

A SURVEY OF CANADIAN JUDGES ABOUT THEIR MEETINGS WITH CHILDREN: BECOMING MORE COMMON BUT STILL CONTENTIOUS

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This article reports on a study of the views and experiences of 62 Canadian judges with judicial interviews of children in family cases. There has been an increase in this practice in the past five years, with more than half of the judges reporting some experience. There is variation in its use, with Quebec judges having more experience. Although the practice remains controversial, most judges who interview children find this a useful practice, but there are differences in approach to such issues as confidentiality and recording. The authors conclude that this practice should be encouraged, but there is a need for clearer guidance about the practice and more education for judges and lawyers.

Cet article fait le compte-rendu d'une étude réalisée par les auteurs sur les opinions et les expériences de 62 juges qui ont conduit des entrevues avec des enfants dans le cadre d'affaires en droit de la famille. Cette pratique a été de plus en plus utilisée au cours des cinq dernières années et plus de la moitié des juges interrogés déclarent qu'ils s'en sont déjà servis. On a constaté des variations dans son utilisation, les juges du Québec étant les plus nombreux à s'en prévaloir. Bien qu'elle demeure controversée, la plupart des juges ayant effectué des entrevues avec des enfants estiment que cette pratique est utile. Il existe cependant des différences dans les approches en ce qui concerne les questions touchant notamment la confidentialité et l'enregistrement. Les auteurs concluent que cette pratique devrait être encouragée, mais qu'il est nécessaire de la baliser en mettant en place des directives claires et davantage de sensibilisation auprès des juges et des juristes.

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1. Introduction

A considerable amount has been written on the different ways that children's views and perspectives can be heard when their parents separate and are making plans for the future, especially if there is a dispute about the parenting plan that is being resolved in the family justice system.¹ There is an increasing body of legal literature and empirical research that addresses what children have to say about their participation during the separation process,² as well as children's views and experiences about different custodial arrangements.³ There is also a small but growing body

¹ Rachel Birnbaum, *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Processes: A Literature Review* (Ottawa: Family, Children and Youth Section, Justice Canada, 2009); Nicholas Bala, Victoria Talwar and Joanna Harris, "The Voice of the Children in Family Law Cases" (2005) 24:3 Can Fam LQ 221; Nicholas Bala, Rachel Birnbaum and Lorne Bertrand, "Controversy About the Role of the Children's Lawyers: Instructional Advocate or Best Interests Guardian? Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers" (2013) 51:4 Fam Ct Rev 681; Joan B Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice" (2002) 10:1 Va J Soc Pol'y & L 129; Suzanne Williams, "Perspective of the Child in Custody and Access Decisions: Implementing a Best Interest and Rights of the Child Test" (2007) 86:3 Can Bar Rev 633 [Williams, "Perspective"].

² Rachel Birnbaum, Nicholas Bala and Francine Cyr, "Children's Experiences with Family Justice Professionals and Judges in Ontario and Ohio" (2011) 25:3 Int'l JL Pol'y & Fam 398; Judy Cashmore, "Children's Participation in Family Law Decision-Making: Theoretical Approaches to Understanding Children's Views" (2011) 33:4 Child Youth Serv Rev 515; Gry Mette D Haugen, "Children's Perspectives on Everyday Experience of Shared Residence: Time, Emotions and Agency Dilemmas" (2010) 24:2 Child Soc 112; Karl-Franz Kaltenborn, "Children's and Young People's Experiences in Various Residential Arrangements: A Longitudinal Study to Evaluate Criteria for Custody and Residence Decision-Making" (2001) 31:1 Brit J Soc Work 81; Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Pilot Project" (2012) 26:1 Int'l JL Pol'y & Fam 1; Bren Neale and Jennifer Flowerdew, "New Structures, New Agency: The Dynamics of Child-Parent Relationships after Divorce" (2007) 15:1 Int'l J Child Rts 25; Patrick Parkinson, Judy Cashmore and Judi Single, "Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation" (2005) 43:3 Fam Ct Rev 429; Linda D Elrod, "'Please Let Me Stay': Hearing the Voice of the Child in Hague Abduction Cases" (2011) 63:4 Okla L Rev 663; Alfred A Mamo and Danielle Gauvreau "Judicial Interviews of Children in Custody/Access Disputes" (Paper delivered at the 7th Annual Family Law Summit, Continuing Education, Law Society of Upper Canada, May, 2013) [unpublished].

