

Application of the UNCRC in Canadian Law

International Summer Course on the Rights of the Child
June 2017

Emily Chan, Staff Lawyer



Outline

- Children's Rights as Human Rights Framework
- Brief overview of UNCRC
- UNCRC in Canadian law
- Select areas of law and impact on rights of Aboriginal children
- Ensuring a Rights Based Approach to Advocacy

This presentation posted here: <http://jfcy.org/en/moncton2017/>



Justice for Children and Youth

A child rights organization with a provincial mandate

Funded by Legal Aid Ontario as a “Specialty Clinic”

Mission Statement: we strive to protect and advance the legal rights and dignity of children and youth in Canada



Justice for Children and Youth

- Staff of 7 lawyers who provide legal services to children and youth and the adults who support them.
- Experts on the legal issues as uniquely experienced by children and youth
- We represent children across a range of legal subjects, including criminal justice, education, health and mental health, human rights, privacy, family and child protection, housing, social and financial support, immigration



JUSTICE
FOR CHILDREN
AND YOUTH

ABOUT JFCY ASK A LAWYER DONATE FRANÇAIS

Legal information and services in
Ontario for young people under
18 and homeless youth under 25

LEARN MORE

Legal Rights Wiki

I am a **victim** of a crime.
Help with **small claims**
court.
I am in **child welfare** court.
A **civil suit** against me.
The **police** have charged me.
I have been **expelled**.

LEGAL RIGHTS WIKI

Ask a Lawyer

Free confidential legal
advice for youth under 18
and living in Ontario

416-920-1633

ASK US ONLINE

Resources

For **Parents**
For **Youth Workers**
Links & External **Resources**
Publications & **Downloads**
Rulings & Case Studies

GO TO RESOURCES

AGE BASED LAWS

When can I change my
name? Start working?
Consent to sexual
activity?

LEARN MORE

Shoplifting Demand Letters

Marv

0:00 / 2:43

What can I take with me
when I leave home or
get kicked out?

Children's Rights are Human Rights Framework



Children are Individual Rights Holders

- Children are entitled to recognition of their rights and respect for their inherent human dignity as individuals
- Children are not property, and do not have to earn their entitlement to human rights
- Human Rights are inherent, interrelated, interdependent and indivisible



Children's Rights: Adult Supporters

Adult Roles:

- Recognize, support and advance children's rights
- Support and develop child's capacity and ability for independent decision making
- Ensure that child has meaningful participation in decisions that affect them
- Professional duties apply with equal rigour to adults and children (eg. confidentiality, due process, competency)



Children's Rights: Adult Supporters

It is our duty to:

- educate children about their rights
- support children in exercising their rights, and preserving their options into the future.

We want to:

- Help to support & ensure meaningful exercise of rights
- Ensure access to appropriate supports and resources is being sought and maintained
- Ensure that needs as identified by the child are being addressed & supported



United Nations Convention on the Rights of the Child - UNCRC

- One of the core UN Human Rights Treaties
- It is aspirational and articulates a common standard of achievement
- The most ratified Human Rights treaty in the world
- Ratified by every member state in the UN except one (196 countries, except the United States)



Four Guiding Principles of the UNCRC

Article 2 – the obligation of State Parties to respect and ensure the rights set forth in the Convention to each child without discrimination of any kind

Article 3 – the obligation for the best interests of the child to be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies

Article 6 – the recognition that every child has the inherent right to life and the obligation of State Parties to ensure to the maximum extent possible the survival and development of the child

Article 12 – the obligation to ensure that 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



UNCRC – Best Interests of the Child

- The UNCRC requires Canada to act in the best interests of children. **The best interests of the child is “a primary consideration”** – the only primary consideration identified in the convention.
- What does it mean to act in the best interests of the child?
- Remember **inherent, interrelated, interconnected and indivisible** rights.
- The UNCRC is to be read as a whole.



Who must act in the “best interests”

Article 3(1) of the UNCRC provides that:

In all actions concerning children, whether undertaken by

- public or private social welfare institutions,
- courts of law,
- administrative authorities or
- legislative bodies,

the best interests of the child shall be a primary consideration.



Who must act in the “best interests” cont.

State parties are required to ensure that
the best interests of children are:

“appropriately integrated and consistently applied in every action
taken by a public institution”, and,

all policies and legislation concerning children demonstrate that
the best interests of the child, or particular group of children,
have been a primary consideration.

