misunderstand legal phrases and jargon but best not to use them
- May still struggle with complex forms of negation - multiple negatives or phrases where a negative must be applied to a different clause in the sentence
- Probably not understand the passive voice until the end of this stage
- Questions should be stated so every verb has a clearly expressed subject

General Suggestions:

- Keep sentences in subject-verb-object order
- Do not use the passive voice
- Avoid using “do you remember . . .?”
- Avoid using negatives (e.g. “did you go to the store?” rather than “didn’t you go to the store?”)
- Do not use “tag” questions - e.g. “didn’t you . . . “
- Do not use the negative form of words (e.g. incorrect)
- Avoid pronouns - repeating the noun is always better
- When using a word that has a critical meaning, ensure that both the child and questioner share the same meaning (ask the child to use the word in a sentence)
- Use simple everyday terms (e.g. “go to” rather than “proceed”)
- Use concrete terms (e.g. “knife” rather than “weapon”)
- Do not ask school age children to answer questions involving abstract ideas like “justice” or “love”. Until adolescence, it is generally difficult for children to think in the abstract.
- Avoid asking children to speculate
- Young children cannot determine another person’s motives, no matter how obvious they may seem
- Do not use sarcasm
- Children’s understanding of time, space and size is dependent on their level of development
- Let the child know he or she should tell the questioner when he or she does not understand a word or question
- Children should never be told that they cannot have a break or go to the bathroom until all questions have been asked
- Avoid asking exactly the same question more than once
- Refrain from praising particular answers
- Speak slowly and clearly

Suggested Instructions to Parents

1. Explain to the children what's going on:

- Mom and Dad have gone to court to ask a judge help them figure out what should happen now that/ once they are living apart
- Mom and Dad both love you very much and want to do what is best for you
- The judge wants to know how you think things should work for your life now that Mom and Dad are living apart (thinks like where you will live)
- Mom and Dad and the Judge want you to go to talk to (interviewer's name) about what's happening
- Do you want to talk about what you think? If yes, okay. If no, no interview

2. Arrange the Interview

Both parents must participate in the transport of the child (either to or from the interview).

Do not coach or prepare the child on what to say before the interview. Afterwards, do not ask your child what they said in the interview.

Respect the child's privacy. You will hear what was said when the interviewer provides the children's views to your lawyer (or you, if unrepresented) and the court.

3. Talk to Your Children About the Court's Decision and Let Them Ask Questions

When the court makes a decision about the custody and access matters in your case, tell the children what the judge decided in words that they understand. Give the children an opportunity to ask questions about the decision.

Suggested Parenting After Separation Information is taken from information available online.

MEANINGFUL CHILD PARTICIPATION IN BC FAMILY COURT PROCESSES
KELOWNA PILOT

Completed Interview Information

(please send this document, the Views of the Child document, and completed consent form to Suzanne Williams at IICRD via email, mail or fax : swiicrd@uvic.ca , address and fax noted below)

1. Please provide age and gender of child interviewed:
2. Did you have a neutral party sit in on this interview? If so, please indicate who (e.g. assistant, child's teacher)
3. What question(s) did you find most effective in this interview?
4. Was there any point during the interview that you felt challenged?
5. If you did feel challenged, do you think further training or education might have assisted you with overcoming this challenge with greater ease? If so, what type of training?
6. Was there anything that surprised you during this interview?
7. Is there anything else you want to share about this interview?

Thank You!