³ Judy Cashmore and Patrick Parkinson, "Children's and Parents' Perceptions on Children's Participation in Decision Making after Parental Separation and Divorce" (2008) 46:1 Fam Ct Rev 91; William V Fabricius, "Listening to Children of Divorce: New Findings that Diverge from Wallerstein, Lewis and Blakeslee" 52:4 Fam Relat 91; Jane Fortin, Joan Hunt and Lesley Scanlan, "Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth"

of empirical literature and on the views and experiences of judges meeting with children in family disputes,⁴ though very little from Canada.⁵

This article adds to the literature by reporting on a study recently undertaken by the authors about the attitudes and experiences of Canadian judges with judicial interviewing of children in custody and access cases. This study builds on the authors' ongoing research agenda about children's participation during the process of family dispute resolution. With more than sixty judicial respondents, it is by far the largest Canadian study on judicial attitudes and practices about meeting with children, and the first to explore whether judicial attitudes and practices of meeting with children have changed in the three years since the 2010 decision of *Martinson J in BJG v DLG*⁶ expressed strong support for judicial interviewing of children. This study also explores the effects of programs about judicial interviewing of children in the last five years at both legal and judicial educational conferences,⁷ and effect of the development of the first guidelines in

(Brighton, UK: Sussex Law School, 2012); Bruce Hawthorne, "Split Custody as a Viable Post-Divorce Option" (2000) 33:3/4 J Divorce Remarriage 1; Joan B Kelly, "Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research" (2007) 46:1 Fam Process 35.

⁴ Michelle Fernando, "Conversations between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters" (2009) 23:1 Aus J Fam L 48; Michelle Fernando, "What do Australian Family Law Judges Think about Meeting with Children?" (2012) 26:1 Aus J Fam L 51 [Fernando, "Australian Family Law Judges"]; Morag, Rivkin and Sorek, *supra* note 2; Patrick Parkinson, Judy Cashmore and Judi Single, "Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia" (2007) 21:1 Int'l JL, Pol'y & Fam 84; Carol C Smart, Amanda Wade and Bren Neale, "Objects of Concern? Children and Divorce" (1999) 11:1 Child & Fam LQ 365; Anne B Smith, Nicola J Taylor and Pauline Tapp, "Rethinking Children's Involvement in Decision-Making after Parental Separation" (2005) 10:2 Childhood 201; Patrick Parkinson and Judy Cashmore, "Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges" (2007) 21:2 Int'l JL Pol'y & Fam 160; Rachel Birnbaum and Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24:3 Int'l JL Pol'y & Fam 300; Nicholas Bala, Rachel Birnbaum, Francine Cyr, and Denise McColley, "Judges for Children in Family Court: Guidelines for Judicial Interviews with Children" (2013) 47 Fam LQ 381.

⁵ Birnbaum and Bala, *supra* note 4, reporting on a study based on interviews with 30 judges from Ontario and 18 from Ohio; and Suzanne Williams, "Judges Listening to Children Directly in Separation and Divorce Proceedings: Individual, Institutional and International Guidelines" (National Judicial Institute Program, Toronto, February 2010) reporting on a survey of 31 judges from 10 countries, including 20 from Canada; this study did not breakdown responses by country.

⁶ 2010 YKSC 44, 324 DLR (4th) 376 at para 6 [*BJG*].

⁷ In Ontario, there were two conferences organized by the Continuing Legal Education Department of the Law Society of Upper Canada, Ontario on the Voice of the

Canada for judges who may meet with children.⁸ This article adds to the existing research about judicial meetings with children; this is an increasingly common way of allowing for children's participation during decision-making following parental separation, but certainly not the only way for them to be involved.

This paper reviews the legal context and the jurisdiction for judges in Canada to meet with children. We then discuss the methodology of this study and our major findings. In sum, the study reveals that there is an increased willingness by Canadian judges in family cases to meet with children, though many judges continue to express caution and others do not engage in this practice at all. Among judges who do meet with children, there is wide variation in the frequency, purposes and methods used in meeting with children. Further, many judges are concerned about the lack of direction offered by legislation and case law, and it is clear that courts, litigants and children would benefit if judges had clearer guidance and training regarding judicial meetings with children.⁹ We conclude that there is no single "best way" to involve children in the decision-making that occurs during parental separation. Much depends on the nature and stage

Child in 2009 and 2010. In 2009, in conjunction with the University of Toronto Faculty of Law and UNICEF Canada in celebration of the 20th anniversary of the Convention on the Rights of the Child, "The Best Interests of the Child: Meaning and Application in Canada" was held in Toronto, Ontario. The National Family Law Program in July 2010 in Victoria also held panel discussions and debates on children's participation, especially regarding judicial interviews with children. The National Judicial Institute, which has primary responsibility for the education of judges in Canada, had had a number of programs with sessions on this topic, including programs in Toronto in January 2013 (Ontario Court of Justice) and Calgary in January 2012 (Alberta Court of Queen's Bench), as well as the Vancouver Conference in February 2013, in conjunction with which this survey was undertaken.

