

CHILDREN'S PARTICIPATION IN FAMILY JUSTICE PROCESSES
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Hear the Child—The Legal Framework: Why Children in Canada Have the Legal Right to Be Heard

These materials were prepared by The Honourable Donna Martinson, QC, LL.M., Justice of the British Columbia Supreme Court (retired), Vancouver, BC, for the Continuing Legal Education Society of British Columbia, November 2009.

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HEAR THE CHILD—THE LEGAL FRAMEWORK: WHY CHILDREN IN CANADA HAVE THE LEGAL RIGHT TO BE HEARD

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I. Summary

The law relating to children’s participation in custody proceedings has evolved significantly.

We have moved from an approach which has viewed children as chattels, the property of their parents or guardians, to thinking that children needed our protection and charity, to, in the 1970s, a best interests approach. That best interests approach has evolved further to the point where it is considered to be in all children’s best interests to have two distinct though related legal rights to be heard in all matters affecting them, including judicial and administrative proceedings.

The first is the right to express their views so long as they are capable of forming their own views. The second is the right to have those views given due weight in accordance with their age and maturity. A child’s evolving capacity will be relevant to how the views are expressed, and the weight to be attached to them.

There are three reasons why the law has evolved in this way. The first is the developing Canadian jurisprudence, in cases such as *Young v. Young*, [1993] 4 S.C.R. 3 and *Gordon v. Goertz*, [1996] 2 S.C.R. 27, which favours a broad and flexible approach to the best interests test which is child centred, focusing on the child’s perspective, not that of the adults involved. The second is the ratification by

Canada in 1991, with the support of the provinces, of the *United Nations Convention on the Rights of Children*, Can. T.S. 1992, No. 3 (“the Convention”), which, in Article 12, specifically enshrines these two legal rights to be heard. The Convention recognizes the importance of the right to be heard to children’s best interests. The third is the advent of the *Charter* (Part I of the *Constitution Act*) and in particular the equality provisions found in s. 15, prohibiting discrimination on the basis of age.

From a legal standpoint then, the question is not whether children in Canada have a right to be heard. They do. The focus in each case must be on whether the child wishes to exercise that right, and if so, whether the child is capable of forming his or her own views. If the answer to each is yes, then due weight must be given to those views. This applies to all stages of the family justice process, including mediation, collaborative law, negotiations between lawyers, judicial case conferences, settlement conferences, and court hearings or trials.

Somewhat different considerations apply in child abduction cases. The *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can. T.S. 1983, No. 35, governs (*Beatty v. Schatz*, 2009 BCSC 706, affirmed, 2009 BCCA 310). I will consider here only the provisions of the Convention on the Rights of Children.

This paper contains an overview of the applicable legal principles. For more detailed discussions see: Interim Report of the Standing Senate Committee on Human Rights, *Who’s in Charge Here? Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children*, November 2005; Final Report of the Standing Committee on Human Rights, *Children: The Silenced Citizens, Effective Implementation of Canada’s Obligations With Respect to the Rights of Children*, April 2007 (“The Senate Committee Final Report”); British Columbia Ministry of the Attorney General Family Relations Act Review, *Children’s Participation*, April 2007; British Columbia Ministry of the Attorney General Family Relations Act Review, Chapter 8, *Children’s Participation, Discussion Paper*, April 2007; Suzanne Williams, *Perspective of the Child in Custody and Access Decisions: Implementing a Best Interests and Rights of the Child Test*, [2007] 86 C.B.R. 633 (“Williams, CBA Article”); and Suzanne Williams, *Bringing a Child-Perspective Lens to Canadian Family Justice Processes*, 2008 Federation of Law Societies Family Law Program (“Williams, Federation of Law Societies Article”).

II. The Legal Framework

A. The United Nations Convention on the Rights of Children

The Convention is a comprehensive international instrument which reinforces the fact that children are people with human rights. While many of those rights existed in other international instruments, the UN recognized the importance of singling out children in this way. It is the most widely ratified UN Convention.

The preamble to the Convention acknowledges both the need to recognize the inherent dignity and the equal and inalienable rights of all people, including children, and the need to extend particular care to the child, who, by reasons of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection.

The Convention acknowledges that parents and others legally responsible for children have rights and duties and play an important role in children’s lives. It recognizes children’s evolving capacity.

It contains four fundamental principles, one of which is respecting the views of the child:

I. Best Interests of the Child

In all actions concerning children, the best interest of the child shall be the primary consideration (Article 3 (1)).

2. Non-Discrimination

The Convention applies to all children. It says specifically that countries that have ratified the Convention shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination (Article 2).

3. The Right to Participate

The Convention specifically recognizes, in Article 12, that children have the legal right to participate in the making of decisions that affect them. As noted in the summary, the right to participate has two separate, though related parts. The first is the right of the child to express the child's views. The second is the right to have those views given due weight in accordance with the age and maturity of the child. Article 12 provides that:

1. State 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.

4. The Right to Life, Survival, and Healthy Development

The Convention sets out in a comprehensive way, children's basic human rights, including the right to survival, the right to develop to the fullest, to protection from harmful influences, abuse and exploitation and to participate fully in family, cultural and social life.

