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Rethinking the Role of Lawyers for Children : Child Representation in Canadian Family Relationship Cases
La représentation des enfants dans le contentieux familial au Canada : repenser le rôle de l'avocat-e
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Aller au sommaire du numéro

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Résumé de l'article

Cet article examine diverses méthodes favorisant l'implication des enfants dans les procédures familiales et de protection de l'enfance. Il analyse différentes approches quant à la nomination de l'avocat-e de l'enfant dans les juridictions canadiennes et explore les controverses sur le rôle du représentant. Bien que la représentation des enfants soit plus fréquente, dans la plupart des provinces, elle se limite généralement aux procédures dans le cadre de la protection de la jeunesse impliquant les enfants plus âgés. Pourtant, toutes les juridictions disposent de dispositions permettant la participation des enfants dans le contentieux familial. Les auteurs soutiennent que les gouvernements et les barreaux du Canada devraient élaborer des politiques et des programmes plus cohérents et complets, centrés sur les enfants et permettant que leur opinion soit davantage prise en compte dans les dossiers de droit familial. En ce sens, une reconnaissance accrue du rôle des avocats et avocates dans la facilitation du règlement s'impose. La nomination d'un conseil n'est cependant pas toujours nécessaire ; si l'enfant souhaite exprimer son opinion, l'entretien judiciaire, un rapport sur les désirs de l'enfant ou une expertise sont parfois préférables. Enfin, il devrait y avoir une présomption que l'avocat-e détient son mandat de son jeune client ; par contre, si l'enfant n'a pas l'aptitude à donner des instructions, l'avocat ne devrait alors défendre que les droits et l'intérêt de celui-ci. Quel que soit le rôle adopté, l'avocat-e d'un enfant devrait aussi avoir pour mission d'apporter des éléments de preuve importants qui sans cela ne seraient pas soumis au tribunal.

Rethinking the Role of Lawyers for Children : Child Representation in Canadian Family Relationship Cases

Nicholas Bala* et Rachel Birnbaum**

This article examines various methods for involving children in family and child welfare proceedings, surveys varying approaches in different Canadian jurisdictions to the appointment of counsel for children in these cases, and explores the controversies about the role of counsel for children. While child representation is becoming common, in most provinces it is usually limited to welfare proceedings involving older children. All jurisdictions, however, have some provisions to allow for child participation in family relationship cases. Governments and law societies in Canada should develop more coherent and comprehensive programs and policies to ensure that the views of children are considered in the family justice process in a child-focused and cost-efficient manner. There needs to be more recognition of the role of lawyers in facilitating settlement. Appointment of counsel is, however, not always the best way to involve children ; if the child is willing to share views, in some cases this may be better done by a judicial interview, a Views of the Child Report or an assessment. There should be a presumption that counsel will be an instructional advocate, but if a child lacks the capacity or willingness to instruct counsel, counsel should be an advocate for the rights and

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interests of the child. Regardless of the role adopted, counsel for a child also has responsibility for introducing significant evidence not otherwise before the court.

La représentation des enfants dans le contentieux familial au Canada : repenser le rôle de l'avocat-e

Cet article examine diverses méthodes favorisant l'implication des enfants dans les procédures familiales et de protection de l'enfance. Il analyse différentes approches quant à la nomination de l'avocat-e de l'enfant dans les juridictions canadiennes et explore les controverses sur le rôle du représentant. Bien que la représentation des enfants soit plus fréquente, dans la plupart des provinces, elle se limite généralement aux procédures dans le cadre de la protection de la jeunesse impliquant les enfants plus âgés. Pourtant, toutes les juridictions disposent de dispositions permettant la participation des enfants dans le contentieux familial. Les auteurs soutiennent que les gouvernements et les barreaux du Canada devraient élaborer des politiques et des programmes plus cohérents et complets, centrés sur les enfants et permettant que leur opinion soit davantage prise en compte dans les dossiers de droit familial. En ce sens, une reconnaissance accrue du rôle des avocats et avocates dans la facilitation du règlement s'impose. La nomination d'un conseil n'est cependant pas toujours nécessaire ; si l'enfant souhaite exprimer son opinion, l'entretien judiciaire, un rapport sur les désirs de l'enfant ou une expertise sont parfois préférables. Enfin, il devrait y avoir une présomption que l'avocat-e détient son mandat de son jeune client ; par contre, si l'enfant n'a pas l'aptitude à donner des instructions, l'avocat ne devrait alors défendre que les droits et l'intérêt de celui-ci. Quel que soit le rôle adopté, l'avocat-e d'un enfant devrait aussi avoir pour mission d'apporter des éléments de preuve importants qui sans cela ne seraient pas soumis au tribunal.

Reconsiderar el rol de los abogados de menores: la representación de menores en los casos de vínculos de parentesco en Canadá

Este artículo examina diferentes métodos que relacionan a menores con procesos de familia y de bienestar de menores. Igualmente, el artículo analiza los diferentes enfoques de las diversas jurisdicciones canadienses en la designación de un abogado de menores en estos casos, y explora las controversias sobre el rol que tiene el abogado de menores. Si bien la representación de menores es algo común, en la mayoría de las provincias generalmente se encuentra limitada a los procedimientos vinculados con el bienestar de menores con más edad. Sin embargo, todas las jurisdicciones poseen ciertas disposiciones que permiten la participación del menor en casos que exista un vínculo familiar. El gobierno y las asociaciones de derecho canadienses deberían desarrollar programas y políticas más coherentes e integrales, y de esta manera, asegurar que las opiniones de los menores sean consideradas en los procesos en el ámbito de familia, bajo un enfoque centrado en el menor y atendiendo a la relación costo-eficacia. Tiene que haber un mayor reconocimiento del rol de los abogados en la conclusión de acuerdos. El nombramiento de un abogado no es, sin embargo, la mejor forma de relacionar a menores. Si el menor desea compartir opiniones, en algunos casos esto debería ser realizado en un interrogatorio judicial, en una declaración donde el menor expone su opinión o en una evaluación. Debería existir la presunción de que el abogado sea un abogado de instrucción, no obstante, si el menor carece de capacidad o de disposición para informar al abogado, entonces éste debería ser un abogado que defienda los derechos e intereses del menor. Independientemente del rol que haya sido adoptado, el abogado de un menor tiene igualmente la responsabilidad de presentar pruebas importantes ante la corte.

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1 Introduction : The Importance of Children's Participation

There is growing recognition in many countries of the importance and value of children's participation in the family justice process[1]. Children are not merely the subjects of decision-making and litigation, but rather, to the extent that is consistent with their age, capacity and desire to participate, they should be informed about the family restructuring process and given an opportunity to express their preferences and perspectives about plans and decisions affecting their lives and well-being.

Originally, the primary reason to learn about a child's views was that this was considered to be an important, though not determinative, factor in determining a child's "best interests" — the basis for decision-making in family relationship cases in Canada for more than half a century. As

1. In this paper we use the term "family relationship proceedings" to include both child welfare proceedings, where the state is a party, and private family cases, most often between separated or divorcing parents. For a review of developments in a number of jurisdictions regarding children's involvement in family proceedings, see Michelle Fernando, "Family Law Proceedings and the Child's Right to Be Heard in Australia, the United Kingdom, New Zealand, and Canada", (2014) 52 *Fam. Ct. Rev.* 46.

observed by the former Chief Justice, Beverly McLachlin, in 1992 : "In order to find out what is in the best interests of the children, it seems logical to find out what the children think. How can you assess a child's best interests without hearing from the child ?[2]" Child welfare and family legislation in almost all Canadian jurisdictions now explicitly provides that the views and wishes of children are a factor to be considered in making decisions based on their "best interests[3]", frequently with a proviso, such as "where these views can reasonably be ascertained" or "taking into account the age and maturity of the child". Learning about a child's preferences and perspectives is important for judges making decisions about parenting plans, as well as for those who provide advice about what is in a child's best interests, such as mental health professionals undertaking court-ordered assessments and making recommendations about parenting arrangements to a judge or parents. Understanding a child's views is also important for mediators, who are trying to facilitate a settlement, as well as for parents themselves, both when being assisted by professionals and when making their own arrangements without professional assistance.

Further, research clearly suggests that children's inclusion in the decision-making process about restructuring of family relationships is important for the promotion of their long-term well-being[4]. Children's involvement gives them some sense of control at a time when their lives seem "turned upside down". Children may also have important insights into their lives that those who are making decisions need to take into account to make child-focused plans, whether judges, mediators or parents

2. Beverly McLachlin, "Children and the Legal Process : Changing the Rules of Evidence", (1992) 50 *The Advocate* 727.
3. The notable exception is the federal *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), but its parenting related provisions were enacted in 1985, and are now outdated and badly in need of reform. The proposed amendments to the *Divorce Act* provide that a factor in determining a child's best interests includes in art. 16 (3) "the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained" : *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, Bill C-78 (1st reading – May 22nd, 2018), 1st sess., 42nd parl. (Can.). Existing caselaw already makes clear that judges making orders under the *Divorce Act* are expected to take account of the views of children : see e.g. Nicholas Bala, "Bringing Canada's *Divorce Act* into the New Millennium : Enacting a Child-Focused Parenting Law", (2015) 40 *Queen's L.J.* 425.
4. Judy Cashmore and Patrick Parkinson, "Children's and Parents' Perceptions on Children's Participation in Decision Making After Parental Separation and Divorce", (2008) 46 *Fam. Ct. Rev.* 91 ; and Anne B. Smith, Nicola J. Taylor and Pauline Tapp, "Rethinking Children's Involvement in Decision-Making After Parental Separation", *Childhood*, vol. 12, nº 2, 2003, p. 201.

themselves, who may settle their disputes but often do not fully understand their child's perspectives.

More recently, there has also been an emphasis on *the right* of children to participate in proceedings that affect them, a principle that is reflected and reinforced by the United Nations *Convention on the Rights of the Child,* a treaty that Canada has signed and ratified[5]. In an article published in 2018, Martinson and Tempesta assert that "legal representation for children by a child advocate is *necessary* in order to achieve just, equality-based outcomes for them and that governments have obligations to provide funding for such representation[6]", and argue that s. 7 of the *Charter of Rights*[7] may require that counsel be appointed for a child in a proceeding between parents. Although a rights-based approach to children's involvement in family proceedings has value, we do not go as far as those authors, as in many family cases children do not want or benefit from legal representation, and they should have a way of "being heard" other than by appointment of counsel for them[8].

Although Article 12 of the *Convention* provides that children must have "an opportunity to be heard" in judicial proceedings, it does not specify that they are to have lawyers[9]. The *Charter of Rights* may well be

5. *Convention on the Rights of the Child*, November 20th, 1989, (1990) 1577 U.N.T.C. 3, art. 12 :

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

   (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial […] 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.

6. Donna J. Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes : A Child Rights Approach to Legal Representation", (2018) 31 *Can. J. Fam. L.* 151, 152 (emphasis added).

7. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, [Schedule B to the *Canada Act, 1982* (U.K.), c. 11].

8. See e.g. *B.J.G.* v. *D.L.G.*, 2010 YKSC 44, where Martinson J. cited both the *Convention on the Rights of the Child*, art. 12, and social science literature to support the right of children to be heard, at least by a judicial interview.

9. UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009) : The right of the child to be heard*, July 20th, 2009, Doc. CRC/C/GC/12, argues that a child needs *legal representation* when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, the child should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision. The Committee is an advisory body, however, and its views are not binding on Canadian

invoked to give mature children a right to participation and legal representation in cases where the state is a party, such as child welfare proceedings[10], but the argument that children have a constitutional right to legal representation in "private law" cases involving only their parents is much weaker.