⁸ patti cross, "Hearing Children: Should You Interview a Child? And, if so, How?" (August 2012) [unpublished memorandum from the Office of the Chief Justice, Ontario Court of Justice]; Bala *et al*, *supra* note 4.

⁹ See M Karle, S Gathmann, and G Klosinski, "Investigation into the Practical Implications of Child Hearings Conducted Pursuant to Section 50b of The German Act Governing Non-Contentious Proceedings" (2010) Department of Psychiatry and Psychotherapy in Childhood and Adolescence, University of Tübingen. The Ontario Court of Justice has developed Guidelines for judges; see cross, *supra* note 8. In California, the state has adopted the California Rule of Court 5.250 (the Rule) that addresses when and how judges will meet with children but there remains wide variation throughout the United States about protocols or guidelines for judges to interview children post separation. In England, see <<https://www.gov.uk/government/policies/making-the-family-justice-system-more-effective>> (last accessed June 7, 2013) that specifically calls for children meeting with judges if they wish to as part of the new legislation on making family justice more accessible in family disputes. In New Zealand, and Germany guidelines have been developed for and by judges on this important topic.

of the process; the child's age, capacity and willingness to participate or not; the resources available, such as children's lawyers, child custody and access assessors, or views of the child reports; and the experience and training of judges and other professionals. It is, however, our view that judicial meetings with children should be more common than they have been until now in Canada.

2. Canadian Legal Context for Judicial Interviews With Children

The *Convention on the Rights of the Child*¹⁰ places an obligation on signatory states to ensure that decision-makers hear the views of children. The Convention does not, however, specify the manner in which children's views are to be heard:

Article 12

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

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

In Quebec, the *Civil Code*¹¹ Article 34 establishes that children in family cases have the right to an "opportunity to be heard" by the court,¹² and it is common for judges in that province to meet children who are the subject of custody or access disputes. Section 64 of Ontario's *Children's Law Reform Act*¹³ creates a discretionary regime, providing that judges in family cases "may" interview children to learn their "views and preferences."¹⁴ In Newfoundland and Labrador, Prince Edward Island, the Northwest Territories, and Nunavut there is similar discretionary

¹⁰ United Nations, UNGAOR 44th Session, UN Doc A/Res/44/25 (1989).

¹¹ SQ 1991, c. 64.

¹² 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."

¹³ *Children's Law Reform Act*, RSO 1990, c C-12.

¹⁴ Ontario's *Children's Law Reform Act* provides:

s 64: (1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.

(2) The court may interview the child to determine the views and preferences of the child.

(3) The interview shall be recorded.

legislation permitting judges to undertake interviews, and in most provinces, case law has long accepted that judges have the discretion to meet children to ascertain their wishes, without the consent of the parties, with the caveat that they should avoid having a private meeting that attempts to resolve factual disputes.¹⁵ Except in Quebec, with its presumptive statutory provisions, Canadian judges have traditionally been reluctant to exercise their jurisdiction to meet children, tending to suggest that this should only be done as a “last resort.”¹⁶ In a significant departure from previous cases, however, the 2010 Yukon decision of Martinson J in *BJG*¹⁷ expressed strong support for the *right* of children to meet the judge deciding a case, as well as emphasizing the potential value of the practice for the court.

Children have legal rights to be heard during all parts of the judicial process, including judicial family case conferences, settlement conferences, and court hearings or trials. An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there must be a determination of the method by which the child will participate

Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully. They have important information to offer about such things as schedules, including time spent with each parent, that work for them, extra-curricular activities and lessons, vacations, schools, and exchanges between their two homes and how these work best. They can also speak about what their life is like from their point of view, including the impact of the separation on them as well as the impact of the conduct of their parents.

This decision has been cited more than a dozen times¹⁸ and emphasizes that children have a “right to be heard” in the family courts and meet with the judge.¹⁹

3. *The Study of Judges*

We surveyed judges from across Canada who attended a family law judicial education program in February 2013 about their views and

(4) The child is entitled to be advised by and to have his or her counsel, if any, present during the interview.

¹⁵ *Jandrisch v Jandrisch* (1980), 3 Man R (2d) 135 (CA).

¹⁶ See e.g. *Stefureak v Chambers* (2004), 6 RFL (6th) 212 (Ont Sup Ct); *S (ME) v S (DA)*, 2001 ABQB 1015, 304 AR 112.

