Best Interests of the Child: Meaning and Application in Canada

Dedication

This year, 2009, we celebrate the 20th Anniversary of the *Convention on the Rights of the Child*. It is an opportunity to reflect on progress and challenges in implementation. This report on the *Best Interests of the Child*, one of the core principles in the Convention, is a contribution for such reflection. It is the outcome of a multi-disciplinary conference that considered the concept in general and its application for many areas in the lives of children in Canada. The conference was held at the University of Toronto, Faculty of Law, on February 27-28, 2009.

We hope this report stimulates both action and reflection on a rights-based approach to the concept of the *Best Interests of the Child*, rooted in the Convention as a whole. Our goal is improved application of both the principle and the Convention more broadly, for the benefit of children across Canada. We dedicate our efforts to all children in Canada.

Organizing Committee:

Kathy Vandergrift, Canadian Coalition for the Rights of Children
Cheryl Milne, David Asper Center for Constitutional Rights, University of Toronto
Carol Rogerson, Faculty of Law, University of Toronto
Lisa Wolff, UNICEF Canada
Nadja Pollaert, International Bureau for Children's Rights
Emily Chan, Justice for Children and Youth

Acknowledgements

The organizers thank the sponsoring agencies for contributions of time, expertise, and financial support throughout the long process from concept to conference to report:

Canadian Coalition for the Rights of Children
UNICEF Canada
Justice for Children and Youth
Faculty of Law, University of Toronto
David Asper Center for Constitutional Rights, University of Toronto

Thank you to the many volunteers who generously contributed their expertise and time. These contributions demonstrate the strength of the community dedicated to improving realization of the rights of children. Special thanks go to **Kathy Vandergrift** for consolidating the work of many into one report.

Thank you to **Alana Kapell** for assistance in organizing the conference and to **Catherine Mareschal** for doing more than translation to make the report a useful document.

The organizers express appreciation for financial support from the following agencies to make this possible:

Canadian Heritage, Human Rights Program
Justice Canada
Faculty of Law, University of Toronto
Canadian Heritage, Official Languages Support Program

Cover photos courtesy UNICEF

Table of Contents

Best Interests for All Children

Introduction

"Children are persons too!" This observation, made during the conference on the Best Interests of the Child, captures the most important reason for taking its outcomes seriously. Children, defined as everyone under the age of 18, are fully persons, equal in value and deserving of as much respect as adults, defined as everyone over the age of 18. Children are no longer considered future persons, objects of charity, or the property of families – all of which were dominant approaches to children in history. While Canada officially recognizes that children are persons with rights, the conference concluded that many of our public policies and programs need updating to implement the Convention on the Rights of the Child, which Canada adopted twenty years ago.

Age and stage of development distinguish children from adults, leaving children more vulnerable and dependent on adults. This gives rise to special protections for children's rights in law and public policy, justified limitations on their freedom, and correlative obligations by adults to provide support and a conducive context for the full development of children. This concept is captured in the principle of the Best Interests of the Child, one of four core principles in the Convention on the Rights of the Child. What the principle means and how it should be applied in Canada is the focus of this report. It results from a two-day, multi-disciplinary conference on The Best Interests of the Child: Its Meaning and Application in Canada, held at the University of Toronto, Faculty of Law, on February 27-28, 2009.

The goal of this report is better understanding of the principle of the Best Interests of the Child and more effective application in Canada. It is part of the larger goal to achieve full implementation of the Convention on the Rights of the Child. It draws on the expertise and experience of the many presenters at the conference (see Appendix A for a full list of presenters) and it reflects the discussion of key issues, good practices, and suggestions by all participants (see Appendix B for the Conference Discussion Paper).

It captures major themes and suggestions for use in on-going reflection and development. It does not pretend to be an exhaustive analysis of all the issues involved or a complete record of the conference proceedings. It hopes to share knowledge, stimulate further learning, and encourage improvements in policy and practice at all levels across Canada, for the benefit of Canada's children.

The Best Interests of the Child

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (Convention on the Rights of the Child, Article 3.1)*

The Best Interests of the Child (hereafter BIC) is one of the basic principles of the Convention on the Rights of the Child (hereafter Convention). Effective application of it is key for improving implementation of the Convention in Canada. While the principle was applied in some areas of domestic law prior to the Convention, e.g. custody and access determinations, it is now applicable to all policies and practices that affect children individually and as a group.

Public understanding and application of the BIC has evolved over time and will continue to do so. It will be influenced by social science research on child development, the increasing participation of young people in public life, and political and legal developments at all levels of government. How it is understood and applied has significant implications for children in Canada, either positive or negative.