B. Implementation of the Convention in Canada

I. Canada's Obligations Under the Convention

The federal government, with the support of the provinces and territories, ratified the Convention in 1991. It requires countries which ratify it to give effect to children's rights contained in it. Among other things, Canada:

- must "respect and ensure the rights set forth in the present Convention to each child within their jurisdictions without discrimination of any kind ..." (Article 2),
- shall undertake all appropriate legislative, administrative and other measure for the implementation of the rights recognized in the Convention (Article 4), and
- undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

The Convention creates a Committee on the Rights of Children which monitors compliance with the Convention (Article 43). Countries who ratify the Convention undertake to submit to the Committee reports on the measures they have adopted which give effect to the rights recognized in the Convention (Article 44).

In addition to the specific obligations found in the Convention, Canada has an obligation under international law to act in good faith when implementing the Convention and cannot use jurisdictional issues that arise in domestic law as a reason not to fulfil its international obligations: *The Vienna Convention on the Law of Treaties*, Articles 26 and 27.

2. Steps Canada has Taken to Comply with these Obligations

Canada demonstrated its view that the Convention is a very important international legal instrument by acting as a key player in ensuring that it was enacted in the first place. The manner in which the Convention was implemented in Canada is described in some detail in the Senate Committee Final Report.

There are two ways in which countries ratify Conventions. The first is the monist model, where, as in the US, once a convention is ratified it becomes part of the domestic law. The second is the dualist model, in which the ratifying country specifically incorporates the convention into domestic law. Canada uses the dualist model.

Canada has not directly incorporated the Convention into domestic law. It takes the position that it is not necessary to do so as it has complied with its international obligations by determining that existing domestic laws in fact comply with the Convention. The federal government and the provinces and territories continue to say this in their periodic reports to the United Nations Committee on the Rights of Children.

They are able to take this position for these reasons. Canada conducts a review and analysis of existing law before ratification to determine whether any amendment or new law is required. Before the Convention was ratified, the federal government consulted with the provinces and territories on matters within non federal jurisdiction. With respect to Human Rights Treaties such as this Convention, this practice was formalized in 1975 at a meeting that included the creation of the continuing Committee of Officials on Human Rights.

Such a consultation determines several things. It decides whether existing domestic laws and policies already conform to treaty obligations. It determines if there are inconsistencies and if there are it decides whether new legislation and policies should be adopted or whether existing policies should be amended. It decides whether it is appropriate to maintain the domestic position even though it is inconsistent with the treaty provision and enter a reservation or a statement of understanding.

The government advised the Senate Committee that it does not ratify a Convention until all jurisdictions indicate they support ratification and are in compliance with the obligations contained in it. In the case of this Convention, though it was signed in May 1990, it was not ratified until December 1991, when all the provinces and territories sent letters of support to the federal government.

C. Domestic Family Law and its Interpretation

I. A Contextual Approach

International treaties and conventions are not part of Canadian law unless they have been implemented by statute (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69). Nevertheless, the values reflected in international human rights law may inform the contextual approach to statutory interpretation (*Baker*, at para. 70).

In interpreting domestic statutes, Parliament and provincial legislatures are presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible interpretations that reflect these values and principles are preferred (*Baker*, at para. 70).

In *Baker*, at para. 71, the Supreme Court of Canada dealt specifically with the Convention on the Rights of Children and concluded that the values and principles of the Convention 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.

As noted in the Senate Committee Final Report, it may be that the provisions of the Convention should, for clarity, be incorporated directly into domestic law. But, it by no means follows that it now has little or no legal effect. To the contrary, there is a presumption that domestic family law legislation respects the rights and values set out in the Convention; such legislation should be interpreted to reflect those values and principles.

It is worthy of note that the government of Canada and the governments of the provinces and territories themselves rely on this presumption when they take the position that our domestic laws comply with the Convention without the need to directly incorporate it.

This contextual approach to statutory interpretation is similar to that taken by the Supreme Court of Canada when concluding that statutory interpretation should be informed by *Charter* values. As it relates to children's legal right to be heard, s. 15 of the *Charter* says that every individual (which of course includes children) is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and in particular without discrimination based on, among other factors, age.

2. Interpreting the Divorce Act and the Family Relations Act Using a Contextual Approach

a. The Relevant Values and Principles found in the Convention

The Convention emphasizes that children's best interests are the primary consideration. The legal right to participate in a meaningful way in decisions affecting the child found in Article 12 cannot be viewed in a vacuum. Rather, the Convention makes that legal right an integral part of a determination of a child's best interests.