1.1 Outline and Central Arguments

Section 2 of this article discusses the importance and challenges of allowing children to participate in proceedings that affect family relationships, and describes the different ways that this can be done, including but not limited to child representation by a lawyer. The next Section surveys the range of ways that children's views are ascertained and brought into the family justice process in Canada, with a particular focus on the use of lawyers for children. Despite the principles articulated in the *Model Code of Professional Code* and by many commentators, most lawyers who do child representation work recognize that representation of children is very different from the representation of adults, especially when children are young, are unwilling or unable to express preferences, or have been intimidated or pressured by parents[11]. Section 4 of the article explores

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courts : see *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4. In *J.E.S.D.* v. *Y.E.P.*, 2018 BCCA 286, Groberman J.A. referred to both the *Convention* and the Martinson & Tempesta article, and concluded : "Article 12, in its terms, does not go so far as to guarantee children a right to legal representation or to party status in a legal dispute. Rather, it requires that children's voices be heard in proceedings that affect them" (par. 36).

10. See e.g. *A.C.* v. *Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30, where the Supreme Court recognized the constitutional rights of a 14-year-old girl to assert the constitutional right to freedom of religion in a child protection case. See also *A.M.R.I.* v. *K.E.R.*, 2011 ONCA 417, where the Ontario Court of Appeal recognized the constitutional right of a 13 year-old girl to participate in a case under the *Convention on the Civil Aspects of International Child Abduction*, October 25th, 1980, (1992) 1343 U.N.T.C. 89, emphasizing that the proceeding could result in state action to remove her from Canada ; and *Nova Scotia (Community Services)* v. *T.C.*, 2010 NSSC 69, where the court invoked s. 7 of the *Charter* to order legal representation for an older child in a protection proceeding.

11. There is only a limited amount of empirical research on how Canadian lawyers for children actually perceive their role and represent children, but the research that is available clearly suggests that most adopt an advocacy role for older children whom they assess as having capacity, but also recognize that children are different from adults, and there are cases when they will deviate from this role. See Joanne J. Paetsch, Lorne Bertrand and John-Paul E. Boyd, "Children's Participation in Justice Processes : Finding the Best Ways Forward. Results from the Survey of Participants", *Canadian Research Institute for Law and the Family*, 2017, [Online], [www.hearthechild.ca/wp-content/uploads/2017/12/Calgary-Symposium-Survey-Results-Dec-2017.pdf] (October 1st, 2018) ; Nicholas Bala, Rachel Birnbaum and Lorne

the controversies about the possible role of lawyers for children, considering the three often suggested roles of best interests guardian, *amicus curiae*, and instructional advocate, and discusses the provisions of the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada that are applicable to lawyers for children. We share concerns of a growing number of commentators that lawyers for children should not advocate based on their own personal opinions of a child's best interests. Lawyers for children should be either advocates based on the instructions of a mature child, or advocates for the legal interests of a child, though this latter role is not properly recognized in the *Code*. Regardless of role adopted, lawyers appointed for children should ensure that judges and parents are aware of all important evidence, though they should not violate a child's confidentiality or share views that children do not wish to share. Lawyers for children have an important role in advising children and keeping them informed about proceedings, without unnecessarily enmeshing them in their parents' disputes[12].

We conclude in Section 5 by arguing that governments and law societies need to develop more comprehensive, child-focused, contextual and cost-efficient policies and programs for ensuring that children can participate in the family justice process, including recognition of the importance and limitations that lawyers for children can play in family and child welfare proceedings. Appointing a lawyer is not the only, and often not the best, way to ensure children's participation in the family justice process. We offer proposals for rethinking the role of lawyers for children in Canada, and more broadly for addressing the issue of how children are to participate in the family justice process.

This paper is intended to stimulate dialogue and lead to reforms. We recognize that implementation of our proposals will require institutional and cultural changes, and our ideas will be controversial to some. While we support implementation of all of these ideas, we also recognize the need for further research and dialogue. What is critical is that all involved in the family justice process, whether on a systemic or individual case level, take

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BERTRAND, "Controversy about the Role of Children's Lawyers : Advocate or Best Interests Guardian ? Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers", (2013) 51 *Fam. Ct. Rev.* 681.

12. For a recent case where the judge recognized that lawyers for children have a unique role, and should avoid undue involvement of their child clients in court proceedings, see *Jewish Family and Child Service of Greater Toronto* v. *L.R.*, 2017 ONCJ 472. In this very high conflict parental dispute, Curtis J held that the assessor's report should be disclosed to counsel for the children, ages 12 and 15, but not disclosed to the child clients by their lawyer.

seriously their responsibilities for ensuring that children can participate in a safe, meaningful way, to both protect their rights and promote their interests.

2 Methods for Allowing a Child's Participation in the Family Justice Process

There is a range of ways to involve children in the family justice process, each with advantages and limitations. The parties and their lawyers, if they are represented, should be considering how to engage the children at an early stage in the process, and should keep reviewing this issue as a case proceeds. As cases start through the court process, judges will also have a role as "gatekeepers" for the obtaining and admissibility of evidence about a child's views. In deciding how to "hear the voice of the child", judges and lawyers are likely to weigh a number of sometimes competing objectives, including :

— providing as much *reliable* information as possible ;

— minimizing the emotional stress to the child and not harming the child's relationship with a parent ;

— ensuring a fair process for the parents ;

— ensuring a fair process for the child ; and

— resolving disputes in a way that is as cost effective as possible for the parties, the government and the courts.

As will be discussed later in this article, in individual cases legislation in the specific jurisdiction and the public or private resources available for the case will also be major considerations or constraints in deciding how to involve a child.

Too often parents either give children little or no information and make parenting arrangements on their own without consulting the children at all, or alternatively drag the children into their dispute and pressure them to "take sides[13]". As parents go through the process of separation they should be talking to their children about their children's experiences and

13. Joan B. Kelly and Mary Kay Kisthardt, "Helping Parents Tell their Children About Separation and Divorce : Social Science Frameworks and the Lawyer's Counseling Responsibility", (2009) 22 *J. Am. Acad. Matrim. Law.* 315 ; Nicholas Bala, Patricia Hebert and Rachel Birnbaum, "Ethical Duties of Lawyers for Parents Regarding Children of Clients : Being a Child-Focused Family Lawyer", (2017) 95 *Can. Bar. Rev.* 557 ; and Rachel Birnbaum and Michael Saini, "A Scoping Review of Qualitative Studies about Children Experiencing Parental Separation", *Childhood*, vol. 20, nº 2, 2013, p. 260.

hopes for the future, so it is important for lawyers and other professionals working with parents during separation to give parents advice about how to talk to their children about their separation and how to engage their children in making plans and decisions in a way that is meaningful but not unduly intrusive.

In many lower conflict separation cases, parents can communicate effectively with their children and each other, and can make parenting arrangements without involving judges. However, in the higher conflict minority of cases that result in contested court proceedings, parents are often not communicating effectively with their children. Too often in a high conflict case, each parent is subtly, or not so subtly, pressuring their child to "take their side" and say things that they want to hear. As a result, while family courts may admit testimony from parents about a child's stated perspectives as admissible "hearsay" under the "state of mind exception[14]", in cases of higher conflict between parents, courts often conclude that testimony from a parent about what a child said, or the increasingly commonly cell-phone recorded video, are not sufficiently reliable to be relied upon (or even admitted in evidence). Further, in some cases, the admission of this type of hearsay evidence from a parent will be unfair to a child and contrary to their interests[15].

While in most provinces older children may be in court for child protection cases[16], it is very rare in most Canadian jurisdictions for children to be in court in family disputes between parents. Typically, the parents do not want to put the children on the witness stand and be subjected to examination and cross-examination. If counsel (or an unrepresented parent) does seek to have a child testify, a judge in a family case has the power to refuse to issue a summons to a child or to vacate a summons that has been issued to a child witness. Even if a child appears in court "voluntarily" (invariably brought by one parent), a judge in a family case may protect the interests of the child, and refuse to allow the child to testify[17].

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14. *Children's Aid Society of Algoma (Elliot Lake)* v. *P.C.-F.*, 2017 ONCJ 898.
15. *A.H.* v. *S.B.*, 2018 ONCA 347.
16. There are child protection cases where the courts have held that in the absence of evidence about the likelihood of trauma to a child, a parent may call a child as a witness : *Children's Aid Society of Halton Region* v. *J.O.*, 2013 ONCJ 191, par. 39.
17. This power to exclude children from the court may be exercised not only by federally appointed superior court judges with an inherent *parens patriae* power to promote the best interests of children, but may also by provincially appointed judges as part of their jurisdiction to control of proceedings : *Dudman* v. *Dudman*, 1990 CanLII 3996 (ON C.J.).

In Québec, however, the *Civil Code* Article 34 provides that children in family cases have the right to an "opportunity to be heard" by the court[18], and it is common for judges in that province to meet children in court, with the statements of the child recorded. Although lawyers for the parents are usually present, the parents themselves are usually absent[19]. In some other Canadian jurisdictions, legislation allows for judicial interviews of children without the parents or their counsel present[20]. While most provinces do not have such legislation, case law clearly establishes that in proceedings where the welfare of a child is the central issue, the judge has an inherent authority to interview a child in chambers, without the consent or presence of the parents[21]. Outside of Québec, judges in Canada have traditionally been reluctant to exercise their jurisdiction to meet children, but some recent decisions have cited the *Convention on the Rights of the Child* and emphasized that children have a "right to be heard" in the family courts and meet with the judge[22], and the practice of judicial interviewing of children is becoming more common.

Research indicates that, if asked, a significant portion of children in family cases would like the opportunity to meet the judge who is deciding their case, though few want to be responsible for making final decisions[23]. Children may also have questions for the judge about the process, and may be reassured by hearing from the judge that they are not responsible for making a decision. Research finds that while children often express some anxiety before meeting with a judge, they generally report that they were glad to have had an opportunity to be heard by the judge, even if they did not get the outcome that they wanted.

A common way for children's views to be presented in contested family proceedings is for the court to order preparation of an assessment report by a mental health professional. Observations of parent-child interactions and

18. *Civil Code of Québec*, S.Q. 1991, c. 64, art. 34 : "The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it."
19. Québec judges have guidelines for these interviews : M. Gaudreau *et al.*, *Suggestions de questions à l'enfant lors de son entrevue avec le juge*, Assemblée générale annuelle de la Cour supérieure à Québec, 16 au 18 octobre 2013.
20. See e.g. Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C.12, art. 64.
21. See e.g. *Jandrisch* v. *Jandrisch*, [1980] 16 R.F.L. (2d) 239, 249 and 250 (Man. C.A.) ; *S.(M.E.) v. S.(D.A.)*, 2001 ABQB 1015.
22. *B.J.G.* v. *D.L.G.*, *supra*, note 8.
23. Rachel Birnbaum, Nicholas Bala and Francine Cyr, "Children's Experiences with Family Justice Professionals in Ontario and Ohio", (2011) 25 *Int. J.L. Pol'y & Fam.* 398 ; and Nicholas Bala *et al.*, "Children's Voices in Family Court : Guidelines for Judges Meeting Children", (2013) 47 *Fam. L.Q.* 379.

interviews with children are common features of the assessment process, and the report of the mental health professional will inevitably include at least a summary of the preferences and perspectives of the child, as well as commentary from the professional about the extent to which parents may have influenced those views, and the professional's recommendations about how much weight to place on those views.