¹⁷ *Supra* note 6 at paras 6 and 21.

¹⁸ Search on Quickcite, June 24, 2013.

¹⁹ See e.g. *BJG*, *supra* note 6 at para 6.

experiences with judicial meetings in family disputes (child custody and child welfare) over the past year.²⁰ There were 62 respondents to the questionnaire, almost two thirds of those attending, suggesting a high level of judicial interest and concern about this practice.

There were 23 questions surveying judges' demographic information (including gender, number of years presiding, location where they preside, percentage of work in family law); whether or not they had ever interviewed a child; and if so, at what ages, and what factors led them to interview a child; issues about recording the interviews, the purpose and nature of the interviews; at what stage of the process and where the interview was carried out; their concerns with judicial meetings; and what lessons can be learned about judicial interviews. The questions were both open-ended and closed with Likert-type scaling questions (always, often, sometimes, never), allowing for both quantitative and qualitative responses; the latter responses asking judges for their views and experiences to provide breadth and depth to their responses.

There were 56 per cent male and 44 per cent female judge respondents. The largest number of judges who responded were from Ontario (n=18), followed by the Atlantic provinces (Newfoundland and Labrador, Nova Scotia, and New Brunswick) (n=17), the prairies and territories (n=12), British Columbia and Alberta (n=8) and Quebec (n= 7). They were generally very experienced judges, having presided an average of eleven years as a judge. Some 70 per cent did primarily family law, though some had mixed caseloads; 43 per cent had prior experience with representing children when they were lawyers.

Of the respondents, just over half (52 per cent) had interviewed a child while on the bench. There was some geographical variation in use of judicial interviewing, reflecting differences in the law, with Quebec judges having more experience with judicial interviews reflecting Article 43 of the *Civil Code*, the presumptive right of a child to meet the judge. Indeed, all seven of the Quebec judges had interviewed children. There were also some differences in use of judicial interviewing depending on the services available for bringing children's views to the courts. For example, a number of judges commented that they do not feel that they need to meet with children because there is good access where they preside to lawyers for children or mental health professionals who can interview children and present their views in court. It is also apparent, however, that there are differences of judicial opinion and practice regarding meeting with

²⁰ The sampling of judges was purposive and conducted online with the support of the National Judicial Institute. The survey was confidential and voluntary. All results provided in this article are aggregated to protect the identity of any individual judge.

children, even within jurisdictions. There was no statistical significance found by region, gender, or whether the judge had previous experience with representing children and meeting with children.

A) How Often Judges Meet Children and the Factors Considered for Meeting Children

Table 1 sets out how often judges²¹ have interviewed children of different ages.

Table 1 – If you have ever interviewed a child, how often have you done so in the past year in custody/access cases?					
Age of child	Always	Often	Sometimes	Never	No.
3-5 years	–	–	1 (4%)	24 (96%)	25
6-9 years	–	2 (7%)	9 (33%)	16 (59%)	27
10-14 years	–	6 (20%)	14 (47%)	10 (33%)	30
14 years +	2 (7%)	5 (18%)	10 (36%)	11 (39%)	28

Judges generally report that they are more likely to meet with children who are older, with the occurrence and frequency of such interviews increasing with age.

Tables 2 and 3 set out the factors judges consider if and when they choose to interview a child in both child custody and child welfare disputes.

Table 2 – If you interview children in custody/access cases, what factors help you to decide to do this?					
	Always	Often	Sometimes	Never	Total Responses
Age of child	17 (53%)	10 (31%)	4 (12%)	1 (3%)	32
Child expressing a wish to speak to you	8 (26%)	13 (42%)	8 (26%)	2 (6%)	31
Urgency of decision	8 (25%)	7 (22%)	10 (31%)	7 (22%)	32
Absence of a children's lawyer	6 (19%)	6 (19%)	10 (32%)	9 (29%)	31
Absence of an assessment	5 (17%)	7 (23%)	12 (40%)	6 (20%)	30
Request of parent	5 (16%)	3 (10%)	15 (48%)	8 (26%)	31
Consent of parties	14 (42%)	9 (27%)	8 (24%)	2 (6%)	33
Request from child	9 (29%)	10 (32%)	7 (23%)	5 (16%)	31

²¹ Judges could respond several times given the different age groups. Therefore the responses do not always add up to 100.

Table 3 – If you interview children in child welfare cases, what factors help you decide to do this?