The principle, stated in Article 3, is also referenced in seven other articles, dealing with a wide range of matters in the lives of children:

- In Article 9, BIC is the only reason for separation from parents (Article 9.1) and the only reason for denial of contact with a non-custodial parent (Article 9.3).
- Article 18, one of the articles on parental responsibility, states that "the best interests of the child will be their basic concern."
- Article 20 links the BIC with the right to cultural identity by explicitly stating that the BIC for wards of the state includes "due regard" for "the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."
- Article 21 makes the BIC the paramount principle for adoption.
- Articles 37 and 40 use the BIC as a threshold factor within criminal justice. Article 37 says children should be detained separately from adults unless it is in their best interests to be together.
- Article 40 guarantees children's right to a fair trial, unless that is not in their best interest by reason of age or circumstance.

The Convention is indivisible and its articles interdependent. Application of the BIC is expected to influence the interpretation and application of all Convention articles and to interact with the other principles, notably the rights to non-discrimination, survival, and respect for the child's views (Articles 2, 6 and 12).

Canada and the Best Interests of the Child

In 2003 the UN Committee on the Rights of the Child asked Canada to review and improve application of the BIC in Canada. This resulted from Canada's second report on implementation of the Convention. In 2009 Canada will present its next report and we will celebrate the 20th Anniversary of the Convention. The issues highlighted in the 2003 recommendation need to be addressed in Canada:

> *"The Committee values that the State party upholds the principle of the best interest of the child to be of vital importance in the development of all legislation, programs and policies concerning children, and is aware of the progress made in this respect. However, the Committee remains concerned that the principle that primary consideration should be given to the best interest of the child is still not adequately defined and reflected in some legislation, court decisions, and policies affecting certain children, especially those facing situations of divorce, custody and deportation, as well as Aboriginal children. Furthermore the Committee is concerned that there is insufficient research and training for professionals in this respect."*
>
> **The Committee recommends that the principle of "best interests of the child" contained in article 3 be appropriately analyzed and objectively implemented with regard to individuals and groups of children in various situations (e.g. Aboriginal children) and integrated in all reviews of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions and in projects, programmes and services that have an impact on children. The Committee encourages the State party to ensure that research and educational programmes for professionals dealing with children are reinforced and that article 3 of the Convention is fully understood, and that this principle is effectively implemented."** (Concluding Observations of the Committee on the Rights of the Child: Canada, CRC/C/15/Add.215, 3 October 2003, paragraphs 24 and 25.)

The concept for the conference was developed by the Canadian Coalition for the Rights of Children and its partners, UNICEF Canada, Justice for Children and Youth, and the University of Toronto Law Faculty, as a civil society response to this recommendation. It was designed to foster inter-disciplinary dialogue on the understanding and implementation of the BIC. The suggestions in this report propose continuing steps toward improved implementation of the BIC in Canada.

Rights-based Approach to Best Interests

The first and most important value of the BIC is to remind adults that children are important, that their interests are different from those of adults, and that adults need to consider the impact of their decisions for children as a top priority.

The Convention on the Rights of the Child is an important milestone in the long history of approaches to childhood. Once considered of no value, children were treated as the property of their fathers for many generations. Later, the child-saving movement increased protection for vulnerable children, e.g. child labour laws, and the "tender years" doctrine drew attention to the bond of attachment between children and their mothers. The Convention put children at the center and established a rights-based approach to interpretation of the BIC. The other provisions of the Convention provide content for the BIC in particular areas of children's lives, and the BIC in turn helps to resolve tensions between different factors that impact the lives of children.

The amorphous nature of the BIC is both a source of strength and weakness. Its subjectivity allows it to be responsive to the situation of an individual child and to evolving knowledge about child development. Conference participants were encouraged to seriously consider the impact of new scientific knowledge about brain development and about the influence of environmental factors on child development for our understanding of what is in the best interests of children.

However, the vagueness and lack of precise definition of the BIC can allow manipulation by those with power to decide and impose what they think is in the best interests of children. Canadians will never forget that the BIC was used at one time to justify

taking Aboriginal children from their parents and placing them in residential schools. Long after official apology and financial compensation, Aboriginal communities continue to struggle with the impacts of a misguided use of the BIC, one that was done without any consideration for the rights of the children involved. A later chapter on Aboriginal children will consider current policy issues, using a rights-based approach to BIC.

For individual children, a frequently cited example is the negative impact of the current adversarial approach to resolving custody and access disputes for children, even though the BIC is supposed to be the central concern. Parents in divorce cases often justify their own interests by using the language of the BIC. Arguments over the BIC in custody and access cases often fail to include the voices of children. Processes to determine the BIC have spawned an expensive industry of professionals who impose their own views of the BIC, with children at the mercy of whoever has the most power and influence to impose their will on children.