A more recent development in Canada has been for the court to order, usually with the consent of the parties, preparation of a Views of the Child Report (VCR)[24]. A VCR is not a full assessment, just a report on what the child said, usually at two interviews, with some commentary on the child's demeanour during the interviews, but no assessment or recommendations from the interviewer. These reports are much less expensive than a full assessment (or child representation), and are prepared within a few weeks or less. These reports are usually prepared by mental health professionals, though in some places lawyers may prepare VCRs. It is a common practice for the professional preparing a VCR to offer the child confidentiality and an opportunity to review the contents of the report before it is released, though this practice is not universal. Although not used in all Canadian jurisdictions, given their relatively low cost, the use of VCRs is becoming more common[25]. These reports often result in settlements, even in higher conflict cases scheduled for court resolution, as parents in these cases may not really understand their child's preferences and perspectives until the child has an opportunity to speak to an independent professional ; once the parents learn their child's views, however, they may settle the case in a way consistent with those views.

2.1 Lawyer for a Child

As will be discussed below in more detail, there is enormous variation across Canadian jurisdictions in the frequency that counsel is appointed to represent children, ranging from provinces where this almost never occurs, like Manitoba, to ones like Ontario where there is a well-established program for representation of children. One of the functions of a lawyer for a child is to ensure that the child's views are shared with the court,

24. Rachel Birnbaum and Nicholas Bala, "Views of the Child Reports : The Ontario Pilot Project", (2017) 31 *Int. J.L. Pol'y & Fam.* 344 ; Rachel Birnbaum, "Views of the Child Reports : Hearing Directly from Children Involved in Post-Separation Disputes", *Social Inclusion*, vol. 5, nº 3, 2017, p. 148 ; and Rachel Birnbaum, Nicholas Bala and John-Paul Boyd, "The Canadian Experience with Views of the Child Reports : A Valuable Addition to the Toolbox ?", (2016) 30 *Int. J.L. Pol'y & Fam.* 158.

25. In June 2018, Ontario's Office of the Children's Lawyer launched a provincewide program for use of Voice of the Child Reports.

though it is important to appreciate that appellate courts have ruled that the lawyer for the child should not be "giving evidence from counsel table". In its 1994 decision in *Official Guardian* v. *Strobridge*[26] the Ontario Court of Appeal held that unless the parties consent, a lawyer appointed for a child should *not* give "evidence" about the wishes of a child. As Osborne J.A. stated :

> Counsel retained [for the child] is entitled to file or call evidence and make submissions on all on of the evidence. Counsel is not entitled to express his or her personal opinion on any issue, including the children's best interests, *nor is counsel entitled to become a witness and advise the court what the children's [...] preferences are*. If those preferences should be before the court, resort must be had to the appropriate evidentiary means[27].

Accordingly, at least in Ontario and Alberta[28] (where the Court of Appeal has followed *Strobridge*), in the absence of the consent of the parties, evidence about the child's views should be put before the court by a witness who can be cross-examined, such as a social worker who has been retained by the Children's Lawyer and interviewed the child. The social worker can testify about exactly what was said by the child, and describe the demeanour of the child and circumstances in which this information was communicated. The social worker can be cross-examined by all of the parties, ensuring that this evidence is properly explored and fairly tested.

Thus, while counsel for a child may have a critical role before a trial in informing the parties about the views of the child, if there is a contested hearing, the lawyer for the child will be presenting evidence from another witness about the child's perspectives and preferences. This is not to suggest that the pre-hearing role of counsel in sharing of information is insignificant, as parties are more likely to settle a case once they are informed by a neutral professional about their child's views. Indeed, counsel for a child is often well placed to have a mediative role, especially between parents in a high conflict dispute, and facilitate a settlement of a parental dispute consistent with the wishes and interests of a child. However, given the relatively high cost of appointing counsel for a child (whether paid by the parents or the state) compared to retaining a social worker to prepare a VCR or undertake an assessment and make recommendations, the limitations on counsel's communicating the child's views to the court suggest that there needs to be a good reason to have a lawyer appointed.

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26. *Official Guardian* v. *Strobridge*, [1994] 4 R.F.L. (4th) 169 (ON C.A.).
27. *Id*.
28. *RM* v. *JS*, 2013 ABCA 441.

One important function that a lawyer can play is meeting with the child, providing advice to the child, and if appropriate to helping the child develop a plan that is consistent with the child's perspectives but perhaps different from the plans of the parties ; counsel can then adduce evidence and advocate for the child's plan in negotiations or court. The fact that counsel's communication with a child is normally confidential may be especially important. However, lawyers who are carrying out this type of role need skills and knowledge not ordinarily taught to lawyers in law school. Further, in many cases there may be limited (or no) scope for development of a plan that differs substantially from the competing plans being proposed by the parties. It must also be appreciated that in cases involving separated parents, the child may be reluctant to put forward a plan that differs from what the parents are proposing, or there may be concerns that advocating for the child may exacerbate tensions between a parent and child. There may be more scope for children's lawyers to have a role in the development of plans in child protection cases than in family proceedings.

There are also cases where a lawyer for the child can have an important role in ensuring that the parties and court are aware of all of the relevant evidence about the child and his or her interests. This may, for example, occur if one or both parents are self-represented, or if there are unresolved issues of child safety or family violence. In such cases, there may need to be both investigation by counsel for the child, and the calling of witnesses or filing of reports in court.

3 Child Legal Representation Across Canada

In this section we survey how different jurisdictions in Canada provide for legal representation for children, and more broadly how children's views are considered in family proceedings. The primary focus is on services funded by government, as very few parents in these cases can afford to pay for lawyers for their children, and indeed many litigants in Canada's family courts cannot even afford their own lawyers[29].

29. Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts : The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants", (2012) 91 *Can. Bar. Rev.* 67 ; Michael Saini, Rachel Birnbaum and Nicholas Bala, "Access to Justice in Ontario's Family Courts : The Parents' Perspective", (2016) 37 *Windsor Rev. Legal & Soc. Issues* 1 ; and Julie McFarlane, "The National Self−Represented Litigants Project : Identifying and Meeting the Needs of Self-Represented Litigants, Final Report", 2013, [Online], [www.representingyourselfcanada.com/wp-content/uploads/2015/07/nsrlp-srl-research-study-final-report.pdf] (October 1st, 2018).

If the parents have the resources to pay, in family cases a court may order that an independent mental health professional will be appointed to undertake an assessment and prepare a report that will include ascertaining the views of the children based on interviews with them[30]. As discussed below, in some jurisdictions the government may pay for an assessment in some family or child welfare cases.

We start with a discussion of jurisdictions that have little or no child legal representation, and then consider the most comprehensive schemes of child representation in Canada.

3.1 Limited Representation for Children in Child Protection Cases : MB, NB, NS & NL

In a number of Canadian provinces, legislation allows a limited scope for the court to appoint counsel for a child in a protection proceeding, but there are no provisions for appointment for a lawyer for a child in a family proceeding. In Manitoba a judge may order representation for a child of any age in a protection proceeding, but the emphasis is on appointment of counsel for children twelve of older and who have "capacity" to express their views[31]. In New Brunswick, the emphasis is also on having counsel for children twelve or older and who have "capacity" to express their views, but the court may only "advise" about the desirability of appointing counsel for the child, with the child welfare agency making the final determination about whether this will be done[32]. In Nova Scotia, the court in a child protection proceeding may, upon request by the child, order representation by counsel if this is "desirable to protect the child's interests" ; normally the child will be at least 12 years of age, or the court can appoint a guardian

30. Assessments in family cases can be ordered : Alberta, *Alberta Rules of Court*, Alta Reg. 124/2010 ; British Columbia, *Family Law Act*, S.B.C. 2011, c. 25, art. 15 ; Manitoba, *The Family Maintenance Act*, C.C.S.M. c. F20, art. 3 and *The Court of Queen's Bench Act*, C.C.S.M. 1985, c. C280, art. 49 ; New Brunswick, *Judicature Act*, R.S.N.B. 1973, c. J-2, art. 11.4 ; Newfoundland and Labrador, *Children's Law Act*, R.S.N.L. 1990, c. C-13, art. 36 ; Northwest Territories, *Children's Law Act*, S.N.W.T. 1997, c. 14, art. 29 ; Nova Scotia, *Judicature Act*, R.S.N.S. 1989, c. 240, art. 32F and *Parenting and Support Act*, R.S.N.S. 1989, c. 160, art. 19 ; Ontario, *Children's Law Reform Act*, *supra*, note 20, art. 30 and *Courts of Justice Act*, R.S.O. 1990, c. C.43, art. 112 ; Prince Edward Island, *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, art. 4.1 ; Yukon, *Children's Law Act*, R.S.Y. 2002, c. 31, art. 43. It has also been held that a superior court has an inherent jurisdiction to order an assessment : *Cillis* v. *Cillis*, [1980] 20 R.F.L. (2d) 208 (ON S.C.).

31. Manitoba, *The Child and Family Services Act*, C.C.S.M. 1985, c. C80, art. 34 (2).

32. New Brunswick, *Family Services Act*, S.N.B. 1980, c. F-2.2, art. 7 b).

ad item (social worker), who may retain counsel for the child[33]. While there is no established program of child representation in Newfoundland and Labrador, counsel are sometimes appointed by court order for older children in child welfare cases ; in family cases there are statutory provisions to allow a court to order a "family consultant" (social worker), paid by the government to carry out an assessment, which will normally include a report on an interview with the child[34], so in this way the views of children are often provided to the courts in contested family cases in the province.

In these provinces, representation for children is effectively limited to older children in protection cases ; the counsel involved are usually lawyers in private practice, being paid legal aid rates. The priority given to allowing appointment of counsel in protection cases reflects that the fact that the state is a party to these proceedings, which may result in a complete termination of a child's relationship to all members of his or her family. There is a strong argument that children with the capacity to express their views have the constitutional right to have counsel in a child protection proceeding, since their "liberty and security" of the person are implicated[35], and providing representation in these cases is consistent with the *Charter of Rights.*

In these four provinces there is no provision for appointment of counsel in family cases. Although in theory a judge in a superior court in these provinces might invoke the court's *parens patriae* to appoint counsel for a child, this happens very rarely[36]. However, these provinces have established government funded programs that allow courts to direct a social worker to prepare a Views of the Child Report (also known as a

33. Nova Scotia, *Children and Family Services Act*, S.N.S. 1990, c. 5, art. 37 (1) and (2), and 41 ; in *Nova Scotia (Community Services)* v. *T.C.*, 2010 NSSC 69, the court invoked s. 7 of the *Charter* to order legal representation for an older child in a protection proceeding under s. 41 rather than a guadian *ad litem* (social worker).

34. See the *Children's Law Act*, R.S.N.L. 1990, c. C-13, art. 36.

35. See *A.C.* v. *Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30 ; and in *Nova Scotia (Community Services)* v. *T.C.*, *supra*, note 33.

