

**Children's Right to be Heard in Canadian
Judicial and Administrative Proceedings**

Submission for the Committee on the Rights of the Child
General Day of Discussion
Group 1: The Child's Right to be Heard in Judicial and
Administrative Proceedings

Justice for Children and Youth is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. The clinic provides select legal representation to youth aged 17 and under in the areas of income maintenance, education, criminal law, family law, mental health law, health law, constitutional law and human rights, in the Metropolitan Toronto area. It also provides legal support and summary advice throughout the province of Ontario, Canada.

The Foundation prepares policy/law reform positions on issues relating to the legal practice of the clinic based on the needs and experience of its clients. The Foundation also conducts test case litigation, through interventions and applications, on specific issues related to the rights of children and youth, in Ontario and Canada. The clinic also provides public legal education to youth and youth-serving agencies.

Right to Participate and to be Heard (Article 12)

A key element of citizenship for all members of society is the right to make decisions about what is important in our lives. For children the most important areas include the child's family (or the state substitution for family), health, liberty (including the deprivation of liberty through youth criminal justice proceedings) and education. How does the Canadian justice system measure up to the international obligation to include child and youth participation in decisions that affect them? How relevant is the court and administrative justice system in the lives of young people? Justice for Children and Youth has the unique perspective of representing and advocating for the rights of young people under the *Charter* and the *Convention on the Rights of the Child* in the courts and before administrative decision makers in each of these areas. Facilitating effective participation by children and youth in legal proceedings is a challenging task for legal advocates for children as well as for other adults who play significant roles in these proceedings. Most importantly, where the right of participation exists, it is meaningful only if the process is understood by the child and protects the child's right to freedom of expression.

Right to Participate in Canadian Legal Proceedings

The right of children and youth under the age of 18 to participate and be heard in judicial and administrative decisions affecting them is recognized inconsistently throughout Canada depending upon region and the nature of the decision. The state of the law can best be described as a patchwork without evidence of a sound rationale for particular approaches even within the

same area of law or the same Province or Territory. Even in those jurisdictions in which the law establishes clear guidelines for child participation and legal representation, young people report that they find the court proceedings confusing and, at times, their legal representation inadequate. The one area in which Canada can be held up as a model for participation is in the youth criminal justice courts, where legal representation of accused young people is guaranteed and participation as a party with decision-making capacity is presumed. However, youth criminal justice legislation established an adult system, which, although rights-based, is hierarchical and disempowering. The quality of young people's decision-making even in that court is greatly affected by the quantity and quality of the information they are given about the process. A key element of empowering children to express their views and wishes is the guarantee that they have the right to be informed about the processes and to be given the facts they need for good decision-making.

Administrative Proceedings

Many important decisions that affect children's current and future lives are made in administrative processes in Canada. Education-related decisions including school discipline, governance, and access to special education programs can have significant effects on children. Yet in Canada, student participation, even in the choice of curriculum, is often minimal and legally precluded. In the child welfare systems, children and youth often have little say in what happens to them once they are placed in the care of the state. Despite the fact that many provincial and territorial jurisdictions afford children participatory rights in the court proceedings that lead to their coming into state care, their rights to participate in decisions about their care afterward come without recourse or enforceability. Further, although human rights legislation across Canada is generally in compliance with Article 12 of the UNCRC in respect of the ability of children to come forward with human rights complaints in their own capacity, this is somewhat diminished by the exclusion of age discrimination as a ground of complaint for children. A recent Ontario Human Rights Tribunal decision has declared this to be contrary to our *Charter* and read in age as a ground in that particular case.¹

At the federal level, immigration-related decisions are another example of administrative decisions in which respect for the child's views and wishes is sorely lacking. Despite the fact

¹ *Arzem v. R. (Ontario)* 2006 HRTO 17

that the case of *Baker v. Canada (Minister of Citizenship and Immigration)*² is cited as authority for the importance of the UNCRC in interpreting Canadian legislation, the background to the decision is problematic from the point of view of the right of children to be heard. This case involved the deportation of a mother and the importance of considering the best interests of her children when making this kind of decision. The children in this case sought standing at two levels of court, but each time were denied with costs being ordered against them at the Federal Court of Appeal. Justice for Children and Youth were counsel for the children in these applications. Ironically, we were given standing at the Supreme Court as a public interest advocacy group and not as representatives of the children most affected. Children continue to have no standing in these proceedings under the *Immigration and Refugee Protection Act*, despite the requirement that their best interests must be considered. There is no corresponding requirement that their views and wishes be considered.³

