

# PERSPECTIVE OF THE CHILD IN CUSTODY AND ACCESS DECISIONS: IMPLEMENTING A BEST INTERESTS AND RIGHTS OF THE CHILD TEST

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*Family justice professionals regularly address a child's best interests. While relevant legislation provides some guidance in this regard, these laws confer a broad discretion in how their provisions are interpreted and applied. This article suggests that the UN Convention on the Rights of the Child, and research on children's participation support the adoption of a "best interests and rights of the child test" so that broad legislation is interpreted to uphold, rather than deny a child's rights. This approach is explored through the right of a child to be heard and have this perspective considered in best interest determinations, as well as relevant research and emerging practices such as non-therapeutic interviews of children in British Columbia.*

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*La rupture familiale peut victimiser les enfants de bien des façons. Elle peut leur enlever un parent, entraîner la pauvreté et engendrer l'abus, et ce, sans leur donner la possibilité de se faire entendre de manière suffisante. Il semble que lorsque les droits des enfants sont en jeu, les solutions juridiques réactives sont plus inadéquates qu'à d'autres égards. Il faut que les avocats et les juges prennent des initiatives afin de rendre publics les problèmes touchant les enfants et d'y trouver des solutions.*

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.<sup>1</sup>

- Chief Justice Beverly McLachlin, Supreme Court of Canada

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<sup>1</sup> Rt. Hon. Beverley McLachlin, C.J.C., "Reaction and Pro-action: Bringing Family Law Advocacy Into the 21st Century" Family Law Dinner, Ontario Bar Association, January 24, 2002, Toronto) online: <<http://www.fact.on.ca/judiciary/mclachlin.htm>>.

## 1. Introduction

As McLachlin C.J.C. notes, children and their rights are profoundly impacted by the breakdown of their families. Research shows that children often experience distress, anxiety, anger, grief, shock and disbelief when families separate,<sup>2</sup> and enduring parental conflict can significantly hamper the core development needs or psychological growth of children over the life span.<sup>3</sup> Child rights may also be jeopardized when families separate. A child's right to be raised by both parents, to have an adequate standard of living, or to be free from exploitation of any kind may be at stake.<sup>4</sup> The challenge for family justice lawyers, judges and other stakeholders is therefore, how to best support the wellbeing and rights of children in proceedings where their families are breaking down or separating.

This paper addresses how Canada's ratification of the United Nations (UN) *Convention on the Rights of the Child (CRC)* affects the rights and needs of children where their best interests are determined in separation and divorce proceedings. In Part 2, the *CRC* is introduced and its substantive contents are outlined. Canada's role as a "duty bearer," a role that requires Canada to perform its obligations under the *CRC* in good faith as a matter of international law, is highlighted.

In Part 3, it is argued that the "best interests of the child" test used to determine custody and access matters under the *Divorce Act* and parallel provincial or territorial legislation has evolved from one of "best interests" to a "best interests and rights of the child" test consistent with guidance from the Supreme Court of Canada and Canada's ratification of the *CRC*. This means that the test moves from one of "charity" in protecting the child's best interests to one of "entitlement" that recognizes the child as an independent person with rights that support his or her survival, development, protection and participation. Existing "best interests" legislation must therefore be interpreted so that the views of the child are sought and heard consistent with the *CRC*. A "best interests and rights test" also means that the rights of the child inform both the process, where the

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<sup>2</sup> Jennifer McIntosh, "Enduring Conflict in Parental Separation: Pathways of Impact on Child Development" (2003) 9 *Journal of Family Studies* 63 at 65 referencing the work of John Howard Grych and Frank D. Fincham, *Interparental Conflict and Child Development: Theory, Research and Application* (Cambridge and New York: Cambridge University Press, 2001); Joan Kelly, "Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research" (2000) 39 *J. American Academy of Child & Adolescent Psychiatry* 963.

<sup>3</sup> McIntosh, *ibid.*

<sup>4</sup> Articles 18, 27, 36, *United Nations Convention on the Rights of the Child*, 20 November 1989, United Nations General Assembly, Res. 44/25 [*CRC*].

child is an actor in the realization of his or her rights, as well as the outcome of obtaining the child's views.

Part 4 explores children's participation in the determination of their best interests. In particular, it is the right of all children to have the opportunity to participate, to be heard, and to have their views considered in decisions that affect them. Relevant research indicates that children generally want an opportunity to be informed and consulted, and it can be more harmful than helpful to exclude children and their participation. Taking a "best interests and rights" approach gives rise to a presumption that children must be given an opportunity to participate in decisions that determine their custody and access. In keeping with the CRC this means that children must be given an opportunity to be heard when their best interests are being determined, subject only to whether they are capable of forming their own views.

In Part 5 the focus shifts from an analysis of the law that determines a child's best interests for the purposes of custody or access, to how it is implemented. The options available to support implementation of a child's right to participate vary across Canada, and depend on the residency of the child. Some of the barriers to child participation are canvassed, as well as emerging mechanisms to hear and consider children's views in Australia, the United States, and Canada. A "Hear the Child" interview involving a non-therapeutic interview practice being used in British Columbia to hear from children is described. Finally, opportunities to support the rights and needs of children are raised for lawyers, judges and other family justice stakeholders who think pro-actively and who wish to find solutions to children's problems in the course of their practice.

## *2. The Rights of the Child: the UN Convention on the Rights of the Child*

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance.

- Preamble, UN Convention on the Rights of the Child

The need to extend particular care and protection to children has been reflected in various international instruments such as the *Geneva Declaration of the Rights of the Child, 1924*, the *UN Declaration of the Rights of the Child, 1959*, and most recently the *CRC*, which came into force on September 2, 1990, and was adopted and ratified by Canada more than fifteen years ago.<sup>5</sup> The *CRC*'s two optional protocols, one on the involvement of children in armed forces and the other on the sale of

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<sup>5</sup> *Ibid.* The *CRC* was ratified by Canada in 1991.

children, child prostitution and child pornography, entered into force in 2002, and have also been ratified by Canada.

The *CRC* sets out civil, political, economic, social and cultural rights for all children. Children are defined in the *CRC* as people under eighteen years of age who have rights that can be grouped according to child survival, development, protection and participation.<sup>6</sup> Underlying every child's rights are the *CRC*'s four guiding principles:

- Non-discrimination (Article 2) – all rights apply to all children without exception.
- Best Interests of the Child (Article 3) – the best interests of the child is the primary consideration in making decisions about a child.
- Life, Survival and Development (Article 6) – recognizes and supports the holistic needs and rights of the child.
- Participation (Article 12) – the child shall have a right to express his or her views and have them considered when decisions are being made about a child, including in administrative and legal proceedings.

While the substantive rights may be grouped as noted above, child rights are human rights. As such, they are indivisible and universal and in accordance with these principles apply to all children merely by virtue of birth.<sup>7</sup>

States such as Canada that have ratified the *CRC* bear responsibility for implementing the treaty's provisions. As duty bearers they must, for example, ensure the rights in the *CRC* to every child without discrimination of any kind (Article 2), undertake all appropriate legislative, administrative and other measures for the implementation of the rights articulated in the *CRC* (Article 4), and make the principles and provisions of the *CRC* widely known to both children and adults (Article 42).