36. See e.g. *S.H.* v. *W.H.*, [1999] 48 R.F.L. (4th) 305 (NL S.C.). Only superior courts in Canada have the *parens patriae* (Latin for "parent of the country") jurisdiction, power, as a part of their inherent powers as a court of equity, and provincially appointed judges do not have this power. In *M.B.-W.* v. *R.Q.*, 2015 NLCA 28, the Court of Appeal of Newfoundland and Labdrador left open the question of whether even the Supreme Court can order the government to pay for counsel for the child, or whether a judge can only refer a child to Legal Aid, which takes account of parental income and other factors before deciding whether to provide a child with counsel. In *J.E.S.D.* v. *Y.E.P.*, *supra*, note 9, the British Columbia Court of Appeal emphasized the narrow nature of the *parens patriae* power, and held that it did not authorize a judge to order the government to pay for counsel for a child.

Voice of the Child Report in these jurisdictions), to provide the court with information about the child's views and give a child the opportunity to participate in the proceedings without being directly involved[37]. There are also some possibilities in these provinces for a more thorough assessment to be undertaken by a mental health professional paid by the government for use in a family case, though these reports may take a long time to prepare and are not often ordered.

3.2 Counsel for Children Program in Child Protection Cases : SK

Like the provinces discussed in the previous section, Saskatchewan only allows for appointment of government paid counsel in child protection cases, but it has gone significantly further than some other provinces by having a program that facilitates access to these lawyers and provides some assurances of the quality of this representation. In 2014 the Saskatchewan government established the Counsel for Children program to allow for appointment of counsel for children and youth involved in child protection proceedings[38]. A parent or the court may make a request for appointment of counsel for a child in a protection case through the program. The program has a roster of lawyers around the province ; the Public Guardian and Trustee is responsible for recruitment, training, supervision and payment of the lawyers in private practice who act for the children and youth, as well the assignment of cases[39].

There is no provision for appointment of lawyers for children in family cases in Saskatchewan, though as is other provinces there is some use of government paid mental health professionals to prepare reports for the courts in family cases that include information on the views and perspectives of children, as well as the conclusions of the professional.

3.3 Limited Representation But Encouraging Developments : BC

In British Columbia the *Family Law Act* s. 203 provides that a lawyer *may* be appointed by the court to represent a child in a family case if "the court is satisfied that the degree of conflict between the parties is so

37. R. Birnbaum, N. Bala and J.-P. Boyd, *supra*, note 24.
38. For a detailed description, see Government of Saskatchewan, *Counsel for Children and Youth Program Manual*, 2016, [Online], [www.publications.gov.sk.ca/documents/9/82294-Counsel%20for%20Children%20and%20Youth%20Program%20Manual%20-%20January%202016.pdf] (July 19th, 2018).
39. The Saskatchewan Counsel for Children program was established by the the *Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3, art. 6.3 (5). For a case on the independent role of this counsel, see *L.S.O.* v. *S.O.*, 2016 SKCA 151.

severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and [the appointment] is necessary to protect the best interests of the child", *and* one or both parents have the ability to pay the lawyer[40]. Because of the requirement that parents pay for a lawyer for their child, it appears that orders for legal representation are very rarely made under this provision, though court ordered assessments by mental health professionals[41], paid by the parents or in some cases the government[42], are not uncommon for cases that go to trial in the province. It is also quite common for courts in British Columbia to order parents to pay for a "Hear the Child Report" (as VCRs are called in BC), which are relatively inexpensive and not infrequently prepared by lawyers in that province[43].

In its recent decision in *J.E.S.D.* v. *Y.E.P.* the British Columbia Court of Appeal upheld a narrow interpretation of s. 203, and emphasized that the parents must pay for counsel under this provision[44]. The Court of Appeal also held that in light of this statutory provision, judges in Britsih Columbia have no inherent *parens patriae* authority to order that the government pay for lawyers for children in family cases.

An encouraging development in British Columbia has been the recent establishment of the Child and Youth Legal Centre[45], which provides both advice and representation to children and youth in a range of proceedings, including family and child protection cases. While the Centre has a roster of lawyers in private practice around the province, its resources are limited, and there remain real concerns about the lack of resources for child representation and children's participation in family cases in British Columbia.

40. *Family Law Act*, *supra*, note 30, art. 203 (1) a) and b).
41. *Id.*, art. 211.
42. A government paid Family Justice Counsellor may prepare a report for the court in a family case. There are, however, concerns about the lack of access to this program as well as about the quality of these government paid reports, especially in cases involving domestic violence : see e.g. *A. (D.)* v. *A. (J.)*, 2002 BCSC 607 ; and see Shahnaz Rahman and Laura Track, "Troubling Assessments : Custody and Access Reports and their Equality Implications for BC Women", 2012, [Online], [www.westcoastleaf.org/wp-content/uploads/2014/10/2012-REPORT-Troubling-Assessments-Custody-and-Acess-Reports-and-their-Equality-Implications-for-BC-Women.pdf] (October 1st, 2018).
43. BC, Hear the child society, [Online], [www.hearthechild.ca] (October 1st, 2018).
44. *J.E.S.D.* v. *Y.E.P.*, *supra*, note 9.
45. Society for children and youth of BC, "Child and Youth Legal Centre", [Online], [www.scyofbc.org/child-youth-legal-centre/] (October 1st, 2018).

3.4 Representation in Family Cases and a Program for Protection Cases : Alberta

There is a significant amount of legislatively mandated and government funded child representation in Alberta. In child protection proceedings, there is a government agency, the Alberta Office of the Child and Youth Advocate (OCYA) which can provide representation for a child with or without a court order. Government funded representation for children is also relatively frequent in family proceedings, largely provided by lawyers in private practice funded through Alberta Legal Aid, but there is no supervision of this type of representation.

The Office of the Child and Youth Advocate (OCYA) can become involved in a child protection case as the result of a referral, usually from a child protection worker. A lawyer can also be appointed by a court order pursuant to the *Child, Youth and Family Enhancement Act* s. 112[46]. For child protection cases, the OCYA has recruited and supports a roster of lawyers in private practice from around the province for its Legal Representation for Children and Youth (LRCY) program. All LRCY roster lawyers are required to take a training program on child legal representation before they are appointed to the roster, and they are offered mentoring by more senior roster lawyers. Lawyers are also expected to take six hours a year of educational training on issues such as child development and family violence. Lawyers are presumptively required to take an instructional advocacy role by the LRCY *Guidelines* ; however, if a lawyer thinks that a child lacks capacity to give suitable instructions, the lawyer may adopt a "best interests" guardian or an *amicus curiae* role. There is no assistance from social workers or any other mental health professional to help the lawyers on their LRCY files.

Alberta's *Family Law Act* provides in cases involving disputes between parents that "the court may at any time appoint an individual to represent the interests of a child[47]". While there are no legislative provisions regarding payment for services rendered, if an order is made for child representation[48], it is usually provided by a lawyer in private practice, generally paid by Legal Aid, though if parents have significant resources, they may be ordered to pay. Although some of this work is done by lawyers

46. *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12.
47. *Family Law Act*, S.A. 2003, c. F-4.5, art. 95 (3).
48. For a discussion of art. 95 (3) of Alberta's *Family Law Act*, see *Smith* v. *Lagace*, 2011 ABQB 405 and *L.M.H.* v. *S.R.H.*, 2010 ABQB 769.

who are on the LRCY roster, there is no requirement for this and the LRCY does not supervise or support the lawyers doing this work. Appointment in family cases may be made in Provincial Court under the *Family Law Act*, and in the Court of Queen's Bench by judges exercising their *parens patriae* jurisdiction, who do so quite frequently in Alberta[49].

3.5 Significant Child Representation but no Office — Québec & Nunavut

In Québec Article 34 of the *Civil Code* requires that children are to be "heard" by the court in any case where their interests are affected, if they have the ability to express themselves.[50] The courts in that province have statutory jurisdiction to order that a child may be provided with legal representation in both family[51] and child protection[52] cases. Although parents with substantial resources may be required to pay for a lawyer for their child, in practice in Québec when a child has a lawyer in a family proceeding, it is almost always a lawyer in private practice, paid at Legal Aid rates. Although a significant number of lawyers in Québec do child representation work, there is no agency with a responsibility to recruit, train or supervise them.

There is no formal child legal representation program in Nunavut, but lawyers are not infrequently appointed by the courts to represent children, especially in child protection cases[53]. The Nunavut Court of Justice has accepted that it has an inherent *parens patriae* jurisdiction to appoint counsel for a child in family proceedings, though the Court has suggested that this should only be done where a child is old enough to express wishes and preferences[54]. There are no formal policies or protocols regarding the recruitment or role of child's counsel in the Territory, but almost all child representation work is done under the auspices of the Territorial Legal Aid Program. There is no assistance provided by social workers or any other mental health professionals to these lawyers.

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49. See *Puszczak* v. *Puszczak*, 2005 ABCA 426, which took a relatively broad view of the *parens patriae* power of judges to order representation for a child in a family case.
50. For a discussion of the role of counsel in Québec, see Barreau du Québec, *Mémoire. La représentation des enfants par avocat dix ans plus tard*, 2006, [Online], [www.barreau.qc.ca/pdf/medias/positions/2006/200605-representation_des_enfants.pdf] (October 1st, 2018).
51. Québec *Code of Civil Procedure*, CQLR, c. C-25.01, art 394.1.
52. *Youth Protection Act*, CQLR, c. P-34.1, art. 80.
53. *Child and Family Services Act*, S.N.W.T. (Nu.) 1997, c. 13, art. 86.
54. *C.L.* v. *J.M.*, 2017 NUCJ 21.

3.6 Offices for Child Representation : Ontario, PEI, NWT & Yukon

Four jurisdictions in Canada have established government agencies that have responsibility for child legal representation in family relationship cases.

The Ontario Office of the Children's Lawyer (OCL) has the most comprehensive child legal representation program in Canada, providing representation in family and child protection cases as well as in property and civil proceedings[55]. The OCL has a number of lawyers and social workers on staff in Toronto, and a panel of about 500 lawyers in private practice around the province, as well 280 clinical investigators (almost all social workers) who provide services in family cases. The OCL undertakes recruitment, training and supervision of the lawyers and social workers on its panel, and assigns cases to them ; the OCL is involved in cases without charge to parents.

In child protection cases in Ontario, the court has statutory authority to order that legal representation is to be provided to a child[56], and lawyers are often appointed, even if the child is very young, especially in cases involving potential termination of parental rights[57]. In family cases, a court may make an order requesting that the OCL become involved in a case[58] ; these orders are often made on the request of one or both parents, though the court may act on its own motion or the OCL may also get involved in a family case on its own initiative. Significantly, however, if an order is made requesting OCL involvement in a family case, the OCL has the responsibility for deciding whether there will child representation by a lawyer, a clinical investigation and report, a lawyer assisted by a clinician, or there will be no involvement. Given the demands for its services in family cases, and the reality that the Office has a fixed budget, the Ontario Court of Appeal has accepted that the final decision on whether and how to be involved in a family case rests with the OCL, not the courts. In Ontario, a superior court judge cannot exercise a *parens patriae* jurisdiction to order that the government pay for a lawyer for a child[59].

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55. *Courts of Justice Act*, R.S.O. 1990, c. C.43, art. 89.
56. *Child and Family Services Act*, R.S.O. 1990, c. C.11, art. 38.
57. See e.g. *Children's Aid Society of Brant* v. *K.N.*, 2017 ONCJ 202, where the court did not allow the OCL to withdraw from a case involving a 1-year-old child in a medically fragile state where the mother and agency had a dispute about whether to terminate life sustaining medical care.
58. *Courts of Justice Act*, *supra*, note 55, art. 112.
59. *Bhajan* v. *Bhajan*, 2010 ONCA 714. The *parens patriae* jurisdiction is only operative if there is a "legislative gap," and the Ontario *Courts of Justice Act* makes clear that the OCL, not the court, has the final authority to decide whether and how to be involved in a family case.