Macro level application



Who must act in the “best interests” cont.

In addition, the “[s]hort-, medium-, and long-term effects of actions related to the development of the child over time” must be borne in mind.

Application to individual children

Maximizing options and opportunities in the future

Micro level application



Child Rights and Best Interests

- Best interests should be viewed flexibly and holistically
- Participation, capacity, non-discrimination, and other rights are clearly interconnected and indivisible with the best interests test
- UNCRC itself should be read as a whole with guiding principles that include best interests, evolving capacities, right to be heard, non-discrimination and right of protection



UNCRC – some additional provisions

Art 8 – right to preserve your identity, including nationality, name and family relations; if deprived, a right to assistance to re-establish identity

Art 30 – right to enjoy and practice your own culture, language and religion; special protection to minority and indigenous children

Art 28 – right to accessible education and to be encouraged to attend the highest level you are able

Art 29 – education shall develop child's fullest potential, and promote respect for human rights and fundamental freedoms

Art 37 – in detention: no cruel, inhuman or degrading treatment; not arbitrary; detention as last resort; children kept separate from adults; contact with family;

Art 40 – promote sense of dignity and worth



Example of Adult Supporters Responsibility to Support the Evolving Capacities of Children

Article 5:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.



Another Example of Adult Supporters Responsibility to Support the Evolving Capacities of Children

Article 14

1.States Parties shall respect the **right of the child to freedom of thought, conscience and religion.**

2.States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, **to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.**

3.Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.



Example of Interconnected and Interrelated Rights

"The Aims of Education", art. 29(1)

- The aims of education ... which have been agreed to by all States parties, promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights. These aims, set out in the five subparagraphs of article 29 (1) are all linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities.
- Meaning: a child's right to education is connected and interrelated to the respect for a child's right to dignity; freedom from discrimination; protection from harm; and recognition of the varied evolving capacities of children.



UN Committee on the Rights of the Child

- The Committee is established under Article 43 of the CRC for the purposes of examining the progress made by State Parties in realizing the obligations under the CRC
- Committee members are independent experts elected by State Parties with a recognized competence in child rights
- The Committee develops “General Comments” to assist in the interpretation of the UNCRC



UN Committee – “General Comments”

The UN Committee’s General Comments provide authoritative direction to state parties on their obligations under the UNCRC.

For example:

- No. 11 (2009): Indigenous children and their rights
- No. 12 (2009): Right of the child to be heard
- No. 13 (2011): Freedom from all forms of Violence
- No. 14 (2013): Best interests of the child

General Comments:

<http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>



Other International Instruments

While the UNCRC is the most significant international instrument relating to children, others are also relevant.

Examples:

- The Declaration on the Rights of the Child
- United Nations Declaration on the Rights of Indigenous Peoples
- The Universal Declaration of Human Rights
- United Nations Convention on the Elimination of all Forms of Racial Discrimination



UNCRC - Canadian Government

Canada states it had implemented the UNCRC by:

- Ensuring at the time it was signed and ratified that Canada's laws, policies and procedures complied with the CRC, and
- Stating that laws, policies and practices developed after ratification continue to comply with the CRC, and
- By declining to directly incorporate the CRC into legislation on the basis that is unnecessary as it does already fully comply.



UN Committee's Concluding Observations

The last assessment that comments on Canada's implementation of the UNCRC was issued in 2012.

The Recommendations for Canada include:

- Addressing the overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and in out of-home care (including foster care, kinship care, children's aid, group homes, etc.) (#14a)
- Take immediate steps to ensure that in law and practice, Aboriginal children have full access to all government services and programs (#14d)
- Making sure all children learn about their culture and heritage and allow both men and women from Aboriginal families to pass on their Aboriginal status to their grandchildren. (#19)
- Lower the very high level of violence against Aboriginal girls and women (#21d) and do more to solve the disappearance and murder of Aboriginal girls (#22)
- Work with Aboriginal and minority community leaders to make sure there are culturally based solutions for children being raised in care. (#26f)
- Ensure services for Aboriginal, African-Canadian and other minorities are at the same quality provided to all children and meet their needs (#32)
- Create a plan to lower the number of children who drop out of school, particularly for Aboriginal and African-Canadian children (#33b)

For a plain language child-friendly version of the Observations:

http://rightsofchildren.ca/wp-content/uploads/2016/03/concluding_observations_in_youth_friendly_language_EN.pdf



UNCRC – Canadian Legislation

- The legal power of the UNCRC is clear when it has been incorporated into legislation.
- It has only been incorporated into legislation in a few specific cases.
- Even where it has not been incorporated into legislation the Supreme Court of Canada has made clear that it is to be used as an interpretive tool.