Canada, as a state that has signed and ratified the *CRC*, is bound to perform its obligations in good faith as a matter of international law and cannot invoke its internal law as justification of not living up to a treaty obligation.<sup>8</sup> International law is not, however, automatically implemented

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<sup>6</sup> Article 1, *CRC*, *supra* note 4.

<sup>7</sup> UNICEF Innocenti Research Centre, *Summary Report of the Study on the Impact of the Implementation of the Convention on the Rights of the Child*, UNICEF: Italy, 2004.

<sup>8</sup> Articles 26 and 27, *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N.T.S. vol 1155 at 331.

at the domestic level in Canada; the *CRC* must generally be incorporated by domestic legislation, or used as a tool in interpreting existing laws.<sup>9</sup>

Since its first introduction in 1989, the *CRC* has become the most widely ratified human rights instrument in the world and Canadian courts have considered the *CRC* in well over one hundred cases.<sup>10</sup> Several provinces and territories have also taken measures to implement legislation consistent with the rights of children, and Canadian courts have considered the *CRC* in making decisions in the best interest of children.<sup>11</sup> However, more effective means of incorporating and implementing the *CRC* provisions in Canada are still required.<sup>12</sup>

### 3. *The Best Interests and Rights of the Child Test: From Charity to Entitlement*

#### a) *“Best Interests of the Child Test” in Canada*

Canada’s *Divorce Act* states that the only consideration in making a custody/access order about a child is the child’s best interests, “as determined by reference to the condition, means, needs and other circumstances of the child.”<sup>13</sup> While this legislative wording provides some guidance in making a determination of the child’s best interests, the courts have also canvassed this issue.

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<sup>9</sup> *Re: Arrow River & Tributaries Slide & Boom Co., Ltd. v. Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495 at 509-10[*Arrow River*]; Vanessa Yolles, *The United Nations Convention on the Rights of the Child: A Practical Guide to Its Use in Canadian Courts* (UNICEF Canada, 1998) at 2-3.

<sup>10</sup> All state parties in the world except the United States and Somalia have ratified the *CRC*; see Robin M. Junger, “Canadian Judicial Consideration of the UN Convention on the Rights of the Young Person” (2003) [unpublished].

<sup>11</sup> 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 BCSC 1455, 2002 Carswell BC 2643 (B.C.S.C.), Martinson J. considered Article 12 of the *CRC* in deciding that it was possible to interview a child in a custody dispute being decided under the *Divorce Act*, even without the consent of the parents.

<sup>12</sup> 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.

<sup>13</sup> *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 16(8).

In *Young v. Young*, McLachlin J. outlined the history of the “best interests of the child” test in determining custody of a child under the *Divorce Act*.<sup>14</sup> She noted that under the common law of the eighteenth and nineteenth century there was “the rule of near-absolute paternal preference” that in truth “probably had more to do with the acceptance of the father’s dominant right in all family matters, which in turn found its roots in the notion of the inherent superiority of men over women.”<sup>15</sup> This was displaced by a rule establishing in the mother a primary right to custody of a child of tender years.<sup>16</sup> Then in the 1970s several western countries introduced the “best interests” or “welfare of the child” as a primary or paramount consideration in determining custody and access.<sup>17</sup> In *Young* the Court recognized that in applying the test (1) the child’s best interests are the only consideration - parental rights or preferences have no role; (2) the test is broad and flexible, yet must be applied objectively based on the evidence; and (3) the court must maximize contact between the child and both parents, unless this conflicts with the best interests of the child.<sup>18</sup>

L’Heureux-Dubé J. in *Gordon v. Goertz*<sup>19</sup> set out “fundamental and uncontroversial premises” as a starting point for her analysis of the test to be applied in determining custody and access under the *Divorce Act*, including that:

1. It is the right of children that custody and access adjudications under the Act be governed by their best interests (ss. 16(8) and 17(5); *Young v. Young*, [1993 CanLII 34 (S.C.C.)] [1993] 4 S.C.R. 3, at p. 63 (per L’Heureux-Dubé J.) and at p. 117 (per McLachlin J.)).
2. The best interests of the child test under the Act is constitutional (*Young*, supra, at p. 71 (per L’Heureux-Dubé J.), and at p. 124 (per McLachlin J.)).
3. The Act provides that the best interests of the child must be “determined by reference to the condition, means, needs and other circumstances of the child” (s. 16(8)) or, where “there has been a change in the condition, means, needs or other circumstances of the child, . . . by reference to that change” (s. 17(5)). It is thus from the child’s perspective, and not from the perspective of either parent, that his or her best interests must be assessed (J. D. Payne, *Payne on Divorce* (3rd ed. 1993), at p. 279; *Young*, supra, at p. 63 (per L’Heureux-Dubé J.)),<sup>20</sup>

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<sup>14</sup> *Young v. Young*, [1993] 4 S.C.R. 3.

<sup>15</sup> *Ibid.* at para. 11.

<sup>16</sup> *Ibid.* at para. 12.

<sup>17</sup> *Ibid.* at para. 13.

<sup>18</sup> *Ibid.* at paras. 16-18.

<sup>19</sup> [1996] 2 S.C.R. 27 [*Gordon*].

<sup>20</sup> *Ibid.*, per L’Heureux-Dubé J. at para. 69 [emphasis added].

This premise that a child's best interests must be determined from the child's perspective, and not that of either parent, is also addressed in relevant provincial/territorial legislation that expressly references consideration of the views of the child.<sup>21</sup> The following table outlines a sampling of Canadian legislation in this regard.

*Table 1: Best Interests and Child Views in Canadian Legislation  
(in separation/divorce custody matters)*

<b>Statute</b>	<b>Relevant Provisions</b>	<b>References to the Views of the Child</b>	<b>Qualifiers to Hearing a Child's Views</b>
<i>Divorce Act</i> , R.S.C. 1985 (2nd Supp.), c. 3 (Canada)	16. (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.	No express reference, but courts have ruled that perspective of the child is required.	
<i>Family Law Act</i> , S.A. 2003, c. F-4.5 (Alberta)	18(1) In all proceedings under this Part, the court shall take into consideration only the best interests of the child. (2) In determining what is in the best interests of a child, the court shall (b) consider all the child's needs and circumstances, including (iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,	The court shall consider "the child's views and preferences, to the extent that it is appropriate to ascertain them."	If appropriate
<i>Family Relations Act</i> , RSBC 1996, Chapter 128 (British Columbia)	24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances: (b) if appropriate, the views of the child;	A court must consider "if appropriate, the views of the child."	If appropriate
<i>Family Maintenance Act</i> , C.C.S.M. c. F20 (Manitoba)	2 (1) In all proceedings under this Act the best interests of the child shall be the paramount consideration of the court. (2) Where the court is satisfied that a child is able to understand the nature of the proceedings and the court considers that it would not be harmful to the child, the court may consider the views and preferences of the child.	A court shall, "may consider" the child's views and preferences, if they can reasonably be ascertained". of the child."	If the child is able to understand the nature of the proceedings, and it would not harm the child.

<sup>21</sup> *The Constitution Act, 1867*, s. 91(26), s. 92(14), confers jurisdiction for divorce matters on Canada and non-divorce civil proceedings on the provinces. Table 1 sets out a sampling of provincial legislation.

