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Accountability to and for Canada's Children and Youth

Brief to the Standing Senate Committee on Human Rights:
Canada's International Obligations to the Rights and Freedoms of Children

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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.

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. The clinic also provides public legal education to youth and youth-serving agencies.

Introduction

The work of the Canadian Foundation for Children, Youth and the Law (the "Foundation") through test cases, consultations and direct representation of young people in legal matters through the clinic, Justice for Children and Youth, forms the basis and context for our submissions to the Standing Senate Committee on Human Rights. We appreciate the opportunity to offer our observations on the implementation of Canada's international obligations to children within Canada and our recommendations for meeting these obligations in a more effective manner.

Despite the leadership role that Canada verbally espouses on the issue of children's rights and the implementation of the UN Convention on the Rights of the Child (UNCRC), our direct experience suggests that Canada is in fact lagging in its responsibilities. It is time for Canada to fully embrace a children's rights perspective, with a corresponding commitment to accountability to Canada's children through monitoring, enforcement and legislated mechanisms for full implementation of the UNCRC. A strong commitment to setting targets, outcome measures with time limited goals is an essential adjunct to "A Canada Fit for Children." We need to move beyond paying lip service to children's rights toward full acceptance of children as citizens of Canada worthy of recognition and dignity as human beings.

Children have not been very well served by the courts in Canada. The decisions of our highest court on *Charter* rights for children suggest that the *Charter* rights are of little value in the issues that matter most to the daily lives of children, such as education, parental discipline and access to health care and resources. The Foundation would go so far as to say that children's rights have been eroded or diminished through the courts. Except in the case of our youth justice courts, in which young people are presumed to be capable of fully participating, children are often denied their voice in the court process, at times through complete lack of legal standing, or through the inability to access lawyers to assist them. Despite the Foundation's commitment to test cases on behalf of children and youth, reliance on litigation to further children's rights under the *Charter* is of

limited utility, even in the most sympathetic of cases. Thus it is of utmost importance that children's rights be strengthened through the political and legislative process, through concrete initiatives by government to honour Canada's obligations to children under the UNCRC. Because many of the failures in Canada to support and protect children are within provincial jurisdiction, the government of Canada must find ways to engage the provinces and territories in meaningful co-operation to ensure adherence to our international treaty obligations.

Canada's Compliance with the UNCRC

The Foundation has been directly involved in a significant number of cases which are illustrative of some of the problems with Canada's compliance with its international obligations to children. In support of the more general recommendations that follow, we provide summaries of some of the cases and situations of concern to us.

Right to Participate and to be Heard (Article 12)

Despite the fact that the case of *Baker v. Canada (Minister of Citizenship and Immigration)* 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 in proceedings that affect them. This case involved the deportation of a mother and the importance of considering the best interests of the 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. Children continue to have no standing in these proceedings under the *Immigration and Refugee Protection Act*.

At the provincial and territorial level, the right of participation in judicial and administrative hearings is very 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 the 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.

Best Interests a Primary Consideration (Art. 3)

Canadian courts, including the Supreme Court, have parsed the language of this article with particular emphasis on the word "a", to support conclusions that the "best interest of the child" is only one of many factors the court must consider and that the principle is not a principle of fundamental justice in Canadian society. It is curious that courts have fixated on the word "a" and not the word "primary" in their deliberations. The disturbing aspect of the legal discourse on this issue is that the courts have been responding in this way partly because of the legal arguments advocated by lawyers for the Canadian government.

In the *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004), the Foundation sought a declaration that section 43 of the *Criminal Code* (the corporal punishment defence) was unconstitutional. One of the arguments made by the Foundation was that the principle of the "best interests of the child" was a principle of fundamental justice under section 7 of the *Charter*. The Respondent, Attorney General for Canada argued vigorously against this position and also against the notion that "primary" meant anything more than one important factor amongst many. The majority of the Court held that the principle was not a necessary element of our societal notion of justice.

The Foundation was intervener in the case of *Hawthorne v. Minister of Immigration and Citizenship* (2003) before the Federal Court of Appeal in which the lawyers for the Minister argued that the immigration officer need only look at whether the deportation of the child's mother would cause the child undue hardship in order to meet the test of the best interests of the child. Similarly, in another deportation case in which we were not involved, *McEyeson v. Canada (Immigration and Citizenship)* (2003), the IAD noted that the best interest of the child was only one among many factors to be given serious consideration, despite a finding by a provincial family court that the best interest of the child was to remain in the custody of the mother in Canada.

It is of serious concern that our government is taking positions in litigation that would have the affect of minimizing the importance of the test despite it being "a primary consideration" as well as narrowing its definition to an undue hardship test. Where does one draw the line between due and undue hardship for a child? To say that treating children anyway we wish short of undue hardship does not advance their interests at all and makes a mockery of the UNCRC.