UNCRC – Canadian Legislation

Incorporated into legislation:

- *Youth Criminal Justice Act*
- Child welfare legislation Yukon, NWT, Nunavut, (proposed legislation in Ontario)
- *Immigration and Refugee Protection Act is to be construed and applied consistent with “international human rights instruments to which Canada is signatory”.*
- Expressly referenced in Provincial Advocate for Children and Youth legislation in Yukon, Nunavut and Ontario.



UNCRC – Optional Protocol: Communications Procedure

- in 2014, a third Optional Protocol was adopted, allowing children to bring complaints directly to the Committee on the Rights of the Child. The Committee will then investigate the claims and can direct governments to take action.
- Children, groups of children, or their representatives who are from countries that ratify the Protocol can use the treaty to seek justice if the national legal system has not been able to provide a remedy for the violation.
- The Committee is also able to launch investigations into grave or systematic violations of children's rights and States are able to bring complaints against each other, if they accepted this procedure.
- To date, 50 parties have signed on. Canada has not.



UNCRC – Supreme Court of Canada

[T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

The values and principles of the UNCRC recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, “childhood is entitled to special care and assistance” and children “need special safeguards and care”.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

R. v. Sharpe [2001] 1 S.C.R.



UNCRC – Supreme Court of Canada

- The UNCRC is the most universally accepted human rights instrument in history.

R. v. Sharpe [2001] 1 SC.R at para. 177

- Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para 67



UNCRC – Supreme Court of Canada

“Interpretive Tool”

The UNCRC is significant interpretative tool in respect of key legal concepts such as the *best interests of the child*:

The *Convention on the Rights of the Child*, ... describes "the best interests of the child" as a primary consideration in all actions concerning children... It then sets out a framework under which the child's own input will inform the content of the "best interests" standard, with the weight accorded to these views increasing in relation to the child's developing maturity [evolving capacity].

A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 S.C.R. 181 at para 93.



UNCRC – Supreme Court of Canada

Charter of Human Rights & Freedoms

The Supreme Court has looked to international law to assist in interpreting the Charter"

The Charter ... provide[s] at least as great a level of protection as that afforded by similar provisions in international human rights documents which Canada has ratified.

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at para 1056

Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia v. B.C., 2007 SCC 27, at para 70

R. v. Hape, 2007 SCC 26 (quoting Alberta Reference), at para 349



UNCRC – Supreme Court of Canada

Broad Recognition of Children's Rights

- A recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law.
- International protections such as under the UNCRC are based on age, not the sensitivity of the particular child. The law attributes the heightened vulnerability based on chronology, not temperament.

A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567



UNCRC – Application to Different Areas of Law



UNCRC - Youth Criminal Justice

- Inclusion of the UNCRC in the preamble to the ***Youth Criminal Justice Act, 2003*** makes it's application concrete
- Recognition by the SCC has made it useful in the entire area of practice
- Has authority in related areas of law – e.g. inquests



UNCRC - Youth Criminal Justice

Significance of the UNCRC in the preamble to the YCJA was identified immediately by the Courts.

The Quebec Court of Appeal found that the reference to the UNCRC creates a relative interdependence between the YCJA and the Convention that can guide the courts in interpreting domestic legislation

Quebec (Minister of Justice) v Canada (Minister of Justice) (2003)
228 DLR (4th) 63 (QCCA) at para 92



UNCRC – Youth Criminal Justice

Supreme Court of Canada, 2005:

Turning first to the preamble, there are two parts that demonstrate that the Act is aimed at **restricting the use of custody** for young persons.

First, there is the part of the **preamble that states that “Canada is a party to the United Nations Convention on the Rights of the Child** and recognizes that young persons have rights and freedoms, including those stated in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, and have special guarantees of their rights and freedoms”.

This reference to the Convention on the Rights of the Child, Can. T.S. 1992 No. 3, is important because **art. 37(b) of the Convention** provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

R. v. CDK, [2005] 3 SCR 668



UNCRC – Youth Criminal Justice

Also used by the Supreme Court to define a principle of fundamental justice:

This legislative history confirms that the recognition of a **presumption of diminished moral culpability** for young persons is a long-standing legal principle.