Statute	Relevant Provisions	References to the Views of the Child	Qualifiers to Hearing a Child's Views
<p><i>Family Services Act</i>, S.N.B. 1980, c. F-2.2 (New Brunswick)</p>	<p>"best interests of the child" means the best interests of the child under the circumstances taking into consideration</p> <p>(b) the views and preferences of the child, where such views and preferences can be reasonably ascertained;</p> <p>6(1) In the exercise of any authority under this Act given to any person to make a decision that affects a child, the child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him, shall be given consideration in determining his interests and concerns, and the interests and concerns of the child shall be given consideration as distinct interests and concerns, separate from those of any other person.</p> <p>6(2) Where the wishes of a child have not been or cannot be expressed or the child is incapable of understanding the nature of the choices that may be available to him, the Minister shall make every effort to identify the child's interests and concerns and shall give consideration to them as distinct interests and concerns separate from those of any other person.</p> <p>6(4) In any matter or proceeding under this Act affecting a child, whether before a court or any person having authority to make a decision that affects a child, <i>the child has the right to be heard either on his own behalf or through his parent or another responsible spokesman.</i> [emphasis added]</p> <p>129(2) Upon application the court may order that either or both parents, or any person, either alone or jointly with another, shall have custody of a child, subject to such terms and conditions as the court determines, such order to be made on the basis of the best interests of the child; and the court may at any time vary or discharge the order.</p>	<p>A court must take into consideration "the views and preferences of the child."</p>	<p>If can be reasonably ascertained.</p> <p>Where child is capable of expressing wishes and the child understands the nature of any choices available to him or her.</p> <p>Where the child's wishes have not been or cannot be expressed, the Minister must make every effort to identify the child's interests/concerns.</p> <p>The child has a right to be heard.</p>
<p><i>Children's Law Act</i>, R.S.N.L. 1990, c. C-13 (Newfoundland)</p>	<p>31. (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.</p> <p>(2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including</p>	<p>A court shall consider "the child's views and preferences, if they can reasonably be ascertained."</p>	<p>If can be reasonably ascertained</p>



Statute	Relevant Provisions	References to the Views of the Child	Qualifiers to Hearing a Child's Views
	(b) the views and preferences of the child, where the views and preferences can reasonably be ascertained;		
<i>Children's Law Act</i> , S.N.W.T. 1972, c. 14 (Northwest Territories)	17. (2) In determining the best interests of the child for the purposes of an application under this Division in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including (b) the child's views and preferences if they can be reasonably ascertained;	The court shall consider "the child's views and preferences."	If can be reasonably ascertained.
<i>Maintenance and Custody Act</i> , R.S.N.S. 1989, c. 160 (Nova Scotia)	18 (2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or (b) respecting access and visiting privileges of a parent or guardian or authorized person.	Legislation silent. "It must be the aim of the court, when resolving disputes between rival claimants, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face problems of life as a mature adult." (King v. Low, [1985] 1 S.C.R. 87 at 101)	
(Nunavut) See North West Territories legislation			
<i>Children's Law Reform Act</i> , R.S.O. 1990, CHAPTER C.12 (Ontario)	19. The purposes of this Part are, (a) to ensure that applications to the courts in respect of custody of, incidents of custody of, access to and guardianship for children will be determined on the basis of the best interests of the children; 24. (2) The court shall consider all the child's needs and circumstances, including, (b) the child's views and preferences, if they can reasonably be ascertained.	The court shall consider "the child's views and preferences, if they can reasonably be ascertained."	If can be reasonably ascertained
<i>Family Law Act</i> , R.S.P.E.I. 1988, c. F-2.1 (Prince Edward Island)	25. (4) In determining whether to make an order for exclusive possession, other than in the circumstance described in subsection (3) [temporary or interim order], the court shall consider (a) the best interests of the children affected;	The Court shall consider "the child's views and preferences, if they can reasonably be ascertained."	If can be reasonably ascertained

Statute	Relevant Provisions	References to the Views of the Child	Qualifiers to Hearing a Child's Views
	<p>(5) In determining the best interests of a child, the court shall consider</p> <p>(b) the child's views and preferences, if they can reasonably be ascertained.</p>		
<p><i>Civil Code of Québec, C.c.Q. CHAPTER II (Québec)</i></p>	<p><b>RESPECT OF CHILDREN'S RIGHTS</b></p> <p>32. Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are able to give to him. 1991, c. 64, a. 32.</p> <p>33. Every decision concerning a child shall be taken in light of the child's interests and the respect of his rights.</p> <p>Consideration is given, in addition to the moral, intellectual, emotional and physical needs of the child, to the child's age, health, personality and family environment, and to the other aspects of his situation. 1991, c. 64, a. 33; 2002, c. 19, s. 15.</p> <p>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.</p>	<p>The court shall give the child an opportunity to be heard if his age and power of discernment permit.</p>	<p>If child's age and power of discernment permit</p>
<p><i>Children's Law Act, 1997, S.S. 1997, c. C-8.2 (Saskatchewan)</i></p>	<p>8. In making, varying or rescinding an order for custody of a child, the court shall:</p> <p>(a) have regard only for the best interests of the child and for that purpose shall take into account:</p> <p>(vii) the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child;</p>	<p>The court shall take into account "the wishes of the child" if appropriate having regard to the age and maturity of the child.</p>	<p>If appropriate based on child's age and maturity</p>
<p><i>Children's Act, R.S.Y. 2002, c. 31 (Yukon Territory)</i></p>	<p>30(1) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including</p> <p>(b) the views and preferences of the child, if those views and preferences can be reasonably determined;</p>	<p>The court shall consider the "views and preferences of the child" if can be reasonably determined.</p>	<p>If can be reasonably ascertained</p>

*b) Evolution: A “Best Interests and Rights of the Child Test”*

The *CRC* achieved near universal ratification during the 1990s, including ratification by Canada. It provides a comprehensive framework of the human rights of children that supports their healthy development. Accordingly, the best interests test and the welfare or child-centered approach it incorporates from the 1970s has arguably evolved into a “best interests and rights of the child” test. This approach is already incorporated expressly into the applicable legislation in Quebec and to a certain extent in New Brunswick as outlined in Table 1 above.

The legal foundation for interpreting the best interests of the child test across Canada within a child rights framework rests in the common law presumption that Canada’s legislation, both federal and provincial, complies with its international law obligations.<sup>22</sup> While this presumption does not import the terms of the *CRC* directly into Canadian law, it requires the legislative language, as far as it may permit, to be interpreted in compliance with the *CRC* and Canada’s other international law obligations. As a result, the “broad and flexible” nature of the best interests test described by McLachlin J. in *Young v. Young* not only should, but arguably must, be interpreted in compliance with the contents of the *CRC*.<sup>23</sup>

By modernizing the best interests test to reflect the *CRC*, the legislation outlined in Table 1 above that includes broadly-worded qualifiers to hearing from children can be interpreted to uphold, rather than deny a child’s rights. Thus qualifiers such as “reasonably ascertained” or “if appropriate” can not be interpreted to determine whether to hear from children, but rather how best to hear from them or gather their perspectives when their best interests are determined.<sup>24</sup> As a result these qualifiers can not deny a child the opportunity to be heard on the basis that it is inconvenient or difficult for the adults involved, but rather, will inform how to best provide this opportunity given the specific circumstances of the child involved.