At the provincial and territorial level, the right of participation in judicial and administrative hearings is inconsistent. For example, students under 18 have no standing in their own expulsion and suspension appeals before school boards in Ontario. Some school boards have provided for standing for young people in these circumstances under their own procedures, but one of Ontario's largest schools boards, the Toronto District School Board still does not. In one case involving a client of Justice for Children and Youth, an application was made by an exceptionally capable student, with the support of his parent, for standing in an expulsion appeal, but the Board denied him standing stating that his mother could adequately represent his interests.⁴ Some provinces and territories, such as British Columbia, Northwest Territories and Nova Scotia, extend the right to participate in administrative decisions to students without age distinction; while others, such as Alberta and Ontario (with respect to special education hearings) limit participation in a few areas to students over the age of 16 and preclude participation entirely in other areas until 18 and 19 years of age. In addition, in Ontario student representatives sit on the governing board of trustees for the school boards, but unfortunately their participation is merely titular, as they have no voting rights.⁵

² [2001] 1 S.C.R. 45

³ In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555, the Federal Court of Appeal reduced the test to one of "undue hardship".

⁴ *Griffin v. Toronto District School Board* (2002), Unreported ruling of the Toronto District School Board

⁵ *Education Act*, R.S.O. 1990, s.55

Court Proceedings

Children over the age of 12 years in many provincial and territorial jurisdictions have participatory rights in child protection proceedings. Notable exceptions include Saskatchewan which provides no right to participate⁶ and Nova Scotia which sets the minimum age at 16 years. Despite the ability to participate in child welfare proceedings in Ontario, some young people have expressed confusion and dissatisfaction with their participation in the court process.⁷ Although Ontario has a well-established and well-trained contingent of lawyers who act for children through the auspices of the Office of the Children's Lawyer, the court proceedings themselves are not tailored to the needs of young people and the role of counsel from that Office is to present a case for the best interests of the child, not necessarily for the child's views and wishes. The Children's Lawyer also represents children in many contested child custody cases where the dispute is between parents, again representing the best interests of the child who is the subject of the court proceedings but is not a party to them.

Youth Justice Courts in Canada operate on the presumption that young people over the age of 12 years are capable of retaining and instructing counsel in their own defence against criminal charges. Children under 12 cannot be charged with criminal offences. Parents, although not parties to the proceedings, are encouraged to participate (and can be ordered to do so) and are entitled to notice of the charges and court appearances pertaining to their children. The young person charged is able to participate in the court proceedings in the same way that an adult would be, instructing counsel and choosing whether to plead guilty or engage in alternative dispute resolution.

Despite these examples of reasonably good compliance by Canada and many Canadian provinces with Article 12 of the UNCRC, considerable barriers exist in respect of effective participation by young people in these two contexts. Children, even those over the age of 12 years, cannot participate effectively in court proceedings, which focus on the adult participants and can intimidate children through their formality. The procedures create a disincentive to meaningful participation by young people and further the oppression of children through adversarial adult-centric proceedings. Members of the Children in Limbo Task Force of the Sparrow Lake Alliance in Ontario recently conducted focus groups of young people on their

⁶ Saskatchewan Children's Advocate Office (2006) *Saskatchewan's Children's Right to be Heard in Child Welfare Proceedings* (submission for the General Day of Discussion)

⁷ Aitken, G., et al., "The Voices of Youth in Care: Learning from Focus Groups with former and Current Crown Wards". *OACAS Journal*, Fall 2005, Vol49, No. 3.

experiences coming into the care of child welfare agencies focusing on the court process in particular.⁸ One young person described their child welfare court experience as follows:

*I didn't feel as though anyone thought about what I had to say, or considered me at any point there ... not as much as I would have liked... And then [at the conclusion of the hearing] it was just "Bang, bang – this is it!"*⁹

Some of the youths were reluctant to admit that the process confused them: “*Often things are said in ways that go way over your head, and then you're asked, 'Do you understand?' and of course you say, 'Yes – sure' but you don't.*”¹⁰

In the youth justice system, many decisions may be made by young people prior to attending court. For example, a young person might waive the right to counsel or to have an adult present prior to providing police with incriminating evidence. Despite the requirement that the police advise young persons of their rights, many young people proceed without understanding the nature of the right they have chosen to waive. In one progressive pre-charge diversion program in Toronto, young people were occasionally pressured into accepting responsibility for criminal acts they did not commit because they were threatened with criminal charges as the alternative.