	Always	Often	Sometimes	Never	No.
Age of child	9 (38%)	5 (21%)	1 (4%)	9 (38%)	24
Child expressing a wish to speak to you	7 (32%)	5 (23%)	1 (5%)	9 (41%)	22
Urgency of decision	5 (23%)	2 (9%)	3 (14%)	12 (55%)	22
Absence of a children's lawyer	2 (9%)	2 (9%)	5 (23%)	13 (59%)	22
Absence of an assessment	1 (5%)	2 (9%)	6 (27%)	13 (59%)	22
Request of parent	1 (5%)	1 (5%)	6 (27%)	14 (64%)	22
Consent of parties	6 (26%)	2 (9%)	3 (13%)	12 (52%)	23
Request from a child	9 (39%)	4 (17%)	1 (4%)	9 (39%)	23

While there is a growing trend of judges meeting with children, no judges consider it appropriate to meet with a child in every case where there is a dispute over their care. Judges are more likely to meet with children if there is no assessment, views of the child report or representation for the child, especially if there is urgency for a decision. Some judges, however, will meet with a child even if there is counsel and an assessment. For many judges a request from both of the parents or the child for a meeting is a significant factor in deciding whether to meet the child. The comments of judges also identified other factors for meeting with children, including:

“Toxic relationship between parents; request of child’s lawyer; sense that the child is being left out in the cold; years of experience in assessing need to do so.” [custody and access]

“Credibility issues.” [custody and access]

“On my own if psychological difficulties” [custody and access]

“Sense that something is ‘missing’ in the picture.” [child welfare]

B) Who Is Present At The Meetings and Where Do They Take Place?

Table 4 reveals that judges most often meet children with the child’s counsel or the court clerk present; less frequently parents’ lawyers may be present; a small minority of judges have parents themselves present.

Table 4 – Who else is present (custody/access)?					
	Always	Often	Sometimes	Never	No.
Anyone besides you and child?	23 (74%)	1 (3%)	3 (10%)	4 (13%)	31
Child’s counsel?	11 (41%)	–	4 (15%)	12 (44%)	27
Court clerk or reporter?	26 (84%)	–	3 (10%)	2 (6%)	31
Parents?	1 (3%)	–	3 (10%)	25 (86%)	29
Parents counsel?	7 (23%)	–	4 (13%)	19 (63%)	30

Having someone else present allows for transparency and assistance in the very unlikely event that the children become distressed or disruptive, or there are allegations of impropriety.

About half the judges who meet with children do this in their chambers or in a conference room. There were a few judges who reported that they met with a child outside of the court house:

“A couple of times in an A & W restaurant at lunch time.”

“At school in principal’s office or staff lounge.”

Some judges, notably in Quebec, and elsewhere in child welfare proceedings, are likely to meet the child in the court room with counsel for the parents present. About two thirds of the judges who meet with a child have a court reporter present, primarily to have a record in the event of an appeal; a minority of judges who meet children provide parents with a transcript.

Table 5 sets out that a few judges meet alone with a child, and even outside the court house, perhaps taking the child to a fast food restaurant.²²

²² See *Haberman v Haberman*, 2011 SKQB 415, 386 Sask R 79, where an expert reported that a 12-year-old boy was at risk of alienation from his mother and Sandomirsky J went to his school with a reporter to “meet” the boy.

Table 5 – Where did you meet with the children?

	Always	Often	Sometimes	Never	No.
In your chambers	11 (41%)	3 (11%)	4 (15%)	9 (33%)	27
In open court with counsel present	6 (33%)	2 (11%)	1 (6%)	9 (50%)	18
In court but with parties excluded	9 (36%)	3 (12%)	2 (8%)	11 (44%)	25
In conference room outside of court	2 (8%)	–	7 (29%)	15 (62%)	24
Outside in public with court officer	1 (4%)	–	2 (9%)	20 (87%)	23

C) The Purpose of the Judicial Meeting and the Issue of Confidentiality

The vast majority of judges (94 per cent) who met with children always explained the purpose of the meeting with the child. For example, judges stated they would tell the child:

“General information of the process.”

“The purpose varies per case. Usually I tell them I want to hear what they have to tell me about certain things such as and then outline it. I try to chat without directly asking the question at the beginning of the interview/discussion.”

“To give them a chance to let the court know what their views/thoughts were, to tell the court how things are at home and in their relationship with each parent—all to help the judge make the best decision possible.”

“To give the child an opportunity to express his or her views and preferences.”

“To explain the role of the Judge and how it would be the Judge’s decision about custody and access. Wanted to talk about how things are going for the child.”

“To enable me to better understand the issues and to hear his/her concerns.”