It does so in a very clear way; there is no ambiguity in the language used. Article 12 specifically says that the only limitation placed on the right to express the child's view, is that the child must be capable of forming his or her own views. While there may be legitimate debate in a given case about the weight to be given to those views for many reasons, the child must nevertheless be afforded the legal right to express those views so long as the child is capable of forming his or her own views.

There are very good reasons for affording this right to children of all ages in furtherance of their best interests.

As Dr. Joan Kelly, Dr. Robert Colby and others will emphasize during this program, research has shown that lack of participation can have short and long term adverse consequences for children and participation can have many beneficial effects. These positive and negative consequences were referred to by the BC Supreme Court in *L.E.G. v. A.G.*, 2002 BCSC 1455:

ii. Giving Children a Say

[19] Children may feel that, in expressing their wishes, they have had a say in a decision that significantly affects their lives. This is sometimes referred to as "giving children a voice" in the proceedings.

[20] There are indications in empirical studies that not listening to what children have to say during divorce processes has had unintended negative effects. As a result of their exclusion, children complain about feeling isolated and lonely during the divorce process and many older children express anger and frustration about being left out. There is also an indication that perceived control over decisions is related to positive mental health: See J.B. Kelly, "*Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*", *The Virginia Journal of Social Policy and the Law*, in press. See also J. William J. (Nova Scotia Supreme Court), "*If Wishes Were Horses, Then Beggars Would Ride*" – *Child Preferences and Custody/Access Proceedings*," cited above.

This point was reinforced by the Court in *Gibb v. Gibb*, 2008 BCSC 966, at para. 8.

Equally important, as we will hear, is the recognition that getting information of all sorts from children, including younger children, on a wide range of topics, can lead to better decisions for children. In addition, receiving children’s input early in the process, and throughout as appropriate, can reduce conflict by focusing or refocusing matters on the children.

Children who wish to be involved and who are capable of forming their own views must be involved no matter what process is being used to reach a solution.

b. Application to the Divorce Act and the Family Relations Act

The *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.) and the *Family Relations Act*, R.S.B.S. 1996, c. 128, are presumed to reflect these values and principles.

The *Divorce Act* provides that in making custody and access decisions the court “shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child” (s. 16(8)).

The BC *Family Relations Act* requires the court to give paramount consideration to the best interests of the child and, in assessing those interests, the Court must consider several factors and give emphasis to each factor according to the child’s needs and circumstances:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
- (b) if appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child;
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

Each has as its focus the best interests of children. As noted at the outset, case law provides that a broad and flexible approach must be taken to the determination of best interests and that best interests decisions must be made from the perspective of the child, not the adults involved.

Taking a broad and flexible child centred approach, these best interest provisions should be interpreted to reflect the fact that, by virtue of international law, the right to participate in the decision making process is an integral part of the determination of a child’s best interests. As Suzanne Williams, Deputy and Legal Director, International Institute for Child Rights and Development, puts it, hearing from children informs their conditions, means, needs or circumstances; children are the best people to provide information about their lived experiences (Williams, CBA Article, 649). I agree with her that it “is difficult to imagine not seeking the views of the person from whose perspective a child’s best interests are to be determined” (Williams, Federation of Law Societies Article, page 8).

The Court, in *L.E.G. v A.G.*, a case decided under the *Divorce Act*, recognized Canada’s obligation to respect the views of children under the Convention in the best interest analysis:

[17] Canada also has an international obligation to make sure that children have an opportunity to make their views known in custody decisions affecting them. Article 12 of the *United Nations Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, which has been ratified by Canada, requires that children be given opportunities to participate in legal proceedings:

{Article 12 of the Convention is quoted}

2.1.7

[18] The significance of a child's wishes to the decision of the court will vary depending on a number of factors, including the age of the child and the child's maturity...

The *Family Relations Act* specifically recognizes the importance of considering children's views in determining their best interests. The legislation uses the phrase "if appropriate." That phrase, in keeping with the legal rights of children to be heard entrenched in the Convention, should be interpreted to mean that if children are capable of forming their own views and want to participate, it will be appropriate for them to do so.

Interpreting the legislation in this way also reflects the *Charter* values found in s. 15. Children should not be discriminated against based on their age.

III. Conclusion

The existing legal framework provides the flexibility needed to deal with particularly complex cases such as those involving abuse, and/or alienation.

The child can choose not to participate. Participation can take many forms and can be direct or indirect. A determination can be made in a particular case that a child is not capable of forming his or her *own* views, as opposed to those formed through undue influence.

In most cases, however, any concerns should not prevent children from exercising their legal right to express their views. Instead, they will be relevant only to the second legal right, the right to have their views given due weight in accordance with their age and maturity.

As this program demonstrates, much good work is being done by some to advocate on behalf of children and their right to be heard. However, much more needs to be done. Judges, lawyers, mental health professionals, children, parents, and the many other participants in the family justice process, need to work together to ensure that we give more than cursory recognition to children's legal rights to be heard. Those rights must become a reality.