Reflecting Canada’s ratification of the *CRC* in the test also recognizes the child not only as a passive recipient who is in need of protection, but also as an active participant in the realization of his or her rights. This is consistent with determining a child’s “conditions, means, needs or

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<sup>22</sup> *Re: Arrow River*, *supra* note 9 at 7-9.

<sup>23</sup> *Young*, *supra* note 15.

<sup>24</sup> *CRC*, *supra* note 4. Article 12 states that a child who is “capable of expressing his or her views” has a right to be heard and have his or her views considered in matters that affect the child.

circumstances” from the child’s perspective as L’Heureux-Dubé J. articulates in *Gordon*.<sup>25</sup> It also moves the test from the concept of welfare and charity to one of entitlement where a child is an actor in realizing his or her rights and healthy development.

There is sometimes a misconception that supporting children as actors in the realization of their rights, means that children decide all matters that affect them. This misconception fails to recognize the “evolving capacity” of children in assuming more responsibility in the exercise of their rights as they develop and mature and the critical role that adults, in particular parents, play in this process.<sup>26</sup> As a result, the perspective of an infant may be best brought forward by evidence from caregivers, while a nine-year-old may be given an opportunity to speak to the decision-maker directly or to a neutral party who can provide the child’s views to the decision-maker. The weight given to this information is then also considered in light of each child’s evolving capacity so that children are not made responsible for decisions that are best left to the adults involved.

Assuming that one adopts a “best interests and rights of the child” test, the rights of the child must inform both the process and outcome of the test. How the child’s views are obtained then becomes just as important as actually giving the child an opportunity to be heard when their best interests are determined.

#### *4. Child Participation in Best Interests Determinations*

##### *a) The Child’s Right to Participate*

The right of Canadian children to participate in decisions that affect them is articulated in Article 12 of the *CRC*, which states:<sup>27</sup>

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

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<sup>25</sup> *Supra*. note 19.

<sup>26</sup> Article 5, *CRC*, *supra* note 4.

<sup>27</sup> Article 12, *CRC*, *ibid*.

Canada's Senate Committee on Human Rights recently stated that "Article 12 is not only a 'substantive right which entitles children to be actors in their own lives, not merely passive recipients of adult care and protection,' but is also a 'procedural right through which to realise other rights, achieve justice, influence outcomes and expose abuses of power.'"<sup>28</sup>

If one accepts that Canadian legislation that outlines the best interests test must be interpreted in compliance with the *CRC*, then according to Article 12, the only condition precedent to hearing from a child is that the child is "capable of forming his or her own views." This further informs, or perhaps discounts, the current conditions precedent of hearing from children "if necessary" or "if it can reasonably be ascertained" that are contained in various Canadian laws, some of which are outlined in Table 1 above. The end result of Article 12's application is therefore that Canadian children must be given the opportunity to have their views heard and considered, so long as the child is capable of expressing his or her views.

Underlying the child's right to participate are the *CRC*'s guiding principles. Thus all children:

- Have the right to participate, without exception (Article 2). This means both older and younger children, in urban as well as rural communities, have the same right to participate, although how their right is implemented may be determined by their evolving capacity (Article 5);
- Must be able to exercise the right to participate in their respective best interests (Article 3). For example, a child's participation must not put the child in a position where he or she could be unnecessarily exploited or harmed;
- Must have their healthy development respected in the course of their participation (Article 6). For example, the language that adults use in communicating with the child, or the environment in which the child participates, should be developmentally appropriate and supportive; and
- Where the child is capable of expressing his or her view, may exercise the right to participate (Article 12). This might mean an adult engaging with the child to select the available option(s) of how to participate that he or she prefers - by speaking directly to a decision-maker, for example, versus being interviewed by a third party.

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<sup>28</sup> Final Report of the Standing Senate Committee on Human Rights, *Children: The Silenced Citizens, Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, April 2007.

Other substantive rights may also arise for a child exercising his or her Article 12 right to participate such as the child's right to information in a way that he or she understands (Article 13), the right to his or her own thoughts (Article 14), or the right to have his or her culture respected (Article 30) in the course of participating. As previously stated, a child's rights are indivisible, and it should be emphasized that exercise of one right does not preclude the existence or implementation of other rights that apply to the child.

*b) Research Consistent with Children Participating in Family Proceedings*

*1) Children Want to be Informed and Consulted*

A key finding of research with children whose parents have separated is their desire to be informed about what is going on, and to be consulted about their family transition and future living arrangements.<sup>29</sup> While most children want to provide input, most do not want to shoulder the responsibility of making the big decision.<sup>30</sup> Their preference is to collaborate with supportive adults and leave the difficult decisions to the adults.<sup>31</sup> However, where children are frightened of, or dislike, a particular parent, or have a negative or oppressive relationship with them, they are more likely to insist that they should be able to make an autonomous choice about residence.<sup>32</sup> It is important to recognize that all children invited to participate may not wish to do so, and this in itself is a form of participation.

*2) Excluding a Child's Participation and Failing to Provide Information to Children may be More Harmful than Helpful*

Researchers, in a study involving more than 460 young people (as young as five years old) whose parents had separated, found that the young people had little information about their parents' separation, what was happening, and why:

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<sup>29</sup> Nicola Taylor, *Discussions with Children in the Family Court: Research Evidence*, Children's Issues and Faculty of Law, University of Otago, New Zealand (presented at the Family Court Update: Discussions with Children, February 19 and 20, 2007, Auckland; February 27 and 28, 2007 Wellington) at 6; Suzanne Williams, *Through the Eyes of Young People: Meaningful Child Participation in BC Family Court Processes*, 2006, online: IICRD, Canada <[www.iicrd.org/childparticipation](http://www.iicrd.org/childparticipation)>.

<sup>30</sup> Taylor, *ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

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.<sup>33</sup>

Research with children also indicates that excluding them from the process, often in a desire to protect children, can further contribute to their pain and confusion.<sup>34</sup> As a result, the way a separation is handled, and not just the fact that it is happening can impact a child:

... [I]gnorance (including partial, partisan information) meant that [children] could not make much sense of what was going on. In turn this made children powerless in relation to their parents and sometimes they withdrew. Knowledge and understanding did not necessarily make them happy, but it could give them an emotional and cognitive map of the terrain they occupied.<sup>35</sup>

Further, where children's right to receive information in a way that they understand (Article 13) is not fulfilled, the children are more likely to suffer from such symptoms as anxiety, depression and conduct disorder, to exhibit distress, and blame themselves for their parents' separation.<sup>36</sup>

### 3) *Gaps in Communication between Children and Parents*

Parents who are separating and whose children's custody is being determined are often dealing with their own emotional needs. As a result, they may not fully appreciate what is happening with their children. For example, a study in the United Kingdom (UK) in which researchers listened to 104 children 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 children:

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.<sup>37</sup>

In the words of one young participant:

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<sup>33</sup> Judy Dunn and Kirby Deater-Deckard, *Children's Views of Their Changing Families* (York: York Publishing Services for Joseph Rowntree Foundation, 2001).