Personal Decision-making

Although the theme for the Day of Discussion focuses on judicial and administrative proceedings, these proceedings are simply mechanisms by which the ability to make personal decisions is respected and enforced. For example, in Ontario children can make personal health decisions if they are competent. If a health practitioner determines that the child is not competent then the child, as a party, can request a hearing before the Consent and Capacity Board to challenge this decision. In other provinces, however, a health decision made by a competent young person can be over-ridden if the decision appears to be contrary to the child's best interest. And even in Ontario, a child under the age of 16 is deemed not to be capable under the *Mental Health Act*.

In Alberta, the views and wishes of a competent 16-year-old were over-ridden in respect of blood transfusions refused for religious reasons, on the application of child welfare legislation which gave the state the power to substitute a decision that was deemed to be in the child's best

⁸ *Ibid.*

⁹ *Ibid.* at p.4

¹⁰ *Ibid.* at p.5

interest.¹¹ The child challenged the decision, but was not permitted to make constitutional arguments based on her own freedom of religion. This case is an example of where the child's rights under other articles of the UNCRC are interconnected. In another case, in which the Supreme Court of Canada acknowledged and respected the child's right to freedom of religion in the school context, the parent of the child asserted the right on the child's behalf in the administrative and court processes – the child was not a party to any of the proceedings.

The ability to make informed personal decisions or to be able to express views and wishes in such a way as to be given weight requires that other Articles of the UNCRC be implemented and enforced to ensure meaningful information sharing and freedom of expression. The conferring of legal standing on children in administrative and judicial proceedings will have less meaning for children if their right to make their views and wishes heard in respect of personal decisions involving family, school, health care and access to information is not respected or acknowledged. As some authors have noted, children are often overlooked in the matter of information sharing as well as planning in the child welfare context, the result being that the child can become mistrustful of the system and the adults who appear to be making decisions about them.¹² Examples include children who have witnessed violence in their homes being told that they cannot talk about what they have experienced because it might jeopardize the prosecution of a criminal case.

Lack of Children's Rights Perspective

Justice for Children and Youth is most concerned about the cases in which the rights of children are virtually ignored, let alone any notion that their views and wishes should be heard. The *Canadian Foundation*¹³ case (the corporal punishment case), although at least acknowledging that children's rights were part of the discussion, failed to find that any rights had been violated in respect of a provision that singled them out to subject to lawful assault. The rights of children were diminished in a number of ways in this case. First, the issue (as was argued by the government) was framed by the court as a parent's right not a child's. Second, the majority of the court refused to put themselves in the place of the child, stating that one could only view the claim from the point of view of a person advocating on behalf of the child (suggesting that a child is not a person). Third, the majority of the court suggested that children

¹¹ *C.U. v. McGonigle*, [2003] A.J. No. 238

¹² Wilkes, J.R. and Milne, C. "Truth or Consequences" in Children in Limbo Task Force, *Permanency Planning in the Child Welfare System*, Sparrow Lake Alliance: 2002.

¹³ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76

are not entitled to the same sense of dignity because, as children, they “often feel a sense of disempowerment and vulnerability” a reality that the court says must be taken into consideration when assessing the impact on a child’s sense of dignity. This approach to children expressly undermines the premise of the UNCRC which is founded upon the dignity and worth of the human person.

In the case of *Auton (Guardian ad litem of) v. B.C. (Attorney General)* (2004)¹⁴, the court failed to address the issue of access to specialized therapy for autistic children from a children’s rights perspective entirely. The Court framed the case as an access to services case rather than one of equality or security rights of children and disabled people. And in the *Baker* decision discussed above, the court determined that the best interests of the child in a parental deportation case had to be considered, but not that it was determinative and not that it included the views and wishes of the child. In fact, in a subsequent case the Federal Court of Appeal decided that the best interests of the child was equivalent to an undue hardship test.¹⁵

Conclusion and Recommendations

The experience of Justice for Children and Youth in the courts in Ontario, has led us to the conclusion that in order for the court and administrative systems to be more accessible to children, a number of factors need to be addressed. Before children can effectively assert their views and wishes, they must have a right to information about themselves and their families and the issues that are important to them, and they must be fully informed about the legal process that affects them. Courts and tribunals must become more child-centric if children are to be comfortable and trusting enough to participate. This means that lawyers or other adult representatives for children must be better trained to communicate with children. If a child does participate in judicial and administrative proceedings, the decisions made must be thoroughly and appropriately communicated to them. But most importantly, the starting point must be from the recognition of the inherent dignity of children and of the legal rights to which they are clearly entitled.

¹⁴ [2004] 3 S.C.R. 657

¹⁵ *Hawthorne*, *supra* note 3.