It is also a legal principle that finds expression in Canada's international commitments. The United Nations **Convention on the Rights of the Child**, explicitly mentioned in the preamble to the YCJA, was ratified by Canada in 1992 (Can. T.S. 1992 No. 3). Paragraph 1 of art. 40 of the Convention states:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

R. v. D.B., [2008] 2 S.C.R. 3 at para 59-60



Aboriginal Justice

Gladue Principle:

Section 718.2(e) of Criminal Code of Canada:

All available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

This includes life circumstances such as discrimination, physical abuse, separation from culture or family, or drug and alcohol abuse. Recognized that jail is often culturally inappropriate and further discrimination occurs within penal system: *R. v. Gladue*, [1999] 1 S.C.R. 688 at para 67-69



Aboriginal Youth Justice

YCJA

Section 3(1)(c): within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should ...

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements

YCJA Sentencing:

- Detention is a measure of last resort
- Rehabilitation and reintegration (vs punishment)
- 2012 added: specific deterrence and denunciation

See also: “Evaluation of the Aboriginal Youth Court, Toronto” – Scott Clark (2016): <http://www.aboriginallegal.ca/assets/ayc-evaluation-final.pdf>



Aboriginal Youth Justice

Section 19 – Conferences *needs to be used more often*

19 (1) A youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act.

19 (2) The mandate of a conference may be, among other things, to give advice on appropriate extrajudicial measures, conditions for judicial interim release, sentences, including the review of sentences, and reintegration plans.



Aboriginal Youth Justice

Lack of Resources can increase chance Detention:

The facts of her case dissuaded the judge from using her background to craft a lighter sentence: “the Band’s limited resources are not available to RRJ, as the Band Council is not prepared to allow her to return to the reserve. The pre-sentence report expresses concern with respect to RRJ’s attitude towards offences, namely her lack of remorse or concern for the victims. Taking into the account the fact that RRJ presents a high risk to the community when she uses alcohol or drugs, and having regard to the unavailability of Aboriginal restorative justice programs, the report recommends a period of closed custody, to be followed by a significant period of community supervision on strict conditions.”

Closed custody was imposed to provide RRJ with access to programs within a structured environment.

R v RRJ, 2009 BCCA 580 at para 9 and 23

See also: Policy Issues Regarding the Over-Representation of Incarcerated Aboriginal Young Offenders in a Canadian Context, Youth Justice, 2014, Vol. 14(1) 40-62.



UNCRC - Health Care

SCC on Views of the Child

“[UNCRC] sets a framework under which the child’s own input will inform the content of the “best interests” standard, with the weight accorded to these views increasing in relation to the child’s developing maturity.

Articles 5 and 14 of the Convention, for example, require State Parties to respect the responsibilities, rights and duties of parents to provide direction to the child in exercising his or her rights under the Convention, “in a manner consistent with the evolving capacities of the child”.

Similarly, Article 12 requires State Parties to “assure 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”...”

A.C. v. Manitoba (Director of Child and Family Services)
[2009] 2 S.C.R. 181 at para 93



Canada – Jordan's Principle

Jordan River Anderson, a First Nations boy from Norway House, Manitoba was born with complex medical needs and died in the hospital while the federal and provincial governments argued over who would pay for his home care.

Jordan's Principle provides that where a government service is available to all other children, but a jurisdictional dispute regarding services to a First Nations child arises between Canada, a province, a territory, or between government departments, the government department of first contact pays for the service and can seek reimbursement from the other government or department after the child has received the service.

On December 12, 2007, the House of Commons unanimously passed a motion that the government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

It is a child-first principle meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.



UNCRC – Immigration Law

International human rights laws have no direct application in Canadian law unless it's incorporated into the legislation, but also held that “nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.” (para 69)

With respect to children's rights, they found that, “(c)hildren's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society”. (para67)

The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights (para 71)

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817



UNCRC – Immigration Law

UNCRC is expressly included in the Immigration and Refugee Protection Act, under s. 3(3)(f):

- (3) This Act is to be construed and applied in a manner that
(f) complies with international human rights instruments to which Canada is signatory.

“Best interests of a child directly affected” is identified repeatedly as an important consideration, an amendment to IPRA following a SCC decision.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

The SCC has recognized that the best interests of the child is to be viewed from the perspective of the affected child with specific attention to their dependence and different perception of the passage of time.