<sup>34</sup> Taylor, *supra* note 29.

<sup>35</sup> *Ibid.* at 6-7.

<sup>36</sup> *Ibid.* at 7; McIntosh, *supra* note 2; Kelly, *supra* note 2.

<sup>37</sup> Gillian Douglas, "Children's Perspectives and Experience of Divorce" (2000) ESRC Research Programme on Children 5-16, Research Briefing December 2000, Number 21.

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).<sup>38</sup>

Children have their own emotional needs during family separation or breakdown. Respecting children’s rights ensures they are provided with some support to help meet these needs during a time when the caregiving adults in their lives may not be as equipped to do so given their own emotional challenges. Upholding a child’s rights in family proceedings means opportunities are created for children to express themselves, to ask questions, and to receive information in a way that they understand about the separation. In the end, this can serve to overcome some of the communication gaps, provide much needed information and space to children to express themselves, and provide support to families who may require additional assistance in supporting their children through a challenging time.

*c) A Presumption of Child Participation: Children Heard Early in the Process*

Adopting a “best interests and rights test” gives rise to a presumption that whenever their best interests are determined that every child shall have an opportunity to be heard and have their views considered. This presumption may be rebutted if the child is not capable of forming his or her own views. The “best interests and rights test” also requires the participation rights of children to be upheld and honoured early in the process.

Too often children are denied their right to participate because of the early decisions or behaviours of the adults involved in the case.<sup>39</sup> In such situations, information provided by the parents or other adults is used to inform the child’s perspectives. The gap in communication that can exist between children and parents as previously discussed, however, means that important information from the child’s perspective may be missed or misrepresented. The value of children’s participation cannot be overstated and should start early in decision-making processes because:

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<sup>38</sup> *Ibid.*

<sup>39</sup> See for example *G.(L.E.) v. G.(A.)*, 2002 BCSC 970, (2002), 37 R.F.L. (5th) 111. Martinson J. determined, under the particular facts of that case, that it was not appropriate to interview the children directly because the children 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 (expert assessment) report being prepared. Further, the Court indicated that other evidence was also available to provide further information about the young people’s views.



- [I]t moves children to the forefront of a dispute, which can refocus the parties and result in earlier resolution of disputes;
- [I]t has many benefits for the development of personal identity, moral reasoning, competency, and increases children's satisfaction with the outcome of any decision reached;
- [C]hildren often have valuable information to contribute;
- [I]t can enable self-protection for children;
- [I]t facilitates children's legal and political socialisation;
- [I]t helps prepare children for their future independence and autonomous decision-making; and
- [I]t is a vital foundation for a nation's civil society and democracy.<sup>40</sup>

There is a need for the law, and those implementing it, to recognize that young people are the ones best able to comment on their own lived experiences and thus experts over their own lives. This recognition must be reflected through the implementation of their right to participate early on, and throughout processes that determine their best interests.

#### *5. Implementing Child Participation in Family Law Proceedings: Finding Solutions to Children's Problems*

While the *CRC* has created some improvements to the law, and can aid in the interpretation of existing law to support the rights of Canadian children, the real challenge lies in its implementation.

##### *a) Options to Hear from Canadian Children in Separation and Divorce Proceedings Affecting Them*

Hearing from children to inform their conditions, means, needs or circumstances from their perspective may on its surface seem straightforward. Children are not always given an opportunity to be heard where their best interests are determined, however, and there is a wide array of practices used to hear from children in custody and access proceedings across and within various Canadian jurisdictions.<sup>41</sup> For example, children may be represented and heard by legal counsel who serve as either the child's advocate, guardian or friend of the court, judges may hear directly from children, or professionals undertaking assessments of the family or child may hear from children.<sup>42</sup>

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<sup>40</sup> Williams, *supra*. note 29 at 19; Taylor, *supra*. note 29 at 7.

<sup>41</sup> *Ibid*.

<sup>42</sup> Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43 *Alta L. Rev.* 845; Ontario Ministry of the Attorney General, "More About What We Do," online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp>.

Some Canadian jurisdictions have processes in place to trigger these options, while others have virtually nothing. The current reality for Canadian children is that to a certain extent it is a matter of residency whether or what services are available to enable them to share their views when their best interests are determined. In other words, a Canadian child's right to participate in custody/access matters that determine their best interests in divorce and separation proceedings is not guaranteed, even when they are capable of forming their own views. Given the patchwork of services available and the inconsistent practice in hearing from children across Canada, one might argue that the equality rights<sup>43</sup> of Canadian children are being violated, particularly where their best interests are decided under the federal *Divorce Act*. This patchwork is reflected in a few Canadian examples set out below.

*Ontario:*

The Office of the Children's Lawyer within the Ontario Ministry of the Attorney General, provides services to children involved in various types of litigation. It has provided services to children in custody and access matters since 1975, and has an annual budget of approximately \$10,000,000.<sup>44</sup> This Office may be called upon in custody/access cases to provide a legal representative for the child or to prepare a report, or a combination of both.<sup>45</sup> This Office has lawyers, investigators and child social workers, who are screened, trained together and monitored, and who provide services for children in custody/access and child protection cases.<sup>46</sup>

*Quebec:*

A party or a judge may arrange for the appointment of a lawyer to represent a child in Quebec custody and access matters, and a child can become a party to a hearing and have standing so long as the young person has the capacity to give instructions.<sup>47</sup> Such capacity is presumed unless the young person is under twelve years of age (judges have found that even those under twelve do have the capacity to instruct a lawyer), and either government funding pays for this representation, or the parties share the cost.<sup>48</sup> Judges will also sometimes hear from children directly in custody

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<sup>43</sup> *Constitution Act 1982*, s. 15, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>44</sup> Williams, *supra* note 29 at 68; information shared by Nicholas Bala.

<sup>45</sup> Ontario Ministry of the Attorney General, *supra* note 42.

<sup>46</sup> *Ibid.*; Williams, *supra* note 29 at 68; information shared by Nicholas Bala.

<sup>47</sup> Williams, *ibid.* at 65; information shared by Sylvie Schirm and Pascal Valente.

<sup>48</sup> *Ibid.*

and access matters, particularly where the child expresses a desire to do so.<sup>49</sup>

*British Columbia:*

In BC, there are virtually no services available to support the participation of children in family proceedings. This was the result of severe government cuts in 2002 that eliminated the Child Advocate program, cut legal aid to parties in family matters, and discontinued funding to assist parties to pay for expert reports under s. 15 of the *Family Relations Act*.<sup>50</sup> BC children are also generally not able to become a party or have standing in separation and divorce legal proceedings.<sup>51</sup> In the midst of this apparent lack of support to children and their families in separation and divorce proceedings, there are a few positive initiatives underway such as:

- in separation and divorce proceedings, use of the non-therapeutic “Hear the Child” interview practice done by a neutral interviewer;
- following a final order, appointment of a Parenting Coordinator to assist families to implement what the court has ordered in their daily lives;
- in separation and divorce mediations, a pilot practice began in 2007 where family justice counsellors obtain information from children and feed it back into the mediation process; and
- review of the BC *Family Relations Act*, with part of the review dedicated to child participation.