As in other jurisdictions, the legislative priority that Ontario gives to providing representation in child protection cases reflects the reality that these proceedings constitute a profound state intrusion into the child's life. Due to budgetary constraints, the OCL has to decline involvement in about a third of the cases where the court in a family case has requested that the Office provide services ; this is a major concern to family justice professionals and parents in Ontario[60]. The OCL recently added the Voice of the Child Reports to its suite of services for family cases (in addition to full clinical investigations, focused investigations and providing child representation). In the right cases, a Voice of the Child Report can be a cost-effective way to ensure that a child can meaningfully participate in family proceedings, while promoting settlements ; the clinician involved can also identify whether there are concerns that warrant a fuller assessment by an OCL or report to a child protection agency for an investigation of suspected child abuse or neglect[61].

In 2017 Prince Edward Island established its Children's Lawyer Office, with both a staff lawyer and access to a social worker who can become involved in high conflict domestic disputes at the request of the court or a party. The government pays for the cost of this service[62]. In child protection cases, the court may order legal representation for a child who is 12 years of age or older[63].

In 2011, the government of the Northwest Territories established its Office of the Children's Lawyer (OCL). In child protection cases in the NWT, courts have the jurisdiction to order that legal representation will be provided for a child[64]. The Supreme Court of the NWT, which deals with most family cases in the Territory, has accepted that it has the inherent *parens patriae* jurisdiction to appoint counsel for a child, which is now also

60. The Ontario Office of the Children's Lawyer, *2014-2015 Annual Update* reported that an acceptance rate is 65 percent. See Ontario, Ministry of the attorney general, *Office of the children's Lawyer 2014-2015 Annual Update*, 2015, [Online], [www.attorneygeneral.jus.gov.on.ca/english/about/pubs/ocl_annual/OCL_annual_report_2015.html] (October 1st, 2018).
61. In the Ontario 2016-17 pilot project, 86 reports were prepared : a year after completion of the project, over 70 % of the cases settled, 3 cases referred to child welfare ; 2 cases where referred for full OCL clinical investigation ; and 3 went to trial. For an early report on the study, see R. Birnbaum and N. Bala, *supra*, note 24 ; and R. Birnbaum, *supra*, note 24.
62. Prince Edward Island, "Children's Lawyer", [Online], [www.princeedwardisland.ca/en/information/justice-and-public-safety/what-childrens-lawyer] (October 1st, 2018).
63. *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1, art. 34 (1) b).
64. *Child and Family Services Act*, S.N.W.T. 1997, c. 13, art. 86.

provided by the OCL[65]. While in theory a court may order the parents to pay all or a portion of the costs of legal representation of children, this never occurs ; at present representation of children in NWT is through the OCL, which has one staff lawyer and a roster of trained and supervised lawyers in private practice who can provide representation as required. The NWT Office of the Children's Lawyer is in the process of establishing formal policies and procedures for child representation.

In the Yukon, legislation specifies that the Official Guardian has the exclusive right to determine whether any child requires representation by a Child's Lawyer or any other person in family or child protection proceeding, though the Office must take account of the recommendation of the court in deciding whether to appoint counsel[66]. If representation is provided, the government pays for it, and it is generally provided by a lawyer in private practice who is on a roster of lawyers.

3.7 Child Representation : The Need for Better Institutional Structures

The preceding survey focused on the legal authority to appoint counsel for a child, and the institutional structures in place to provide representation or information to the court about a child's views. As it shows, there is great variation in legislation, institutional structures and actual use of child representation in different jurisdictions in Canada. Although not discussed in detail, there is also some variation in the words used to establish the legal test for whether to appoint counsel for a child[67]. However, the legislation and jurisprudence tend to use similar, vague concepts that give great discretion, invariably requiring a court or agency to consider whether appointment of counsel is necessary to protect the child's interests or best interests, and perhaps some other factors such as the extent of conflict between the parties and whether the views of the parents and child appear to differ. In practice, the availability of government support for legal representation, or alternate ways to ascertain the views of children, as well the local "legal culture", are critical in determining whether a lawyer is appointed for a child.

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65. *Kalaserk* v. *Nelson*, 2005 NWTSC 4.
66. *Children's Law Act*, R.S.Y. 2002, *supra*, note 30, art. 168 ; and *Child and Family Services Act*, S.Y. 2008, c. 1, art. 76. For a discussion of the role of the child's lawyer, see *T.E.A.* v. *R.S.A.*, 2012 YKSC 65, and *B.L.* v. *M.L.*, 2011 YKSC 67.
67. For a detailed review of legislation on child representation, see Debra Lovinsky and Jessica Gagne, *Legal Representation of Children in Canada*, 2015, [Online], [www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rje/lrc-rje.pdf] (October 1st, 2018). That paper does not discuss the different institutional structures for delivery of legal services to children.

The limited significance of the actual words of the statutory or common law test for deciding whether to appoint counsel for a child is illustrated by the evolution in the thinking of one judge in one jurisdiction about when to appoint counsel for a child in a family case under her *parens patriae* jurisdiction, based on whether this is necessary to protect a child's "best interests". In a 2012 Northwest Territories case, just as the Office of the Children's Lawyer was being established in the Territory, Justice Shaner refused a request by one party to a family case for counsel to be appointed for a seven-year-old child whose mother was litigating against the grandparents about access to the child[68]. The judge suggested that the court should only "sparingly" exercise its *parens patriae* jurisdiction to appoint counsel for a child, and only where the Court is satisfied that the child can provide "instructions" to counsel *and* that it would be in the child's best interests for counsel to be appointed. In 2013 Justice Shaner referred to the establishment of the Office of the Children's Lawyer as a "welcome development", but again suggested that counsel should only be appointed for a child in a dispute between parents if the child has capacity to instruct counsel[69]. However, by 2014, Justice Shaner's views had evolved, and she was prepared to appoint counsel for two children aged five and six years in a high-conflict separation to "represent [the] child's interests, including views and preferences, where appropriate […] by presenting evidence that may assist the Court in determining the child's best interests". The judge also recognized the important role of the OCL in facilitating settlement, observing : "hopefully the appointment of counsel for the children will assist the parties in moving forward and concluding this case[70]".

In every jurisdiction in Canada, consistent with Article 12 of the *Convention on the Rights of the Child*, provincial and territorial governments recognize that they have responsibility to ensure that children's views are shared with the courts making decisions about familial relationships, and all provide some funding to allow this to happen. Some governments, however, give more attention and resources to this responsibility ; there is a clear need for more comprehensiveness and consistency to government policies and programs. An institutional structure that provides for screening, training and supervision of professionals is more likely to result in provision of services that meet the needs of children. Institutional structures that offer a co-ordinated range of services including child legal

68. *Wagner* v. *Melton*, 2012 NWTSC 41.
69. *Lafferty* v. *Angiers*, 2013 NWTSC 3.
70. *GB* v. *AB*, 2014 NWTSC 39.

representation, assessments prepared by mental health professionals, and Views of the Child Reports, are more cost-effective and more likely to allow for the provision of services that meet the needs of the child and of the specific case.

An important issue of institutional design is whether judges or service administrators will make the decision about what services to provide, and indeed whether any services will be provided. Given the constitutional dimensions of child protection proceedings, where the state is intruding in the lives of children and parents, it is understandable that in almost every jurisdiction in Canada, legislation specifies that judges make the decision about whether legal representation will be provided for a child in these proceedings. There is also an argument that judges, who have the final responsibility for making decisions in family cases, should decide whether child legal representation or other services will be provided to the child who is the subject of a dispute between family members. However, given the understandable pressure to have fixed, and limited, budgets for family justice services, one can appreciate why governments want administrators to have the final say about provision of state-funded for services for high conflict parental separations[71].

It must be recognized by governments that providing services for children is likely to actually reduce total state expenditures in high conflict separations. While there is a lack of good research into the cost-effectiveness of these services, it is clear that child legal representation and other services giving voice to children result in more cases being settled without a trial, saving government expenditures for court services and legal aid. Further, but even more difficult to quantify, more settlements and less embittering resolution of cases result in improved mental health for children and parents, which will produce long term savings for social and health expenditures.

The next section of the article considers the controversy over the role of counsel for children in cases where family relationships are the subject of proceedings. In the final section we will return to the issue of institutional structures, arguing for government funded programs that include child representation, but also provide for other options to ensure that the child's views are known to the court and parties.

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71. This narrow approach to the judicial authority, in the absence of explicit legislative authority, to impose costs on the government to provide representational services for children was recently supported by the British Columbia Court of Appeal in *J.E.S.D.* v. *Y.E.P.*, *supra*, note 9.

4 The Role of Child's Counsel

In most jurisdictions in Canada there is a lack of clear and comprehensive guidance from the Law Society or the courts for the unique role that lawyers for children are expected to play in representing children. Helpfully, in the few jurisdictions with agencies responsible for the provision of legal services to children, policies have been developed to provide guidance for lawyers representing children, though these are not reflected in the Law Society standards in those jurisdictions, and in some cases may actually be inconsistent with them. There is a clear need for the Law Society in every jurisdiction in Canada to provide appropriate guidance for lawyers undertaking responsibility for the representing children in proceedings concerning family relationships.

4.1 The *Model Code* and Child Representation

In every jurisdiction in this country the standards for professional conduct are based on *Model Code of Professional Conduct* of the Federation of Law Societies of Canada. While there is no provision specifically governing the role of lawyers appointed to represent children, the *Model Code* provides guidance for relationships with "clients with diminished capacity":

> When a client's ability to make decisions is impaired because of minority or mental disability […] the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

The *Commentary* to this provision states:

> A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. […] A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to *appreciate the reasonably foreseeable consequences* of the decision or lack of decision[72].

The *Commentary* goes on to suggest that a lawyer who believes that a client is "incapable of giving instructions should decline to act" for that client. Thus, the *Code* does not grapple with questions related to the role and responsibilities of lawyers appointed to represent children who are

72. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, 2017, Standard 3.2-8, p. 27 and 28, [Online], [www.flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf] (October 1st, 2018) (emphasis added).

unable or unwilling to "provide instructions", or who are unable to appreciate the reasonable consequences of their decisions, or the question of whether lawyers for children may have broader responsibilities to the courts than other counsel.

4.2 Three Traditional Roles: *Amicus Curiae,* Guardian or Advocate

In light of the failure of professional *Code* in any Canadian jurisdiction to deal adequately with child representation, a commonly suggested approach has been that a lawyer for a child in a family case adopt one of three different roles[73]: (1) the friend of the court; (2) a best interests guardian; or (3) an instructional advocate. We discuss these three different roles, and then consider the approach of the Ontario Children's Lawyer, which has Canada's largest child representation program, and its own somewhat eclectic Policy on the Role of Child's Counsel. We conclude this section of the paper by endorsing a two-role model for counsel: a Child's Rights and Interests Advocate, or a Child's Lawyer Instructional Advocate, arguing that in a proceeding involving family relationships, a lawyer for a child has special responsibilities regarding settlement and introduction of evidence.