Judges are clearly sensitive to providing the child with an opportunity to be heard, but they also want to explain to the child the purpose of the interview with the child and to make clear that the judge is the final

decision-maker. Many judges recognize the importance of discussing the issue of confidentiality with the child, but views about the extent of confidentiality were markedly varied.

Some judges were clear with the child indicating that parents would receive full information about the meeting, and there is no confidentiality:²³

“There is none.”

“I told them I would be telling their parents what we talked about and what they told me, unless they had something to tell me that they did not want me to tell their parents. If so, they were to let me know and we would decide how to handle that. Luckily this has never come up yet.”

Other judges viewed the interview as totally or partially confidential, telling the child the interview was:

“Totally confidential.”

“That I may not be able to keep our interview confidential, if I was concerned about the child’s safety or the safety of others, I would not be able to do so. If I learned of some kind of criminal offence, I would not be able to keep that part of the interview private.”

“What we’re gonna say will stay between us.”

“I would not tell the parties exact nature of our discussion but in general terms what were wishes, preferences”

“I would keep confidential anything that he [child] wanted to be confidential. I did not consider what he told me as ‘evidence.’ It was more in the context of a settlement conference and the parties agreed to be bound by my recommendations.”

²³ The view that parents should receive a full transcript of the meeting is reflected in the decision of Harper J in *McAlister v Jenkins* (2008), 54 RFL (6th) 126 (Ont Sup Ct) at para 135 [*McAlister*]:

I was gowned for the interview. I told Stephanie that I wanted to hear from her about the problems that she was having. At first, Stephanie stated that she was a bit nervous and told me that [her therapist] ... had told her to write things down in order that she not forget anything she felt was important. After a few minutes, Stephanie appeared to be comfortable. I told her that everything that was said in this interview would be taken down by the court reporter and a transcript of what was said would be given to her mother, father and [step mother]. Stephanie appeared to have no difficulty with everyone knowing what took place in the interview.

The diverse views about confidentiality found in this study are similar to the results of earlier studies based on interviews with judges in Ontario and Ohio,²⁴ and British Columbia.²⁵ A survey of New Zealand cases also revealed that judges there do not always apprise the parties of the child's views.²⁶ In contrast, a survey of judges in Australia,²⁷ where judicial interviewing of children is not common, expressed concern with the due process rights of the parents to know what children say to a judge. There are clearly conflicting views and practices regarding the extent to which judges regard interviews as confidential, and how much information about them is shared with the parents about the interviews. This is an issue that clearly needs to be addressed in guidelines (or in legislation or appellate jurisprudence) to ensure a degree of consistency and fairness for both children and parents.²⁸

D) The Different Stages When a Judicial Meeting Occurs

As noted in Table 6, judicial meetings with children occur at all stages of proceedings, including at motions, at pre-trial conferences, at trial and even after a trial. Among those judges who meet with children, it seems to be most common to do so as part of the trial process. It is also quite common for judges to meet children at the pre-trial motion or settlement conference stage, often with a view of giving the parents some idea of what their children are experiencing in order to help facilitate a settlement. Some judges, in selected cases, meet with children after they have rendered a

²⁴ Birnbaum and Bala, *supra* note 4.

²⁵ Williams, "Perspective," *supra* note 1.

²⁶ Pauline Tapp, "Judges Are Human Too: Conservation Between the Judge and a Child as a Means of Giving Effect to Section 6 of the Care of Children Act 2004" (2006) NZL Rev 35.

²⁷ Fernando, "Australian Family Law Judges," *supra* note 4.

²⁸ There is a small amount of conflicting reported Canadian jurisprudence on this issue. In *McAlister*, *supra* note 23, Harper J had a transcript prepared and provided to the parents; he told the child at the start of the interview that this would be done. In contrast, in *Montgomery v Rendell*, 1987 CarswellOnt 1554 (Ont Prov Ct) Volgelsang Prov Ct J had the interview recorded, but indicated that it would only be made available to the parents in the event of an appeal. A similar approach was taken in *Demeter v Demeter* (1996), 133 DLR (4th) 746 (Ont Gen Div) where Speyer J provided the parents with a summary of the interview, stating at para 8:

I have received ... a statement of their views and preferences as to the parent with whom they wish to reside. I think it inappropriate to disclose to the parties the full contents of my interview. I do not wish to embarrass the children and potentially to damage their future relationship with either parent.

It is submitted that the approach of Speyer J adequately balances concerns about fairness to the parents and accuracy of fact finding against the need to protect children.

judgment to explain their decision,²⁹ or write a letter to the child for this purpose (with copies to the parties).