Suggestions for improvement include replacing adversarial approaches with collaborative processes and/or ensuring that, in cases where parents have lawyers, children have their own lawyer to defend their interests through a client-lawyer relationship.

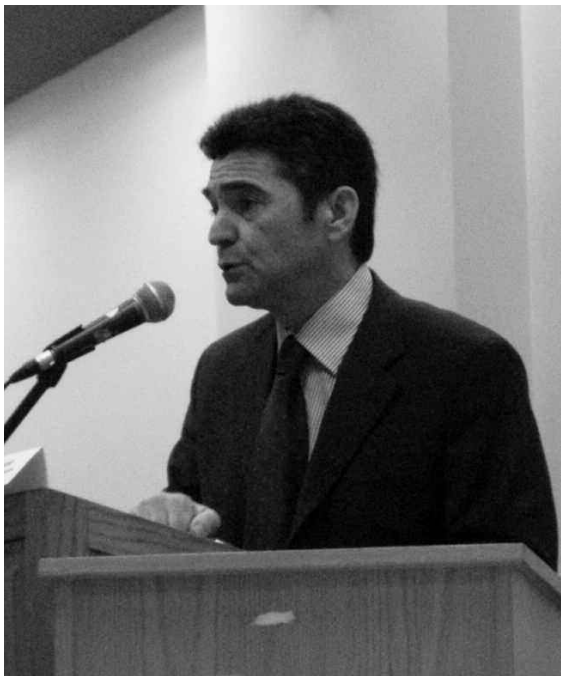
Under the Youth Criminal Justice Act, section 19 allows a judge to call a conference with the young person, to give them a voice and to consider the best interests of the young person in a more holistic way.

Systemic Approach to Best Interests

The conference highlighted the importance of a preventive use of the BIC at the systemic level to improve circumstances for children as a group and provide equal opportunity for vulnerable groups of children. Keynote speaker Mary Ellen Turpel-Lafond presented a compelling case for shifting from an atomistic approach focused on the best interests of a particular child to consider the best interests of children in relation to their context. This can be done through systematic and structural analysis of the situation of children and then using public policy tools to improve the life chances for all children and particular groups of children.

The key question then is what conditions provide optimal circumstances for the development of children, using analysis of data on the outcomes for children as the evidentiary basis for policy formation. Research on the social determinants of health, for example, provides evidence of the correlation between socio-economic

factors and health outcomes for children. A recent report, *Kids, Crime, and Care,* in British Columbia illustrates the use of a rights-based analysis of outcome data to understand the factors that impact children's development. Evidence-based indicators can be used for the development of preventive social policy options that would be in the interests of children. On the government side, British Columbia has adopted a common framework for children, entitled *Strong, Safe, and Supported*. It is based on the Convention and will be used to integrate the work of every department in relation to children. In workshop sessions, other examples were cited, both for negative impacts of policy decisions for children and positive potential to improve the situation for groups of children in Canada.



Used in this way, the BIC has potential to contribute to greater public understanding of child development and to galvanize public support for policy changes and the provision of public services that provide equal opportunity for all children in Canada.

Action

Canada's commitment to the Best Interests of the Child needs to go beyond the courtroom and individual cases into public policy formation, prevention, and public education.

Conference discussions suggest that we will have more effective outcomes for Canada's children if we take this broader approach. The development of a common framework for positive outcomes for children was identified as a useful tool for more mature analysis of both individual and collective application of the best interests principle. There is a national vacuum in Canada with regard to outcome measures for children that could be used to help in analysis of how well children are doing. A common outcomes framework would help to: gather and analyze evidence about the situation of children across Canada; identify policy options and priorities that would be in the best interests of children; and monitor progress in implementation.

Using the BIC and the Convention on the Rights of the Child to assess the impacts of public policies for children is another step with potential for positive impact in the lives of children. Many public policy decisions that are not specifically for children have tremendous impact for the lives of children, but these impacts are not systematically examined or publicly discussed. Taxation was mentioned repeatedly as one of these. In some cases, legislation designed for children yields unintended negative consequences that could have been avoided with a thorough child impact assessment (e.g. recent amendments to the Citizenship Act that affect inter-country adoption).

Action

Establishing a federal Children's Commissioner with a mandate to bring children's voices and perspectives into national public policy formation would provide a mechanism to highlight impacts for children that are now largely ignored.

The use of outcome measures is particularly important for monitoring progress in the realization of children's rights. Canada's current approach reports on institutional policies and programs, which may be useful for evaluating institutions, but it does little to help the public and government agencies understand and advance the best interests of children in Canada. The new initiative adopted by the government of British Columbia to integrate its policies and programs for children within a framework based on children's rights holds promise as a model for others. It is too early to assess implementation, which may provide further lessons for continuing improvement.