4.2.1 Friend of the Court

A lawyer who adopts a "friend of the court" role (often referred to by the Latin translation, *amicus curiae*) has the responsibility to ensure all relevant evidence and argument is before the court so that the court can make an appropriate decision[74]. While most of the evidence at trial will normally be introduced by the parties (the parents or a child protection agency), if the parties do not introduce some relevant evidence about the

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73. See e.g. *Alberta (Child, Youth and Family Enhancement Act, Director)* v. *R.M.*, 2011 ABPC 244; Canada, Department of justice, *The Voice of the Child in Divorce, Custody and Access Proceedings*, Doc. 2002-FCY-1E, [Online], [www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2002_1/pdf/2002_1.pdf] (October 1st, 2018); Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings", (2006) 43 *Alta L. Rev.* 845; and Christine D. Davies, "Access to Justice for Children: The Voice of the Child in Costudy and Access Disputes", (2004) 22 *C.F.L.Q.* 153.

74. There is a related but different legal concept that refers to the inherent power of a court to appoint a lawyer to act as *amicus curiae* [the "friend of the court"] in a case to ensure that all evidence and argument is available to the court if a party lacks capacity or willingness to do so. There are a number of situations in which judges have the jurisdiction to appoint a lawyer to act as *amicus curiae,* including appointment of a lawyer in a criminal case where an accused person may lack mental capacity to has decided to proceed with a serious criminal trial without counsel. It has, however,

child, the *amicus* lawyer will complete the evidentiary picture for the court. The *amicus* lawyer may also have a role in challenging the evidence of the parties by cross-examination or calling reply evidence.

The *amicus* lawyer is expected to ensure that all feasible options regarding the care of the child are investigated, and any relevant information about these options is brought before the court. Provided that the child has the capacity to communicate, the lawyer who adopts this role should meet the child to explain the court process, and should ensure that evidence of the child's views and perspectives is before the court. However, there is no expectation of confidentiality between the child and the lawyer ; to the contrary, the *amicus* lawyer will be responsible for disclosing the child's views to the court and the other parties. The lawyer adopting this role might also retain a mental health professional to investigate the child's circumstances or assist in interviewing the child and providing evidence about the child's wishes[75]. Although the *amicus curiae* role ensures that the views of the child are before the court, the lawyer does not argue in favor of the child's position, or take any position about the child's best interests.

4.2.2 Best Interests Guardian

Like the *amicus curiae*, lawyers who adopt the best interests guardian role have the responsibility for ensuring that if the parties do not introduce all the relevant evidence in court about the child's interests, they will do so, and in particular will ensure that evidence about the child's views and wishes is introduced. However, the best interests guardian will also advocate for a position, based on the lawyer's assessment of the best interests of the child.

While the guardian lawyer will meet with the child, and should keep the child informed about the proceedings, the lawyer adopting this role may not feel obliged to maintain confidentiality about communications received from the child. The guardian lawyer is not bound by any "instructions" given by the child, though the guardian may decide to advocate for an outcome that the child wishes if the lawyer is satisfied this will advance the child's best interests. The guardian lawyer may also introduce evidence to establish that the child's stated preferences are a reflection of parental

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been held that the inherent judicial power to appoint an *amicus curiae* should not be used to appoint counsel in a family case to represent the interests of a child : *J.E.S.D.* v. *Y.E.P.*, *supra*, note 9.

75. As discussed above, there are significant limitations on a lawyer for a child simply telling the judge about the child's views : *Official Guardian* v. *Strobridge*, [1994] 18 O.R. (3d) 753, 4 R.F.L. (4th) 169 (ON C.A.).

influence or based on immature judgment ; in these situations the guardian lawyer may also argue that the outcome sought by the child is not in their best interests[76].

Guardian lawyers will explore options for the care of children. In practice, guardian lawyers often play an important role in negotiating a settlement between the parties, since continuation of litigation is often contrary to the interests (and wishes) of the child, especially in litigation between parents.

Some form of the best interests guardian role is expected for children's lawyers in a number of jurisdictions[77], including several American states[78] ; even in jurisdictions where an instructional advocate role is adopted for mature children expressing views, the guardian approach will often be considered appropriate if the child lacks capacity or willingness to take a position. The guardian role is controversial, however, as there are serious questions about whether lawyers have the appropriate education and training to determine what plan will be in the best interests of a child[79]. A related concern is that lawyers adopting this role may be too influential, with courts placing too much weight on the views of lawyers who purport

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76. *Boukema* v. *Boukema*, [1997] 31 R.F.L. (4th) 329 (ON S.C.). Child's counsel advocated a different position from the child's expressed wishes based on the assessment of two mental health professionals that the mother was manipulating the child. See also *Re A.F.*, 2006 ABPC 225, affirmed *T.W.* v. *Alberta (Child, Youth and Family Enhancement Act, Director)*, 2008 ABQB 97, reversed *T.W.* v. *Alberta (Child, Youth and Family Enhancement Act, Director)*, 2009 ABCA 25, where the Court held that counsel for four children in a child protection case, the oldest of whom was 8 years old, was not obliged to advocate based on the children's stated wishes, as they were subject to "undue adult influence, coupled with unreasonable loyalty, thereby making it impossible for the Children to make reasonable choices" (*Re A.F.*, par. 57).

77. The best interests guardian role is, for example, adopted by children's counsel in Great Britain : Gillian Douglas *et al*., *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991*, 2006, [Online], [www.familieslink.co.uk/download/jan07/familyprocrules_research.pdf] (June 3rd, 2012). In Australia lawyers for children also generally adopt the best interests guardian role. See Family court of Australia, "Independent Children's Lawyer", 2016, [Online], [www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/independent-childrens-lawyer/] (May 8th, 2018).

78. In some jurisdictions, social workers or citizen volunteers are appointed to act in this role. Often the term guardian *ad litem* [Latin for litigation guardian] is used for these non-lawyer advocates, though in some jurisdictions lawyers appointed for children are also called guardians *ad litem*.

79. See e.g. Dale Hensley, "Role and Responsibilities of Counsel for the Child in Alberta : A Practitioner's Perspective and a Response to Professor Bala", (2006) 43 *Alta L. Rev.* 871 ; Martin Guggenheim, "Maximizing Strategies for Pressuring Adults to do Right by Children", (2003) 45 *Ariz. L. Rev.* 765.

to be advocating for the "best interests" of the child, even those views may be based on the biases of the lawyer, with the lawyer in effect usurping the role of the court. However, many judges, and some commentators and lawyers have a preference for this role, believing that it helps promote the fullest judicial understanding of the children's circumstances and hence promotes their interests[80].

4.2.3 Traditional Instructional Advocate

As discussed above, the Federation's *Model Code* and Law Societies in Canada presume that the only role for a lawyer is as "instructional advocate" role, having a relationship with a child that is based on the same basic ethical and professional responsibility principles as those that apply to adult clients.

Lawyers adopt this role when a child has the "capacity" to provide "instructions". As in their dealings with other clients, lawyers should advise a child client about the risks and benefits of different options, and the likelihood that their position will be adopted by the court, but the ultimate decision about the position that the lawyer is to advance in either negotiations or court is determined by the child. The lawyer's conversations with the child are treated as confidential, and what the child has said is only disclosed with the child's permission.

A number of Canadian court decisions have emphasized the importance of the traditional instructional advocacy role, and suggested that the test for capacity to instruct counsel is not high. In 2002 in *M.F.* v. *J.L.*, the Québec Court of Appeal ruled that lawyers who represent children should adopt an advocate role whenever a child gives clear directions, even if the lawyer considers this contrary to the child's interests[81]. In *M.F.* a ten-year old boy told his lawyer that he did not want to see his father, but the lawyer retained a psychologist who interviewed the child and concluded that the child was being alienated and manipulated by his mother. The first lawyer appointed for the child communicated the child's wishes to the court but refused to take a position on the child's best interests, resulting in the trial judge ordering the appointment of new counsel to develop a position about the child's best interests. The mother successfully appealed the order for the appointment of a second lawyer, with the Court of Appeal ruling that a lawyer representing a child must follow the instructions of that child, even

80. *Re RMC*, [1980] 14 R.F.L. (2d) 21 (ON Prov. Ct.) ; J.J. Paetsch, L. Bertrand and J.-P.E. Boyd, *supra*, note 11, and N. Bala, R. Birnbaum and L. Bertrand, *supra*, note 11.

81. *F.(M.)* c. *L.(J.)*, [2002] R.J.Q. 676, 211 DLR (4th) 350 (QC C.A.), leave to appeal to S.C.C. dismissed without reasons at [2002] C.S.C.R. 218 (S.C.C).

in alienation cases. The Court held that counsel appointed to represent a child is expected to advocate for the child's wishes if the child has the "capacity […] to express wishes", with Rothman J.A. writing :

> […] if a child is sufficiently mature to express himself […], then he has the right to be heard on that question and the right to have his wishes fairly put in evidence before the court. If the child has the *capacity and the desire to express his wishes,* then that is a *fundamental right that must be respected by counsel who represents him*, whether or not counsel may have a different personal opinion on the matter[82].

In Alberta, the *Policy on the Role of Counsel* for the program of Legal Representation for Children and Youth (LRCY) has a presumption that lawyers for children in protection cases will adopt the role of an instructional advocate, also with a low standard for assessing capacity, giving as examples of cases where a child does not have capacity when a child is "preverbal ; [has] easily apparent low cognitive functioning, [or] mental impairment due to illness or intoxication[83]". Although the instructional advocate needs to advise the child about the likelihood that a position advocated will be accepted by the court, it is for the child to decide what position to take[84].

While there are clearly cases where an instructional advocate role is appropriate, there is considerable conceptual debate and practical challenge for lawyers in determining whether a child has "capacity", as the *Model Code* indicates that to instruct counsel, children must be able to understand the "reasonable consequences" of their decisions and positions adopted. The reality is that in many cases of parental disputes, children feel "caught in the middle" and are reluctant to be seen as "taking sides". Although in a significant portion of these separation cases a lawyer for a child can play an important "honest broker" and mediative role, attempting to effect a child-focused settlement, if the case gets to court there may not

82. *Id.*, par. 35 (emphasis added). A Quebec Bar Committee Report was cited and influential with the Court ; Barreau du Québec, *Mémoire sur la représentation des enfants par avocat*, Montréal, février 1995. For a translation of an earlier Consultation Paper in Quebec, see Quebec Bar Committee, "The Legal Representation of Children", (1996) 13 *Can. J. Fam. L.* 49.

83. Alberta, Office of the child and youth advocate, *Legal Representation for Children and Youth Policy Manual*, 2018, p. 69, [Online], [www.ocya.alberta.ca/wp-content/uploads/2014/08/PolMan_2018May_LRCY.pdf] (October 1st, 2018).

84. As Prov. J. Abella, (as she then was) wrote in *Re W*, [1980] 27 O.R. 314 (ON C.J.), par. 55 :
> In the case of a child who is capable of coherent expression the lawyer's role in representing the child's wishes does not preclude the lawyer from exploring with the child the merits or realities of the case, evaluating the practicalities of the child's position and even offering, where appropriate, suggestions about possible reasonable resolutions to the case.

be clear "instructions" to counsel about a "position". Indeed, for children caught between warring parents, having a lawyer who will take "a position" may increase parental pressure on the child to provide "instructions".