When asked questions about the purpose of these meetings and offered a range of choices, most judges indicate that they have these meetings to gain a sense of the child's personality and views from such meetings, and to allow the child to ask questions. Judges also typically use this as an opportunity to make clear to children that it is the court, not the child, which has responsibility for the decision. Most judges avoid using these meetings to "ascertain facts,"³⁰ though some judges apparently do this; unfortunately from the way that the survey question was worded, it is not clear whether judges mean that they ascertain "facts" like the wishes of the child, or whether they actually ask children about matters in dispute between the parents.

Table 6 – If you meet children, at what stage in the process do you do this?					
	Always	Often	Sometimes	Never	No.
Motion stage	1 (4%)	2 (8%)	10 (40%)	12 (48%)	25
Case conference stage	1 (4%)	2 (8%)	10 (38%)	13 (50%)	26
Pre-trial stage	1 (4%)	1 (4%)	8 (32%)	15 (60%)	25
Trial stage	9 (28%)	4 (12%)	14 (44%)	5 (16%)	32
Post trial stage to explain decision	0 (0%)	2 (9%)	5 (22%)	16 (70%)	23

E) Advantages and Disadvantages of Judicial Meetings

Most judges who interview children find it helpful (82 per cent), but based on their comments, those judges who do not interview have generally considered the issue and articulate thoughtful concerns about the practice, including their own lack of expertise and training, and the better qualifications and opportunities that lawyers or mental health professionals have for ascertaining the child's views and bringing them before the court.

²⁹ *Reeves v Reeves*, (2001) OJ No 308 (QL) (Ont Sup Ct).

³⁰ See *Ward v Swan* (2009), 95 OR (3d) 475 (Ont Sup Ct) at para 25 *per Harper J*: In my view it is not proper to use the judicial interview process in order to contest evidence that may be disputed. The prejudice to the litigants far outweighs any potential probative value I will not place [the child] in a position where, through questioning by the judge, where she will be at the centre of a storm that may go further to destroy future family relationships rather than preserve the potential of necessary familial re-integration.

Some judges also express a concern that meeting with a child is inconsistent with the judicial role and places the “judge ... in the position of being a witness.”

Comments about how helpful judges find these meetings with children varied. For example, some judges reported the interviews were very helpful and necessary:

“Sometimes parents tell opposite views of what a child wants.”

“Parents rarely know how their children view the arrangements parents have made for them. Often they ignore what appears to be important to the child. As a result I can often craft a decision more in keeping with what is in the child’s best interest.”

“Children are so much more reliable in their sense of parental dynamics and their feelings about what they ‘truly’ want. I have found amazing insights expressed by some very young children which have helped me make much better decisions to support children.”

“Process would be incomplete without this evidence (and in some cases) and the interview, when appropriate, may benefit the child.”

“It generally assures that I will render a judgment in the best interests of the child and helps me to inform the parties of the importance of their assent to the measures ordered.”

Other judges, however, commented on concerns with these interviews. For example:

“I think a judge places him/herself in the position of being a witness. I am also concerned about the judge’s ability as a questioner and social scientist. I have refused to interview children since, but I am very open to appointing children’s counsel or if necessary an *amicus curiae*.”

“Usually I am more troubled – the cases are usually highly conflictual, and the impact on the children is palpable. It usually made the decision more difficult.”

“The court is to decide what is in the best interest.”

“In child protection usually the children want to go home even to terrible circumstances because that is the ‘normal’ for them.”

“Significant concerns, primary empowering a troubled child, and/or parent who may be exercising a parental agenda through a child.”

F) Changes in Judicial Practice Last Few Years?

The judges were also asked whether their views, practices or thinking about interviewing children had changed in the past few years. While not all the judges responded to this question, it would seem that judicial interviewing is becoming a somewhat more common practice in Canada. A number of judges reported a change in their thinking and practice reflecting greater receptivity, making comments such as:

"I will never, ever again interview off the record. I have gained even more trust in the process of hearing children's voices directly. I wish there were more opportunities to hear from children."

"Not as black and white about the issue as I used to be."

"I was far more reluctant in the early years but I have had some positive outcomes."

"Previously I was opposed."

"Yes I'd now consider interviewing in proper situation."

... "I remain cautious about doing so. I may be more attuned to looking for occasions when it is appropriate."

Some judges remain cautious, but seem somewhat more receptive, reflected in such comments as:

"I still don't think it is a good idea, but I am not as opposed as I was."

"... still opposed but not as opposed."

"I am more open to learning about the research."

"I increased my vigilance of my watching brief."

"Yes. I realized that always, the problems are not raised by children, but by their parents. That is why I meet with children only after the trial, when I have a precise idea of the dispute between the parents."