*b) Challenges to Hearing from Children*

While there are a variety of options available to hear from children depending upon where the child lives, several challenges can prevent these options from being implemented. For example, BC judges and lawyers involved in family justice proceedings identified several barriers to hearing from children such as:<sup>52</sup>

- *The child is too young.*

This barrier is reflected in a case where the child was 5.5 years old.

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* at 22.

<sup>51</sup> *Family Relations Act*, R.S.B.C. 1996, c. 128: Pursuant to s. 4(2), only a child who is or has been married has the capacity to make, conduct or defend an application under the *Family Relations Act* without the intervention of a next friend or litigation guardian, unless a child or his or her representative successfully intervenes under s. 18.

<sup>52</sup> Williams, *supra* note 29 at 46.

The judge stated:<sup>53</sup>

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 seven years of age, the judge 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.<sup>54</sup>

These case excerpts do not appear to be consistent with the child's right to participate, which hinges on the child's capability to form his or her own views. The first passage discounts the child's views as not relevant, rather than putting them into a developmental context of a 5.5 year old. The second passage appears to assume that the children are too young to be capable of forming their own views without any apparent canvassing of the children to determine this. It would seem that these children are being discriminated against on the basis of age contrary to the non-discrimination provision of the *CRC* (Article 2). While it may be more difficult to hear and consider the views of younger children given their developmental maturity, it may be more prudent to identify relevant adults who can be called upon to obtain the views of younger children rather than discount these children's views or perspectives.

- *The child is not willing to speak.*

Such a decision by a child is a form of participation, and the child's right. As such, the child's decision needs to be respected and the child should not be pressured to speak.

- *The judge lacks appropriate training.*

There are few, if any, training opportunities regarding children's participation in the family justice system. However, the Continuing Legal Education Society of BC (CLEBC) in partnership with the International Institute for Child Rights and Development (IICRD) launched a program on this subject in November 2007 in Vancouver, and an online desk book for Provincial Court judges is planned.

- *Procedural restrictions - if a judge interviews in chambers, for example, do the parties have a right to know the evidence?*

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<sup>53</sup> *Scheiber v. Phyll*, 2001 BCSC 565, (2001), 27 R.F.L. (5th) 182 at para. 21.

<sup>54</sup> *G.(A.M.) v. G.(S.W.)*, 2004 BCSC 579, [2004] B.C.J. No. 901 (QL) at para. 28.

There are due process concerns<sup>55</sup> that judicial interviews with the child may violate the judge's role as impartial trier of fact<sup>56</sup> However, those views are now being challenged and there is increasing discussion about the potential benefits of judicial interviews with children as part of the overall decision-making process in England, Australia, New Zealand and Canada.<sup>57</sup>

- *Lack of resources.*

Concerns are regularly raised about both the lack of financial resources to engage people to talk to children such as professionals or experts, as well as judges' ability to take adequate time to speak to children because of their heavy case loads. Another time and money constraint arises with respect to the slow turnaround time, and high cost of many professional reports that are sometimes used to obtain the views of children, particularly where no legal aid or similar financial assistance is available to the parties.

- *Lack of agreement by the parties.*

Parties often disagree about whether their children should share their views, and unless a court makes an order to have the children's views heard, the parties' disagreement makes the act of the hearing the children's views prohibitive.

- *A parent may not want to have their children's views heard unless these views are in accordance with the parent's own views, or where that parent has attempted to unduly influence the children.*

This challenge underscores the need to educate parents on how their behaviour in divorce proceedings can impact their children. Further, it highlights the role that the court, and other relevant stakeholders, must play to ensure that the views of children can be heard and considered even where parents are not supportive.

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<sup>55</sup> Cynthia Lee Starnes, "Swords in the Hands of Babes: Rethinking Custody Interviews After *Troxel*" (2003) Wis. L. Rev. 115. In the US most states authorize courts to interview children in camera but concern has been raised about recent decisions that have strengthened parents' due process rights to access their children's in-camera statements, increasing the risks to children's capacity to be heard in this way.

<sup>56</sup> Judy Cashmore and Patrick Parkinson, "What Responsibility Do Courts Have to Hear Children's Voices?" Faculty of Law, University of Sydney for Research Symposium, *Children and Young People as Social Actors*, Dunedin, February 8 and 9, 2006.

<sup>57</sup> *Ibid.*

*c) Emerging Practices and Solutions: Australia, California, Canada (British Columbia)*

Several practices are in effect, or emerging, that reflect a heightened awareness of the impact of separation and divorce on children, and how children and their participation can be better supported. Practices have been implemented in both Australia and California that focus outside the traditional legal system on mediation and collaborative law contexts. In British Columbia a practice has been introduced within regular legal proceedings. These are further discussed below.

*1) Australia: Child-Inclusive and Child-Focused Approach in Family Counselling and Mediation*

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.<sup>58</sup> 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.<sup>59</sup> Building on research that proposed a more “child-focused” approach in mediation and counselling processes with children, the Australian government developed the concept of “Child Inclusive Practice,” and tested a model of Child Interview and Consultation.<sup>60</sup>

The model’s four major components are:<sup>61</sup>

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

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<sup>58</sup> Australian Government, *Child Inclusive Practice in Family and Child Counselling and Family and Child Mediation* (2006) s. 3, The Project Story, online: <<http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/families-CIPcontents.htm>>.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

- Feeding back to parents the child's needs and views: The feedback session usually occurs in the next scheduled parent mediation meeting, with parents' mediator/s also present if a separate child consultant has been used.
- 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 work during the pilot of this model resulted in positive short and long-term outcomes for both young people and their parents.<sup>62</sup>

## 2) *California: Non-Therapeutic Interviews in Collaborative Law and Mediation*

Opportunities to listen to children have also been implemented in mediation and collaborative law practices in California. For example, a practice developed and implemented by Dr. Joan Kelly, former director of the Northern California Mediation Center involves a non-therapeutic structured interview with children. The interview is focused on obtaining the child's views about aspects of the separation, living arrangements, and conflict. The child's views are brought into the mediation by the mediator, who shares the child's views with the parties, helps educate the parents on how their behaviour can impact the child, and keeps the child's views present throughout the mediation process.<sup>63</sup> Hearing from children in mediation brings children to the forefront of the parties' minds, brings forward valuable information that may not otherwise reach a parent or party and results in better, long-term decisions for all.<sup>64</sup>

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<sup>62</sup> *Ibid.*

<sup>63</sup> Williams, *supra* note 27 at 77.

<sup>64</sup> See 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.

An important element of Dr. Kelly's approach is to present the child'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 child's views, and obtain the child's permission to share the views and suggestions for parents with the parties. However, once the child'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 child has said. This approach enables the neutral third party to present, contextualize if necessary and debrief with the parties about the child's views. Further, this method hopefully avoids having one or more of the parties get caught on one thing the child said, rather than consider the child's views as a whole.

This practice has been drawn upon for pilots in both court and mediation settings in BC.<sup>65</sup>

### 3) *British Columbia, Canada: "Hear the Child" Interviews*

There are few, if any, mechanisms by which children's views can be shared in family justice processes in BC.<sup>66</sup> Some people call upon professionals such as psychologists to prepare reports, where parties can afford them, but often these involve an assessment for one side of the case and not necessarily the views of the child. Some judges are also asked to speak to children directly. Many judges, however, are reticent to do so. The challenge for BC family justice stakeholders is how to support a child's right to be heard, within a system that has few resources to support the needs and rights of children whose families are separating or breaking down.