In some cases involving separated parents, children will express strong and consistent views, but are clearly aligned with one parent, and the central dispute between the parents will be whether this is due to parental alienation or justified estrangement from a parent who has been abusive, neglectful or otherwise provided a basis for the child's rejection of that parent. The Quebec case of *M.F.* v. *J.L.* is an example where rejection of a parent is the central issue. Children with capacity to communicate should "be heard" in all cases, for example through a Views of the Child Report, a judicial interview or an assessment ; however, in parental rejection cases, there are real questions about whether there should also be a lawyer appointed by the court and paid by the government to advocate based on the child's views. At least where parents are represented, evidence of the child's rejection of one parent will be introduced by one of the parents (and likely acknowledged by the other), or can be cost-effectively established by a mental health professional. We believe that in parental rejection cases, the objective of social spending should generally not be "advocacy" for the child ; the child's views should be ascertained and made known to the court and parents, but the focus of state provided mental health or social services should be to understand the reasons why the child is expressing those views, and then having an appropriate legal response, whether to protect a child who is realistically estranged or promote a relationship with a parent who has become alienated from the child by the other parent[85].

There are also developmental limitations for children giving "instructions" in a family case. While children, even young children, can have important insights and strong feelings that need to be taken into account in making decisions, for many cases they lack the capacity for abstract thinking and future planning that would allow them to give meaningful instructions, especially if a decision might involve a living arrangement that the child has not experienced, such as in a relocation case.

Despite the adoption of Law Society policies favoring an advocate's role (or perhaps because of this), there continue to be concerns expressed by judges about lawyers for children in this role, as illustrated by the 2011 decision of Kvill Prov. Ct. J. in *Alberta v. R.M*[86]. In this child protection case, the mother of three young boys had a history of living in violent

85. See Nicholas Bala and Patricia Hebert, "Children Resisting Contract : What's a Lawyer to Do ?", (2016) 36 *Can. Fam. L.Q.* 1.

86. *Alberta (Child, Youth and Family Enhancement Act, Director)* v. *R.M.*, 2011 ABPC 244.

relationships and of substance abuse, resulting in the apprehension of her children by the government agency. The mother had little contact with the children for their first months in care, and then ceased to visit. The mother told a child protection worker that she was going to live in another city, and she then "disappeared" without attending the trial. Judge Kvill commented that she was "troubled by […] counsel for these very young children advising [the court] that he was taking an 'instructional advocacy role' [in representing them][87]", and advocating for possible return to the care of their mother, as the oldest was just three and half years old. The lawyer apparently based his position on a report that the oldest child "seemed to have a very hard time understanding and accepting to be living away from […] his mother[88]" after apprehension. It was not clear that the lawyer had even seen any of the children, let alone talked to them in the period immediately before the trial and after they settled into their foster placements. The judge observed : "It is the role of counsel to not only advocate for the child's wishes but also, at a minimum, to present evidence regarding the child physical, intellectual and psychological maturity, the child's understanding of the facts and issues before the Court, the voluntariness of the child's stated desires and the strength of the child's wishes[89]". The judge concluded that while she understood that the three-year old boy loved his mother and wanted to return to her care, given the mother's profound problems and disappearance, this was not realistic ; the judge made permanent guardianship orders[90].

There are lawyers and scholars who argue that the only appropriate role for a lawyer appointed to represent a child who is expressing any views is to be an advocate, and that if a lawyer fails to adopt this role, the child is effectively silenced[91], though others recognize that children's capacity to appreciate the reasonable consequences of their decisions is key aspect of appropriate instructional advocacy for children[92].

87. *Id*., par. 91.
88. *Id*., par. 37.
89. *Id*., par. 131.
90. Alberta, Legal representation for children and youth, "Guidelines for the Role of Counsel", *Policy Manual*, 2011, states that while counsel for a child should normally take an instructional advocacy approach, counsel should also be "more than a mouthpiece" for the child and should introduce evidence to support the child's position.
91. In Canada, see e.g. D. Hensley, *supra*, note 79.
92. In *B.L.S. (Re)*, 2013 ABPC 132, Judge Cook-Stanhope argued that the counsel is to thoroughly assess whether (par. 279 and 280) :
    a) the child can *communicate* clearly with counsel (this would coincide with the ability to articulate a preference, opinion or position as contemplated in the *Guidelines*) ;

4.2.4 Ontario Policy on Role of Child's Counsel

Ontario has the largest and oldest program in Canada of child representation in family relationship cases, now operated by the Office of the Children's Lawyer (OCL), which has adopted its own unique policy on the role of child's counsel.

While the history of representation for the property interests of children in Ontario can be traced back into the nineteenth century, it was only in the 1970s that courts in that province began to appoint lawyers to represent children in family cases[93]. By 1981 there was significant controversy over the role that lawyers for children should adopt[94], and Ontario's Law Society established an Advisory Committee to provide direction for lawyers appointed to represent children. That Committee advised that lawyers for children should practice as traditional advocates as much as possible :

> […] if the child is mature and responsible enough to accept the consequences of his or her acts and decisions and understands fully the nature of the proceedings and can express a preference as to its resolution, the Committee tends to

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b) the child can *comprehend* all the information relative to any decisions the child must make (this requires an assessment of the child's mental capacity, especially when evidence calls that capacity into question) ;
c) the child is *aware of and capable of* appreciating the reasonably foreseeable consequences of making necessary decisions or failing to make these ; and
d) the child is *aware of and capable of* appreciating the nature, context and consequences of the legal proceedings that affect them and the impact they may have on the child.

She went on to opine that :

> When counsel undertakes to act on behalf of a child they must strive to achieve a balance which recognizes not only the ability of the child to articulate their wishes but also appreciates the child's developmental, social, or psychological immaturity or educational deficits and recognizes the child's historical social context. Whether or not counsel's role shifts from one of instructional advocacy to best interests, the Court's role will remain the same, that is adjudicating on all of the evidence to ensure the best interests of a child prevails.

93. *Re Reid and Reid*, [1975] 11 O.R. (2d) 622, 25 R.F.L. 209 (ON S.C.).
94. See *Re W*, *supra*, note 84, at 5 where Prov. J. Abella (as she then was) argued for lawyers to adopt an advocacy based role : "the lawyer for the child is no different from the role of the lawyer for any other party […] by […] and carrying out the client's instructions". Contrast that decision with *Re R.M.C. et al. (Infants)*, 1980 CanLII 1532 (ON C.J.) where Karswick Prov Ct. J. should bring forward the children's wishes and advocate their own professional view, supported by evidence, as to what decision would be in the best interests of the child.

> favour the traditional solicitor client approach rather than the guardian type representation[95].

Despite the views of the Law Society's Advisory Committee about the appropriate role for the lawyer for a child, in 1995 the OCL took a different approach in its *Policy Statement on the Role of Child's Counsel*[96]:

> Position on Behalf of the Child
>
> In taking a position on behalf of the child, child's counsel will ascertain the views and preferences of the child, if any, and will consider:
>
> a) the independence, strength, and consistency of the child's views and preferences,
>
> b) the circumstances surrounding the child's views and preferences, and
>
> c) all other relevant evidence about the child's interests.
>
> In a child protection proceeding, child's counsel may take a different position than the other parties, even where the parties all agree upon a position. However, in custody/access proceedings, child's counsel will not interfere with a settlement reached by the parties[97].

The Ontario *Policy* gives individual lawyers the flexibility to take account of the perspectives and preferences of children, and they may base their position on the children's views. However, the *Policy* avoids directing OCL lawyers to advocate for the child's "*best* interests", because it is the judge's role to determine this. Further, this *Policy* allows lawyers for children to advocate for a position based on the lawyer's assessment of the child's *interests*, a position that is not necessarily based on the child's views or instructions, and in some cases that directly contrary to the child's stated views. The taking of a position contrary to the views of a child, even an older child, may, for example occur in cases where a child is rejecting one parent and the OCL counsel concludes that there is alienation[98]; generally the OCL lawyer in such a case is taking a position based on an assessment undertaken by a clinician retained by the OCL. However, if this is the position of the mental health professional, and that professional prepares a

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95. *Report of the Subcommittee on the Representation of Children*, excerpted in Nicholas Bala, Heino Lilles and George Thomson, *Canadian Children's Law*, Toronto, Butterworths, 1982, p. 240.
96. Although Ontario lawyers are governed by the Law Society, the 1981 Committee report was only "advisory", and since lawyers who represent children are recruited, paid and supervised by the Office of the Children's Lawyer, they are effectively governed by the OCL Policy.
97. Ontario, Ministry of the attorney general, "Policy Statement on the Role of Child's Counsel", *Office of the Children's Lawyer*, 1995, last revised April 1st, 2006.
98. See e.g. *Proulx* v. *Proulx*, 2017 ONSC 5134.

report and testifies, there are questions about whether the involvement of a lawyer "for the child" at the trial in addition to the clinician is a socially useful expenditure or rather just adds to the length and complexity of the trial[99]. Children may have feelings of being disrespected if "their lawyer" is taking a directly contrary position to their wishes, and this raises the question of whether the child in this situation can dismiss "their counsel[100]".

Although Ontario's Law Society has not addressed the issue, the present *Policy* of the OCL on the Role of Counsel for the Child is inconsistent with the *Code of Conduct,* in that the *Policy* allows for representation who is not instructional, and actually allows counsel to advocate for a position contrary to the instructions of a capable child. The Ontario Office of the Children's Lawyer and the Law Society should try to have consistency in their approaches to child representation, which in our view should result in the Law Society amending the *Code* to recognize that a child's lawyer may have a non-instructional role.

4.3 Reconceptualizing the Role of Counsel for the Child

There are significant concerns about present approaches to the role of counsel for a child, as articulated in both the *Model Code* and the policies of agencies responsible for child representation in Canada. There also needs to be rethinking of when and why a lawyer for a child is involved in the case, as opposed to having some other method to ensure meaningful, cost-effective child participation ; that issue is addressed in later, in the concluding section of this article. Before that discussion, we explore the two-role model, that lawyers for children adopt the role of either "child's lawyer instructional advocate" or "child's rights and interests advocate".

A number of American states have a "two role" model of child representation, and the Alberta Office of the Child and Youth Advocacy has supported the recent distribution of a discussion paper written by Edmonton lawyer Anna Loparco, who favours this approach. Loparco proposes that a lawyer for a child should presumptively advocate based on the child's "wish, opinion, or position", but if that is not possible, the lawyer should advocate for the child's "interests and entitlements" (which is very similar to the "rights and interests" model discussed here)[101]. It would appear that the Alberta LRCY program is moving towards endorsement of

99. See e.g. *Eustace* v. *Eustace*, 2018 ONSC 2367.

100. See e.g. *C.R.* v. *Children's Aid Society of Hamilton*, [2004] 4 R.F.L. (6th) 98 (ON S.C.) ; and *Boukema* v. *Boukema*, *supra*, note 76.

101. Anna Loparco, "The Role of Children's Counsel : Where Do We Go From Here ?", [unpublished].

some form of a two role model. We submit that child representation agencies and legal regulators in all jurisdictions in Canada should be working towards adoption of this approach to child representation. However, as we explain, regardless of the role adopted, counsel appointed to represent a child should also have a duty to ensure that all relevant evidence about the child is available to the court making a decision about the child.

4.3.1 Child's Lawyer Instructional Advocacy

We submit that there should normally be a presumption of capacity, and where a child is expressing clear and consistent preferences, these should guide counsel for the child. That is, there should be a presumption of instructional advocacy, but with a modification to the role that would require the lawyer for the child should be satisfied that all significant evidence relevant to the child's interests is before the court and parents, subject to concerns about child confidentiality.

The standard for assessing capacity of a child should not be set high, or few children will meet it. A child only needs to have a basic understanding of the main issues involved, and to express preferences about the desired outcome. While the determination of capacity should not be aged based but developmental and contextual, most children in the range of 8 to 10 years are likely to have *capacity* to instruct counsel in family cases. However, in many family cases, especially those involving high conflict, children with capacity may be unwilling to fully express their views, even to their lawyer, for fear of angering or appearing to reject one parent.