Lack of Children's Rights Discourse

Another area of concern to the Foundation is illustrated in the cases in which the rights of children are virtually ignored. The *Canadian Foundation* 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 for assault. The rights of children were diminished in a number of ways in this case. First, the issue as argued by the government, was framed by the court as a parents' right not a child's. Second, the majority of the court refused to put themselves into the place of the child, stating that one could only view the claim from the point of view of person advocating on behalf of the child (suggesting that a child is not a person). Third, the majority suggests that children 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), 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.

The Foundation was recently an intervener in a case in which the government argued that children's rights under the UNCRC were irrelevant and where the acts of a young person while they were under 18 were treated the same as an adult's would be. In *Poshteh v. Canada Citizenship and Immigration* (2005), a 15 year old whose father had been killed by Iranian authorities for being a member of an outlawed organization (MEK) handed out pamphlets for the organization periodically for 2 years. He was arrested by Iranian police and tortured. After one week he was released and fled to Canada and filed a refugee claim; he was 18 years old when he arrived. He was denied refugee status on the basis of being a member of a terrorist organization, even though he was found not to be a security threat. The Federal Court and Federal Court of Appeal upheld the decision on the basis that the test for membership is the same for children or adults. Further, they held that even though he was a child at the relevant times, because he was 18 years old when he arrived in Canada, the UNCRC did not apply.

Youth Criminal Justice

The Foundation in its work with young people in conflict with the law agrees with both the encouraging observations as well as the concerns voiced by the Committee on the Rights of the Child in its concluding observations to Canada's Second Report. The *Youth Criminal Justice Act* advances the rights of young people under the UNCRC and attempts to establish clear barriers to the use of custody in sentencing and pre-trial detention. Unfortunately, some recent cases in which the Foundation was been involved, illustrate the problems that remain in the system.

In the *Inquest into the Death of David Meffe*, the Foundation was granted intervener standing in a case involved the death of a young person by suicide in the now closed Toronto Youth Assessment Centre. The inquest jury made a number of recommendations referencing the UNCRC as well as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. One of the key recommendations was that the new facility for youth custody in the Toronto area comply with these rules in that such facilities should be small and community based. Contrary to this recommendation, Ontario is moving toward a large facility in Brampton which will hold well over a hundred young people. Parliament needs to take more of a leadership role with the provinces to ensure that the UNCRC and the recommendations of the Committee are followed, especially in the area of youth justice, a federal responsibility.

The Foundation was recently granted intervener standing in three cases before the Supreme Court involving the interpretation of the *Youth Criminal Justice Act*. In the cases of *C.D. v. Her Majesty the Queen* and *C.D.K. v. Her Majesty the Queen*, two appeals heard together on April 14, 2005, Attorneys General from Alberta, Manitoba, British Columbia and Ontario all argued that the term "violent offence" should be given a broader interpretation to allow judges to be able to consider custody for more young people. One argument advanced was that the UNCRC supported this interpretation because it would protect child victims. In a case to be heard on April 20, 2005, *R . v. R.C.* the Nova Scotia Court of Appeal found that the

taking of mandatory DNA samples is not modified by the principles of the *Youth Criminal Justice Act*, including the application of UNCRC when applied to young people.

Recommendations

The Foundation's recommendations echo many of the recommendations which this Committee has heard. We believe that they are worth supporting and repeating. We have offered examples from our daily work with young people to further demonstrate the necessity of the measures recommended to better ensure that Canada's international obligations to Canadian children are being met. By ensuring that Canada is committed to being accountable to children for legal positions argued, resources allocated and measures taken to comply with the UNCRC, the concerns we have expressed through the description of some of our casework can be addressed and alleviated.

1. The U.N. *Convention on the Rights of the Child* should be enacted as law in Canada.

The UNCRC should be explicitly incorporated into every piece of legislation which affects children. Currently, it is mentioned in the preamble to the *Youth Criminal Justice Act* and is incorporated by reference to all international treaties in the *Immigration and Refugee Protection Act*. Our recommendation is much broader than that and encompasses all legislation, including such resource based legislation as the *Canada Health Act*. We also recommend that it be enacted in its entirety as its own document or in the context of the appointment of a children's commissioner with specific powers to audit Canada's compliance with it.

In the case *Baker v. Minister of Citizenship and Immigration*, the Supreme Court of Canada stopped short of stating that legislation much comply with the UNCRC. The

majority of the Court did state that it was a valuable interpretative tool, as Canada is presumed to be in compliance with duly ratified international treaties. Since that time the Court has been even more explicit about the need for Canada to comply with the UNCRC and the need to interpret legislation in accordance with its terms. Despite our disappointment with the ultimate interpretation placed on the UNCRC by the majority of the Court in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, McLachlin C.J. did state that legislation shall be interpreted so as to be in compliance with its terms. The clear problem with the Court's decision in that case is that the Court did not feel the need to comply with the recommendations of the UN Committee on the Rights of the Child to repeal section 43 of the *Criminal Code* because it contravened the UNCRC.