Despite the scarcity of resources, a few stakeholders in Kelowna, BC undertook an *ad hoc* practice where an independent lawyer was asked by a judge or master to meet with a child, hear the child's views, and report the views back to the court. In 2003 the IICRD, based at the University of Victoria, interviewed family justice stakeholders in BC to find out what was happening with the implementation of the child's right to participate when their best interests were determined in family proceedings. Through this work IICRD became aware of the Kelowna *ad hoc* practice, built on it and launched a pilot of the "Hear the Child" Interview tool in 2005-2006 in cooperation with the Kelowna legal community.

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<sup>65</sup> IICRD, with support from the Kelowna legal community, piloted the Hear the Child Interview practice in Kelowna, BC in 2005 – 2006 for custody/access matters in separation/divorce cases in the court process; the BC Attorney General launched a pilot to hear from children in family separation/divorce mediation cases in 2007.

<sup>66</sup> Williams, *supra* note 29 at 22.



*i) Piloting “Hear the Child” Interviews*

The “Hear the Child” tool is a non-therapeutic interview used where custody/access is being decided in separation/divorce proceedings, is approximately one hour in length, and is done with the child outside the court setting by a neutral interviewer to hear the child’s views. It involves very minimal resources for parties or the justice system, and is not intended to be a full assessment like a report prepared by a psychologist, or to be a substitute for such a report where an assessment is required.

The pilot of the tool encouraged the participation of families with children eight years of age or older. It involved recruiting and creating a roster of fifteen interviewers, outlining an interview structure, training the interviewers, establishing a process with the court to permit the views to be filed, drafting relevant documentation such as intake and consent forms, and raising awareness about the practice. The process piloted is briefly described as follows:<sup>67</sup>

*Preparation:*

- The judge (or master), party or counsel can initiate the process at any point in a proceeding (from time of filing initial court documents to trial) with the parties’ consent;
- The parties (including counsel) select an interviewer from a roster (composed of lawyers and clinical counsellors who completed a brief mandatory training);
- The parties complete a background intake form about their child for the interviewer;
- The interviewer sets up the interview with the parents who are each encouraged to participate in either picking up or dropping off the child, and the interviewer then has an opportunity to explain the purpose of the interview to each parent and answer questions.

*The Interview:*

- The interviewer follows a seven-stage interview structure that lasts approximately one hour: (introduction; establish rapport; separation specific information; explore; review (periodically and/or at end of interview); debrief; and closure);
- The interviewer explains to the child the reasons for the interview, gives the child an opportunity to ask questions, and asks the child if he or she wishes to be interviewed;

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<sup>67</sup> Suzanne Williams and Jocelyn Helland, *Hear the Child Interview, Kelowna Pilot Evaluation: May 2007*, online: IICRD <[www.icrd.org/childparticipation](http://www.icrd.org/childparticipation)>.

- If the child wishes to be interviewed, the interviewer takes approximately one hour (generally at the interviewer's office) to interview the child, with an emphasis on listening to and writing down the child's views;
- The interviewer captures the child's views verbatim in writing and the notes are reviewed with the child so they are accurate from the child's perspective.

*Reporting:*

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

The recommended fee for an interview was \$250, and parties were to share responsibility in paying the fee. During the first three months of the pilot, financial assistance was provided to parties who did not have the means to pay the fee.<sup>68</sup>

During the pilot approximately 59 sibling groups of children aged seven to sixteen years were interviewed.<sup>69</sup> Seven of fifteen interviewers were called upon to conduct interviews, and most of the interviews were initiated by legal counsel for one of the parties.<sup>70</sup> The most common reason for interviews not proceeding where suggested was because one party refused to consent to the practice.<sup>71</sup>

*ii) Initial Feedback about the Hear the Child Tool*

The feedback from family justice stakeholders who were involved in the pilot has been very positive. All of the lawyers and judges who were interviewed following the pilot indicated that the process was helpful, it led to early settlement or a shorter trial in at least one or more of their cases, and they intend to continue using the tool.<sup>72</sup> The judges indicated the tool

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<sup>68</sup> *Ibid.* at 7. The pilot was originally intended to run for a three-month period. Financial support from the Legal Services Society of BC corresponded with this initial time period.

<sup>69</sup> *Ibid.* at 10.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> Some judges indicated that parents softened their positions when they heard the words of their child.

made their job easier because the child's information gave them greater confidence in making decisions by clarifying issues, contextualizing evidence, bringing forward new information or corroborating existing information.<sup>73</sup> Some of the direct feedback received from pilot participants during the pilot's initial evaluation include:<sup>74</sup>

[B]etter and more just decisions that the family was happier with and was reached so efficiently [that the process actually] builds the public's confidence in the justice system. (member of judiciary)

It avoids the affidavit wars, gets better results, more pieces of the puzzle, more satisfaction in terms of better result, and more child focused.(counsel)

[F]elt (name) got some stuff off her chest. (parent on child's experience)

I find the expressed views very helpful, particularly in alienation and high conflict. (member of judiciary)

Many participants commented on the timeliness, and simplicity of the process to obtain the child's views.<sup>75</sup> In a matter of a few days, the Hear the Child Interview makes it possible to capture a snapshot of the views and perspective of the child, and refocus the parties' on the reason why they are there.<sup>76</sup> It is thus not surprising that almost all those interviewed, not including children and the parties, indicated an increase in the use of Hear the Child Interviews over the course of the pilot, and the Kelowna legal community is continuing the practice.<sup>77</sup>

### iii) "Hear the Child" Interviews: Children and Parents

The children who participated in the pilot generally wanted to share their views and be heard.<sup>78</sup> Many children had concrete ideas about what they wanted such as one child who proposed using web cameras as an easy way to facilitate seeing the other parent during extended times apart.<sup>79</sup> The children also commented on several aspects of their living situations such as travelling back and forth between their parents' homes:<sup>80</sup>

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<sup>73</sup> Williams and Helland, *supra*. note 67 at 10.

<sup>74</sup> *Ibid.* at 10-11.

<sup>75</sup> *Ibid.* at 10.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.* at 14.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

It's kinda tiring cause I just want to live in one house. (male 9 years)

It gets confused sometimes. I don't know where I am going. (male 11 years)

All the children also seemed to have a common goal of finding an end to the discord and instability they were experiencing.<sup>81</sup>

The Hear the Child tool is designed to ensure that children have a caring, skilled, neutral interviewer to hear them, rather than someone who may be acting for one side in a case, and they are interviewed in an atmosphere that is more relaxed than a courtroom. This creates an opportunity for the child to share his or her views in a way that might not otherwise be achieved. For example, one child shared her views with the interviewer with respect to what she was dealing with:<sup>82</sup>

My mom tells me about court but my dad does not. My dad asked me yesterday who I want to live with and when. I didn't answer because I didn't want to hurt his feelings. (female 9 years)

The interviews can be helpful to both children and parties in the family justice system as it provides children with an opportunity to express their views, have them heard and decrease some of the frustration the children feel regarding the separation process.<sup>83</sup> This not only respects their right to participation, but it also creates an opportunity for children to ask questions and receive information about what is going on that is tailored to their developmental level. For example, in one post-pilot interview, a lawyer who served as an interviewer recounted his experience interviewing a child who at the outset of the interview was convinced that she was going to have to make the decision about where she would live. Through the interview he was able to talk to her, answer her questions in a way that she understood to dispel this myth, such as by asking her who decided what lessons she learned at school each day and comparing this to a judge deciding where she would live.