Counsel for the child will need to communicate in developmentally appropriate terms, and even more than with adult clients, will need to provide information and advice to allow their child clients to understand their situation and articulate a position. It is to be expected that it may take several meetings with counsel for children to be able to understand their situation and provide instructions. In some cases, the child will not be consistent or will be reluctant to express any position to the child, and it may be appropriate for the lawyer, after becoming familiar with the child and context, to assess the child's interests and suggest a position, asking the child to consent to the lawyer advocating those interests on his or her behalf. However, lawyers must be careful not to impose their own values and perceptions on their child clients and ultimate responsibility for determining a position rests with the child, and the child's lawyer should present evidence and argument for that position. If no position is articulated by the child, the lawyer should take a rights and interests approach, as discussed below.

Once the child has had an opportunity to consider his or her situation and has given instructions, the lawyer for a child has a responsibility to ensure that the parties and court are aware of the child's views and preferences, provided that the child agrees to this information being shared. Even with young children, lawyers should discuss issues related to confidentiality with their child clients (in age appropriate language), and ensure that a child agrees to the sharing of information, unless there is a risk of serious harm that requires a report to child protection authorities. If a case is going to be contested at a hearing, the lawyer will need to ensure that there is admissible evidence of the child's views, or obtain the consent of the parties for counsel for the child to report this to the court. Lawyers for children should also be discussing with their clients how information will be shared with parents and the court, including the question of whether the child would like to meet the judge, if this is possible in the jurisdiction. If the lawyer is adopting an instructional advocacy approach, this should be made clear to the parties and court.

In many cases, counsel for a child taking an instructional approach may be uniquely placed to help arrange a settlement that is consistent with the child's preferences. Indeed, in our view, often the most useful role that an advocate for a child will play is to facilitate settlement.

Sometimes in an adversarial family hearing there may be important evidence about the child or parents that is not introduced, or not fully introduced, by the lawyers for the parties. The lack of complete evidence is especially likely to be a concern if one or more parties are not represented, which is increasingly the case in Canada ; indeed, one reason for a court to appoint counsel for a child may be a lack of representation for one or both parents, with the hope or expectation that the lawyer for the child will ensure that the parents, or court, has sufficient evidence to appropriately resolve the case.

Lawyers for adult clients do not have an obligation to the court introduce evidence that does not support their client's position ; indeed, their obligations as partisan advocates for their clients may preclude their introducing evidence contrary to their client's position[102]. However, in our view, an important aspect of the role of the Child's Lawyer Instructional Advocate is that, unlike a lawyer for an adult client, the lawyer for the child

102. In another article we discuss the ethical duties of lawyers for parents towards the children or their adult clients ; while we have a child-focused view of the duty of lawyers for parents, it is a reality that many lawyers for parents feel constrained by instructions of their clients in deciding what evidence to introduce. See N. Bala, P. Hebert and R. Birnbaum, *supra*, note 13.

should be satisfied that all significant evidence relevant to the child's interests is before the court in a contested hearing, except information disclosed by the child to the lawyer that a child wants to remain confidential. This added responsibility reflects the interests at stake in such proceedings and recognizes that the lawyer is appointed *by the court* to represent a vulnerable person who is affected by the proceedings, but who is generally not a party. This obligation is not dissimilar to duty of the Crown prosecutor in a criminal trial to ensure that all relevant evidence is placed before the court, whether or not it supports the Crown's case[103].

The expectations for ensuring that all significant evidence is before the court does not derogate from the duty of the Child's Lawyer Instructional Advocate to argue for the position based on the child instructions.

The balancing of these duties may be especially challenging in cases where a child, perhaps a teenager, is rejecting a relationship with one parent, and the lawyer is concerned that this is due to alienation by the favoured parent. The lawyer may consider that the child's views are clear and consistent, but not truly independent ; the lawyer may also be concerned that the outcome desired by the child, total rejection of one parent and contact only with a favoured parent who may have significant mental health issues, may pose a significant risk to the child's long-term well-being. In these cases, a Child's Lawyer Instructional Advocate should also ensure that evidence of alienation and its effects is before the court, probably introduced through a mental health professional who has interviewed the child and can testify about issues related to alienation.

If children have the capacity to understand their situation but seem to be unreasonably rejecting one parent due to the alienating influences of the other, after ensuring that all evidence will be before the court, the child's lawyer should seriously consider seeking to withdraw from the case[104] ; however, as long as counsel for a child in involved, if the child is giving clear and consistent instructions, those instructions should guide *the advocacy* position of counsel. Further, if one or both parents are unrepresented, withdrawal of child's counsel, especially in a high conflict case, is unlikely to be in the child's interests.

103. *Boucher* v. *The Queen*, [1955] S.C.R. 16 ; *Nelles* v. *Ontario*, [1989] 2 S.C.R. 170.

104. *B (M)* v. *B (P)*, 2018 NWTSC 28 where the OCL was granted leave to withdraw from a case involving alienation issues, and suggested that some other method than legal representation, such as a judicial interview or assessment, could be used to bring the children's views before the court.

4.3.2 Non-Instructional Role : Child's Rights and Interests Advocate

The role of "advocate for the rights and interests" of a child combines some of the features of the *amicus curiae* and best interests guardian roles that were discussed above. The lawyer in this role is not to advocate for the child's *best* interests, as lawyers lack the training and education to assess the child's best interests. However, unlike the *amicus curiae,* the lawyer who is advocating for the child's "rights and interests" should not disclose confidential information received from a child.

Adoption of this role will be appropriate for cases where children are unable or unwilling to give instructions. This role may also be appropriate for cases where a child is expressing some preferences, but appointed counsel believes that the child lacks capacity, or is not able to appreciate the reasonable consequences of their preferences, or that implementation of this preference would expose the child to risk of harm.

Lawyers who adopt this role will meet the child, usually a number of times, as well as interviewing the parents and other persons significant to the child. The lawyer will provide the court with information on legal and factual issues. The lawyer adopting this role should ensure that evidence of a child's perspectives is before the court, even if the child lacks capacity or is unwilling to give clear instructions. This information providing role will be especially important for cases where one or more of the parties lack the resources to properly ensure that relevant evidence is obtained and presented in court. However, in providing information to the court, the lawyer should respect the child's wishes about confidentiality, in particular about disclosures that will be shared with parents, unless there is a disclosure from the child that would require reporting of child abuse in the jurisdiction.

The lawyer adopting this role should advocate to ensure the protection of the child's rights and interests, as articulated by relevant legislation and case law, as well as treaties and the *Charter or Rights.* This will normally include advocacy to support the child's relationship to family, culture and community, especially in child protection cases. However, lawyers adopting this role must appreciate that they are not advocating for an outcome based on their subjective opinions of what may be in the best interests of a child. Often this will limit the extent to which lawyers can make arguments about appropriate court decisions. In many cases, the lawyer in this role may take a lead in attempting to achieve a negotiated resolution that is consistent with the child's interests, recognizing that a settlement is often in the interests of children, especially in cases involving disputes between parents. Further, if the child has capacity but is unwilling to "take a position", perhaps because of fear of hurting one of the parents,

the lawyer for the child should ask whether the child would like to meet the judge, accompanied by the lawyer, if this is possible in the jurisdiction, and the lawyer should attempt to arrange this.

5 Moving Forward on Children's Participation

Judges and lawyers face real challenges when dealing with children's participation in legal proceedings involving family relationships. While this paper has discussed discrete topics, there is an inextricable intertwining of issues related to the different ways of allowing for children to participate in the family justice process, the institutional structures for provision of government funded advocacy services for children, and policies and professional rules related to the role of child's counsel. Although we are advocating systemic change to address each of these issues, individual lawyers and judges must engage with the existing laws, policies and agencies in their jurisdiction.

We have advocated that governments should establish programs that provide a flexible, comprehensive, adequately resourced range of services and approaches to children's participation in the family justice process, including judicial interviews, views of the child reports, clinical assessments by mental health professionals, child inclusive mediation and child legal representation. In many cases, there only needs to be one method of child involvement, but other cases might require a number of methods of ensuring child participation at different stages of the process. Although there are costs for governments in having this type of comprehensive institutional structure, it would result in more settlements and ultimately save court resources and legal aid costs, as well as promoting children's well-being. No jurisdiction in Canada has fully adopted this type of comprehensive service model, but there is clearly movement in this direction.

As jurisdictions expand their range of services, there needs to be consideration of what type of cases most need child legal representation. Government resources are limited, and there needs be "right sizing" of the most cost effective services. Some of the factors to be considered in deciding whether to involvement of a lawyer for the child include[105]:

— The age and maturity of the child;

— The child's views about a lawyer's involvement in the case, taking account of the fact that if alienation is an issue and the child's view are known, appointment of counsel for the child may be less appropriate;

105. A frequently cited case on the factors to be taken into account in ordering child representation in the Australian decision in *Re K*, [1994] FLC 92-461.

— Whether the case involves higher conflict and there are good prospects that a lawyer for the child might be able to help settle the case ;

— Whether one or both parents are self-represented, making involvement of a lawyer acting for the child more important ; this factor is especially important if (as proposed above), the lawyer has a responsibility, regardless of role adopted, to ensure that all relevant significant evidence is before the court ;

— Whether there are safety issues that may not be adequately addressed without counsel for the child ;

— Whether the case involves issues of legal principle ; this may be most obvious if the case is under appeal[106] ; and

— Whether the state as a party, most obviously in child protection case, but also in *Hague Child Abduction* cases.

At present, when individual judges or other agencies are making a decision about whether to have a lawyer for a child in a family relationship case, these factors will be important, but the reality is that account must also be taken of the institutional constraints and other resources available. In some jurisdictions counsel for a child may be the only available resource ; even if in theory some other method of ensuring child participation might be preferable, such as having a social worker undertake an assessment, an order for the appointment of counsel may be the most appropriate decision a judge can make. Conversely, in other Canadian jurisdictions, there are cases where a child would clearly benefit from having a lawyer advise and advocate for the child, but this is not possible as an option for the court, and judge may only be able to order preparation of a social work assessment, and perhaps not even that.

While we support the adoption of clearer, more realistic guidelines for the role of counsel for children, at present decisions about whether to appoint counsel for a child will have to take account of the actual role that a lawyer in the jurisdiction is likely to play. We appreciate that those involved in making decisions about children's participation under their current regime, whether on a systemic or individual case level, are faced with resource, policy and legal constraints. This does not mean, however, that even within existing constraints more cannot be done to allow children

106. There have been a number of recent cases in Ontario where the Children's Lawyer has only been involved at the appeal stage, but has had a significant impact on the final outcome : see e.g. *Ojeikere* v. *Ojeikere*, 2018 ONCA 372 ; and *Office of the Children's Lawyer* v. *Balev*, 2018 SCC 16.

to participate in a safe, meaningful way in processes that will profoundly affect their lives.

In this article we have proposed some rethinking of the role of lawyers for children in Canada, and more broadly for addressing the issue of how children should participate in the family justice process. While there is an urgent need for action by governments and other agencies, there also needs to be empirical research into "what works" for which children and families, and why. More research will allow further development and refinement of programs and policies for ensuring children's participation in family relationship cases, as well help in providing better education and guidance for professionals doing this type of work. However, even without additional research, the basic directions needed for reform are already clear.