2. Canada should appoint a Children's Commissioner, Ombudsman and/or Secretariat.

Like many of the groups who have made submissions to this committee, the Foundation is in agreement that Parliament needs to appoint someone directly responsible for ensuring that children's rights are protected in all government actions. The specific title of the office is less important than the mandate and to whom the office reports. They should report directly to the House. The government of Canada needs to be accountable directly to children on an ongoing basis. It needs to ensure that there is continual monitoring of Canada's compliance with the UNCRC as well as case-specific advocacy to provide a voice for children when their rights are being violated through government action or inaction.

In order to ensure accountability for Canada's international obligations to children, a permanent position/office must be given the mandate to monitor compliance, and by this we mean more than reporting on how well Canada has done and thereby ignoring the failures. Canada's Plan of Action needs to be given the force of specific target-setting with time limits and concrete goals with someone to actually monitor progress. More

importantly, Canada must be accountable for the recommendations of the Committee on the Rights of the Child which have not been followed.

3. Canada should provide ongoing core funding to an NGO Coalition on children's rights

The collective and individual voice of children throughout Canada is best expressed through the grassroots organizations working directly with them. Sadly, the only coalition which was specifically focused on both monitoring Canada's compliance with the UNCRC and educating its members and the public about it is functioning without any core funding. To expect under-funded NGO's to provide this essential funding is unrealistic. The end result is that such a coalition becomes dependent on some organizations which are able to donate space or staff time, potentially alienating other organizations with different mandates or priorities.

The ability of Canada to provide an NGO commentary on Canada's Second Report to the Committee was important to Canada's overall compliance with the UNCRC. The Committee values the contribution of such a coalition. Further, such a coalition assists in the obligation to educate Canadians about the UNCRC and ensure that it is relevant to the lives of all Canadian children. The Foundation, and other organization working directly with children, benefit from the ability to network and information share about the important front line work or innovative programmes with children. Systematic communication requires resources without which we merely work together on an ad hoc basis. In addition, monitoring of compliance with the UNCRC should not be done only periodically, but should be a continual process, in order to continually improve the lives of Canadian children. This should be our collective goal.

4. Canada needs to make a commitment to educate lawmakers, children and the general public about the UNCRC

Although the education of children is a provincial responsibility, the government of Canada should provide leadership in respect of the international rights of children. Very few students throughout Canada are familiar with the UNCRC. Learning about human rights in Canadian society is an essential component of learning about responsible citizenship. Teaching children about their rights was a key factor in the change in public opinion in Sweden regarding the use of corporal punishment on children. Children grew up with a new attitude and approach toward child discipline which was then put into practice with the next generation. By showing children that we respect them as human beings, by not being afraid to tell them they have rights, we raise children who have respect for the rights of others.

We need to better educate our lawmakers about the importance of our obligations under the UNCRC to children. We have seen an increase in the use of the UNCRC in court decisions throughout Canada. The Foundation references the UNCRC in all of its legal advocacy on behalf of individual clients and as an intervener in court cases. However, all too often that aspect of the legal argument is ignored in the final decision of the court, or if mentioned, too quickly dismissed as being of any relevance. The federal government needs to be a leader by establishing and supporting educational programs for MP's, the judiciary and lawyers. It needs to ensure that the politicians in each of the provinces and territories are equally aware of their obligations.

5. Repeal Section 43 of the *Criminal Code*

Canada's international obligation to children, as interpreted and recommended by the Committee on the Rights of the Child is as follows:

> The Committee recommends that the State party adopt legislation to remove the existing authorization of the use of "reasonable force" in disciplining children and explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed.

It cannot be stated in more plain language that Canada must repeal section 43 in order to be in compliance with the UNCRC. This last vestige of children as property, deserving of less respect and human dignity, is a significant symbol of our attitude toward the rights of children in Canadian society. The decision of the Supreme Court in the *Canadian Foundation* case was disappointing, not just because we were unsuccessful, but also because of its impact on the legal rights of children more generally. It is hard to conceive of an equality rights case on behalf of children that would be successful in light of this decision. Canada's obligation under the UNCRC is to do better than this. The Court's decision was that the defence was constitutional. That does not mean that it should stand for all time. Parliament has the power to decide differently.

The Foundation supports the private members bill currently before the Senate to repeal section 43. The evidence to support such a move at this time is based both on our international responsibility to children as well as the evidence that this is a degrading and harmful practice that should no longer be justified in our *Criminal Code*. We wholeheartedly support any efforts to better support parents and educate the public about parenting and the developmental needs of children. The best way we can teach our children not to use force against others is not to use it on them. It is time for Canada to accept responsibility to provide public education and guidance on this important issue and at the same time to ensure that its laws are consistent with the public message.