Other judges, however, remain opposed to the practice:

"I listen to very respected colleagues and some others who see no problem

and none of these people have been able to answer the questions I put in the disadvantages.”

“I am more convinced that we as judges are not competent to interview children.”

“Without training I would be reluctant to try this.”

“I have attended judicial education, and listened to experts. These discussions have reaffirmed my belief that the pitfalls to judicial interviewing do not outweigh the advantages. The wishes of children are important, but such can be obtained through a third party independent professional.”

The responses of those judges opposed to the practice reflect a thoughtful judiciary who are more engaged with the topic than ever before, listening carefully and exploring the issue from all sides in order to make decisions in the best interests of children.

G) “Anything You Wish To Add?” (Lessons Learned)

In a concluding question, the judges were asked whether there was anything that they wished to add about interviewing children. The responses indicated that many judges have given careful thought to this issue, but they have very different views and opinions, in part reflecting different practices and experiences with interviewing children as well as differences in resources available across Canada. For example, in British Columbia, Alberta, Saskatchewan, Manitoba and New Brunswick, a “Views of the Child Report” can be ordered to bring the child’s views before the court after an interview from a skilled lawyer or social worker; these reports are more focused and much less expensive than a full assessment.³¹

A number of judges concluded with some very positive comments about the practice of judicial interviewing of children, even if there is good availability in their jurisdiction of legal representation for children, assessments and views of the child reports. For example, they state:

“Great tool when used with wisdom and discretion.”

³¹ These are also called Voice of the Child Reports. For a discussion of their value and information about how they are prepared, see e.g. John-Paul Boyd, *Interviewing Children: A Methodology for Views of the Child Reports*, CBA Family Law Section News April 2011; *Meaningful Child Participation in Family Court Processes*, online: <http://www.iicrd.org/familycourt/>; and *Bruce v Bruce*, 2005 SKQB 325, [2005] SJ No 481 (QL).

“In one off the record interview I received a disclosure of sexual abuse. I learned a huge lesson never to do this again, and I have not done so. I have also learned that these interviews are really nothing about the law; they are about respectful caring exchanges between an adult and a child and can be extremely helpful for children. We owe it to these children to allow them to participate in their own cases whenever possible.”

Other comments were more cautions and raised concerns:

“We are not experts, children from families in conflict may have serious issues and there is a concern about what we may inadvertently do.”

“One danger is that the interview is not representative of the true situation but the negative circumstances that may have preceded it. The interview is only one factor to take into account in making your determination of the issues.”

Still other judges commented on the need for further dialogue and the development of protocols to guide the practice and offer some consistency.

“I appreciate further discussions on this subject.”

“I would like to see a recommended protocol to use when attempting interviews.”

4. Considerations and Cautions

This study was intended to learn more about what Canadian judges have been doing and thinking in regard to judicial interviewing of children since the 2010 decision of Martinson J in *BJG*,³² as the issue has been an increasing topic in focus at educational conferences for both lawyers and judges in this country, as well as a growing body of empirical research in a number of countries.

It is significant that among the judges surveyed, more of them are meeting with children, albeit some tentatively, than was the case a few years ago, and that more judges are considering doing this in the future. It is, however, also notable that some judges remain strongly opposed to this practice, and a number of others remain very cautious about starting to do it.

This study presents a window into the ongoing dialogue in Canada about judicial meetings with children. This study, however, cannot be considered to be a definitive report or generalized to all judges across Canada. Although the response rate was high, only a relatively small

³² *Supra* note 6.

portion of all judges in Canada attended this conference. Further, it is apparent that attitudes and practices are changing.

5. Research, Protocols and Training

Whether judges undertake the practice of meeting children or not, a common response from the judges is that there is a need for more research about the practice, and the development of protocols to provide guidance for judges in deciding whether, when and how to meet with children. One particularly contentious issue to address in guidelines is whether the interview should be confidential, and how the parents should be informed about what transpired. Judges also observed that if meeting with children is to be an expected judicial function, there should be education and training available for judges.³³

In the view of the authors, it is now time to focus on making education and training available to all judges in Canada who preside over family cases, and conducting research about the effects on parents and children as opposed to the perceived benefits and risks as identified by judges, lawyers and mental health professionals.

In our opinion, children should not have to wait any longer to have their views and perspectives properly heard in the family justice process in Canada, including by judges. In the words of one judge who responded to this study:

“... if a picture can be worth a thousand words, meeting and listening to a child and assessing the child’s thoughts is well worth the exercise.”

Having such meetings, however, requires planning, education, the development of protocols to guide the practice, and research into what practices are most effective.

³³ Supra note 4.