The neutral aspect of the tool can also assist the parties, as they seem to be more open to hearing their children's views as ascertained by a neutral party.<sup>84</sup>

Many parties appear to be positively impacted by hearing the actual words of their children. In fact the words from children have the potential

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<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.* at 15.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

to soften the positions of adversarial parties:<sup>85</sup>

I can tell them from the bench that the parties need to address the interests of their children but it's just not the same as hearing it from their own children. (member of judiciary)<sup>86</sup>

The common sense that comes from children helps parents focus on what's important. (member of judiciary)<sup>87</sup>

Further evaluation about the experiences of children and parents will be available in 2008.

#### *iv) The Challenges of the Hear the Child Interview Tool*

While the Hear the Child Interview tool has been praised for its timeliness and ability to positively assist parties at various stages of a proceeding, its use during the pilot was very “last minute” and a “one time” effort. This meant that people who wanted to use the tool required interviewers to be immediately available and for the interview to happen “as close in proximity to the decision as possible.” Some pilot participants expressed a concern about the possibility that the interview tool could be used as another weapon by adversarial adults. As a result, unless this “last minute,” “one-time” approach is modified:<sup>88</sup>

- There may be barriers to securing an interviewer and arranging an appropriate interview time.
- The child will likely not be guaranteed a time to return to the interviewer should they have more to add or would like to see their views report and clarify what they said (the same may be the case for the interviewer).
- It is not possible to guarantee that parents and children receive advance information about the Hear the Child Interviews (including its neutral nature), complete the interview in-take form providing relevant advance information to the interviewer, or have a facilitator available such as counsel or a family justice counsellor to answer questions from parties and children about the practice or the child's views produced by the process.
- It generally will not provide an early enough opportunity for the child to

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<sup>85</sup> *Ibid.* at 12.

<sup>86</sup> *Ibid.* at 11.

<sup>87</sup> *Ibid.* at 12.

<sup>88</sup> *Ibid.*

be heard and have the child's views brought forward to processes such as Judicial Case Conferences where the child's perspective may be helpful to earlier dispute resolution. Anecdotally, there is feedback that Hear the Child Interviews are starting to be requested earlier in the process.

Despite the relative success of the pilot, participants estimate that children are still only being heard in ten percent or less of their custody and access cases. Several participants suggest that this low percentage could be improved if a master or judge routinely ordered hearing from children. This would also be consistent with upholding a child's right to participate.

*d) Opportunities for "Pro-Active" Judges and Lawyers to Bring Children's Problems to Light and to find Solutions to Them*

*1) Create Opportunities for the Child to be Heard*

There are several opportunities where lawyers and judges can exercise "pro-active attitudes" to support the realization of Canadian children's rights in custody/access matters. The first opportunity arises every time they are involved in a case where a child's custody or access is in issue. In these cases judges and lawyers can ask, as a matter of course, whether the children have been given an opportunity to be heard, and take steps to ensure this opportunity is made available to a child, "capable of forming his or her views."

*2) Seek Background Information About, and Input from, the Child*

The next opportunity for lawyers and judges to be pro-active in such cases is to ensure that adequate background information about, and from, the child is available to inform the process used to hear from the child. This can support children as actors in the realization of their rights. For example, a more mature, articulate child may wish to speak to the judge directly, but another child may prefer to speak to a neutral interviewer. In either case, the judge or interviewer ideally needs to be equipped to know how to create an enabling environment for the child (setting up a desk like the principal's office, for example, is not particularly child friendly), and to respect the child's culture, dignity, privacy and evolving capacity by using suitable practices, language, and questions. According to a service provider in BC who works with Chinese-Canadian families, including immigrants from Hong Kong, Taiwan, Mainland China and other parts of the world, one<sup>89</sup>

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<sup>89</sup> Williams, *supra* note 29 at 57.

[m]ust 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.

### *3) Provide Information to Children and their Parents in a Way That They Understand*

Another opportunity for pro-active attitudes is in providing information to children and their parents in ways that they understand about the process. This is about demystifying what it means to hear and consider the views of children, to minimize the possibility of the child's views being used as a "weapon" in litigation, and to ensure the child and parties are as comfortable as possible.

Children need to have processes explained in language they understand, and have an opportunity to ask questions themselves. This must be done in addition to providing information to parents, as parents are often "gatekeepers" for their children in determining what, if any, access their children will have to information and support services. For instance, some leaflets for children are distributed to parents through courts or lawyers' offices to pass on to their children, but research shows that most leaflets given to parents are not passed on.<sup>90</sup> Establishing a "how to survive your parents divorce" course could prove useful for children in every Canadian jurisdiction.

At the same time parents need to have things explained to them in ways that they understand and have an opportunity to ask questions. They also need to know how their actions can positively, or negatively, impact their children in separation/divorce proceedings. Some of this information is provided to parents who attend parenting after separation courses, however, periodic reinforcement or guidance may be required to ensure children are not unduly pressured by their parents or caregivers. This means parents and caregivers must be equipped to know how to talk to their children, or not, about what is happening as the process evolves.

### *4) Report Back to Children About What Happens to Their Views*

Finally, an opportunity available to judges and lawyers with pro-active attitudes lies in reporting back to children about what happens to their views. Judges can write a paragraph, in child-friendly language, about how he or she has considered the child's views and what decision has been

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<sup>90</sup> Joanna Hawthorne, Julie Jessop, Jan Pryor and Martin Richards, "Supporting Children through Family Change: A Review of Interventions and Services for Children of Divorcing and Separating Parents," Joseph Rowntree Foundation, 2003, online: <<http://www.jrf.org.uk/KNOWLEDGE/findings/socialpolicy/323.asp#top>>.

made about the child's best interests, and ask the parties, and counsel, to ensure this is conveyed to the child or arrange to convey it directly to the child through those who originally interviewed or obtained the child's views.

### 6. Conclusion

Acting on a "best interests and rights of the child" basis recognizes that while children are in special need of protection, they are also human beings with their own thoughts, feelings and rights. Children have a valuable contribution to make to legal decisions that affect them, and the state of the law in Canada enables family law stakeholders to act on several opportunities to make this a reality. Perhaps it is best to leave the final word to Canada's Senate Committee on Human Rights which recently recommended that pursuant to Articles 12 to 15 of the *CRC*:<sup>91</sup>

[T]he federal government dedicate resources towards ensuring that children's input is given considerable weight when laws, policies and other decisions that have a significant impact on children's lives are discussed or implemented at the federal level.

The same words could be said to provincial/territorial levels of government in enabling children, and families to realize their rights, and support those working in the family justice system to respect them.

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<sup>91</sup> Recommendation 1, Final Report of the Standing Senate Committee on Human Rights, *supra* note 28.