Young v. Young, [1993] 4 S.C.R. 3;

Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61, [2015] 3 S.C.R. 909



UNCRC – Immigration Law

“(T)hese interests include “such matters as children’s rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections”” (para 34)

International human rights instruments to which Canada is a signatory, including the Convention on the Rights of the Child, also stress the centrality of the best interests of a child [cites *Baker and UNCRC Article 3(1)*] (para 37)

Kathasamy v. Canada (Citizenship and Immigration), [2015] 16 SCC 61



Immigration – Aboriginal Child

I agree with the intervener that aboriginal children are doubtless among the most vulnerable in Canada and end up foster care with far greater frequency than non-indigenous children (para 86). [also gives statistics and cites Truth and Reconciliation report]

I also agree with the intervener that the well-being of an indigenous child will be enhanced if he or she maintain some connection with his or her culture, heritage and ideally, territory, to help foster a sense of belonging and pride (para 86)

These issues give rise to both short and long-term interests in the present case given the impact that removal for a period of the requested deferral would have on the child's connection to her indigenous roots (para 88).

In short, having accepted that it was important for the child to maintain a connection with her indigenous roots during the period of the requested deferral, it was incumbent on the Enforcement Officer to realistically and sensitively assess whether this was possible if she were accompany her father to Guyana (para 92).

Lewis v Minister of Public Safety and Emergency Preparedness, 2017 FCA 130



UNCRC – Family law

“Best interests of the child” widely recognized as fundamental principle of decision making

Child welfare legislation incorporates UNCRC in:

- Yukon (preamble)
- NWT (principles)
- Nunavut (principles)



UNCRC – Family Law

Right to Participate in Custody Proceedings

Hague Convention case where analogy made between refugee child and a child removed from Canada pursuant to the Hague Convention in respect of procedural rights under s.7 of the Charter: “meaningful procedural protections must be afforded to the child.” Included a right to participate consistent with Article 12 of the UNCRC (including the right to representation)

Amri v. Ker, 2011 ONCA 417

“More than just lip service must be paid to children’s UNCRC legal rights to be heard. Because of the importance of children’s participation to the quality of the decision and to their short and long term best interests, the participation must be meaningful...”

BJG v DLG, 2010 YKSC 44



UNCRC – Family Law

Child Welfare

** not covering, you will be hearing much more about this tomorrow from Brian Smith, First Nations Child & Family Caring Society of Canada

- Assessments: focus on individual (vs community)
- Harm done that is hard to undo (eg. DO & sibling access)



The SCC regarding “best interests”

The “best interests of the child,” while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),
[2004] 1 S.C.R. 76 at para 10



And again

A.C. provides some room to re-evaluate the “best interests” principle from a child rights perspective:

Such a robust conception of the “best interests of the child” standard is also consistent with international instruments to which Canada is a signatory. The [Convention] describes “the best interests of the child” as a primary consideration in all actions concerning children (Article 3). It then sets a framework under which the child’s own input will inform the content of the “best interests” standard, with the weight accorded to these views increasing in relation to the child’s developing maturity. Articles 5 and 14 of the Convention, for example, require State Parties to respect the responsibilities, rights and duties of parents to provide direction to the child in exercising his or her rights under the Convention, “in a manner consistent with the evolving capacities of the child”. Similarly, Article 12 requires State Parties to “assure 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”...

A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 S.C.R. 181 at para 93- 94.



And then again

The “best interests” principle is “highly contextual” because of the “multitude of factors that may impinge on the child’s best interest”: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child’s particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), [2009] 2 S.C.R. 181, at para. 89. The child’s level of development will guide its precise application in the context of a particular case.

Protecting children through the “best interests of the child” principle is widely understood and accepted in Canada’s legal system: *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 (CanLII), [2012] 2 S.C.R. 567, at para. 17. It means “[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention”: *MacGyver v. Richards* (1995), 1995 CanLII 8886 (ON CA), 22 O.R. (3d) 481 (C.A.), at p. 489.

Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61, para 35-36



Conflicting approaches to the best interests test

- Paternalistic approach in family law context
- Previously narrow approach in immigration context (now more holistic in Kanthasamy)
- Need for more consistency
- UNCRC itself should be read as a whole with guiding principles that include best interests, evolving capacities, right to be heard, non-discrimination and right of protection



Case Study

- Aboriginal client with history of addiction
- Lived with mother who leaves and goes back to reserve on occasion, leaving him homeless
- First time he was homeless, he was hit on the head with a skateboard, no assessment (brain injury?)
- Young person started engaging in criminal activity, series of YCJA charges
- Receives diversion for many of these
- Crimes become more serious – stabbing someone while on drugs – can not remember
- Being held in custody
- Mother was adopted out when young to non-Aboriginal family
- Father is in and out of his life on occasion
- This is the most stability he has had, he wants to be in custody
- Diagnosed with conduct disorder
- No assessments regarding trauma, history and impact on behaviour
- At odds with YCJA and Gladue principles



Rights Based Approach to Advocacy



Child Rights Approach

Challenging Questions

- How do we think about children and youth?
- What does it mean to be an Independent rights holder?
- Is Rights a “dirty word”? Just for children? Only for adults?
- How do we support evolving capacities?
- Do young people have the right to make mistakes?



Foundation of a Rights based approach in practice: Relationship Building

Trust, Dignity and Respect

- **Building trust**
- **Maintaining dignity**
- **Modelling and building mutual respect**



Rights based approach in practice

- **Respect young people's experiences and feelings – their lived experience.**
- **Don't judge.**
- **Be honest and straightforward. Do not “sugar coat”. Children are perceptive and look for authenticity, if you are not being honest and straightforward, trust will be impossible to establish.**
- **Ask questions about their lives outside the legal issue, share information about yourself and find mutual interests.**
- **Address trauma, mental health issues, and social context – take a multidisciplinary approach**



Anti-Oppression Framework

- Helping clients challenge and overcome oppression / discrimination that disempowers them
- Examples may include poverty, cultural discrimination, disability, mental illness, family dynamics, institutional care, etc.
- Assisting a client – recognize and address enormous power imbalances they face
- This involves taking an interdisciplinary & inclusive approach to issues affecting a client
- Harm reduction approach



Understanding Trauma

Become “trauma informed”.

Be ready to understand how the experience of trauma impacts the life of your child client. It will affect all the areas of their development and the way they organize their thinking – their needs, capacities, and decision making.

Be familiar with the social and mental health supports that are available to children in their community. Try to help your client find adult supports – “natural advocates / supporters” as well as professional supports.



Understanding Development & Mental Health Generally

Mental health issues will have a huge impact in a child's involvement in the legal system – their own mental health and the mental health of others in their lives.

Understand children's mental health issues and how they influence behavior, communication, and decision making.



Take a Multi-Disciplinary Approach

Become familiar with child friendly resources – legal, social, family, economic. Use these resources as places to which you can refer your client when they need things other than what you can offer.

It is good to diversify the supports to which your child is connected, but most children can only make a small number of professional connections at a time – do not overwhelm your child client.

Children will need supports even after their present issues are over, make sure that supports are in place.



Give Thought to Other Factors Affecting Child

- Social context - including poverty, education, family, recreation, institutional care
- Consider impact of disabilities
- Take a strengths based approach to problem solving



Empowering Youthful Clients

Explain professional relationship

"You can expect me to do X for you. You will need to do Y for me. If you are not happy with my services, here's what you can do..."

Give options. Young clients get to make their own legal choices... even when counsel disagrees.

"Let me tell you what will probably happen in each option. Do you have questions about any of these options?"

Describe how the young person could advocate for themselves in particular situations

"If the police say that again you can tell them X..."

Explain the relevant players and procedure

"The prosecutor is the person who..."

"During cross-examination the prosecutor can..."

Show the client where to get more information



Children's Rights:

Support not Discrimination

Do we engage in discrimination in the name of “best interests”?

It will sometimes be appropriate ... to treat children differently than adults ... such differential treatment should only be used to ensure procedural protections where necessary, or to ensure implementation of rights, and not in a way that restricts children's' rights and freedoms in a discriminatory way.



Challenging Questions:

Applying Child & Youth Rights Approach

1. How do the unique vulnerabilities of young people, including their dependence on adults and the call for special protections influence our thinking?
2. Do we impose our own views instead of taking a rights approach?
3. How do we “balance rights? How do children’s rights intersect with notions of collective rights?
4. Do we hold young people to a higher standard?



Take Home Activity:

Rights Respecting Strategies for Working with Young People

- A. Identify aspects of the UNCRC that are important in your work context.
- B. Identify barriers and resistance to using a rights based approach that may exist in your context.
- C. Develop suggestions, strategies, and solutions for overcoming barriers and resistance, and for supporting a rights based approach.