The conference heard about examples where provincial children's advocates have documented the impact of current policies, recommended changes, and achieved results. In New Brunswick, for example, documentation of the situation of youth at risk in the province, in a report entitled *Connecting the Dots*, highlighted gaps and lack of coordination in services that harmed children. In response, steps have been taken toward integrated service delivery. As stated by Bernard Richard, the New Brunswick Child and Youth Advocate, "we are data-rich and information-poor because we do not analyze the data to understand real outcomes for children and then measure progress in terms of those outcomes."

Action

Applying the BIC in the policy formation process at all levels of government in Canada is a first step; then regular monitoring and public reporting of impacts through analysis of the actual outcomes for children could result in significant improvements for the daily lives of children.

Vulnerable Groups are a Top Priority

A rights-based approach to the BIC includes providing equal opportunity for every child to develop his or her potential. As Keynote Speaker Mary Ellen Turpel-Lafond expressed it, the "accident of birth" alone should not determine the outcome for children in vulnerable groups. Children do not start in the same place, but different development opportunities can help to reduce the gap between those who are born into privileged circumstances and those who, through no choice of their own, start out in less fortunate circumstances. An adolescent without any adult support, for example, has very different chances for success, compared to other children. Social policies that can help to level the playing field for such children are in the best interests of children and Canada as a country.

Several vulnerable groups of children in Canada were named for further attention in the second review of Canada's implementation of the Convention on the Rights of the Child. Similar groups were mentioned during the Best Interests Conference as needing focused attention:

- Children living outside the parental home,
- Children living in poverty,
- Children living independently before the age of maturity,

- Children and youth with special needs, including mental health concerns,
- Aboriginal children, and
- Children in refugee families and recent immigrant families.

In the case of vulnerable groups, the BIC needs to be approached on a collective basis in public policy and also on an individual basis in case management. Social inclusion and closing gaps between vulnerable groups and other children require focused attention. For Aboriginal children, the recent General Comment on the Rights of Indigenous Children, adopted by the UN Committee on the Rights of the Child, provides useful guidance on combining respect for cultural and collective rights of Aboriginal children and the individual best interests of each child within the group.

Action

For Canada, federal and provincial strategies to protect and promote the best interests of children in vulnerable groups should be a high priority.

Children's Voice and Best Interests

"People need to really listen to kids."
"Young people look to adults for guidance, but want to make decisions for themselves."
"Young people can make good decisions if they have enough, correct information."

These statements by young people reflect the importance of active participation in any process to determine what is in the best interests of a child or children as a group.

Article 3 of the Convention, the BIC, and Article 12, the Right to Participate, are complementary and need to be implemented together. The BIC includes age-appropriate participation by children in making decisions that affect them. Several speakers highlighted examples of practical suggestions for improvements in programs that came from young people, when they were given the opportunity to have a voice in the systems designed to help them. Having a voice does not mean making final decisions; but it does mean serious consideration is given to the views of children.

The challenge is building both Articles 3 and 12 into the systems that affect the lives of children. The conference learned through experience that creating an enabling context for youth participation requires changes in typically adult ways of working and making decisions. Systemic changes that effectively incorporate children's voices will be far-reaching. They will include measures such as mandatory requirements to consider the views of children in legislation and legal processes that affect children; more consideration of the views of children and less adversarial approaches to custody proceedings; and legal representation for children in lawsuits that have an impact on their best interest. At the policy level, expansion of the work being done by provincial children's advocates to give children a voice would benefit from establishment of a national children's advocate with a mandate to facilitate similar youth participation in national policy decisions that have major impacts for children across Canada.

Action

Listening to children's voices needs to become an essential part of any process to determine the BIC in Canada, through systematic incorporation of both Articles 3 and 12 of the Convention into all policy formation and legal systems that affect children.

Capability or Age?

In every session and workshop, questions were raised about the rationale for some of the current age-based policies for young people and the lack of consistency between different policies. It was noted that our society sends very mixed messages to adolescents; on the one hand, they are courted at a young age as fully capable consumers by advertising and marketing messages; they can be employed and manage bank accounts at 16; and they exercise public voice and influence through electronic forums. On the other hand, they are not considered capable of taking responsibility for decisions such as missing a class in high school, for which they need parental permission; they have no voice in public affairs; and they cannot vote. In some provinces, young people can be married at 16 without parental consent, but they need parental signatures on school forms until they are 18. 16 and 17 year-olds are considered competent enough to be soldiers, sell goods, be responsible if they commit a crime, and leave home. But they are not considered competent to manage child support payments if they live on their own and they are not eligible for social assistance. Young people noted, as another example, that some girls are now already menstruating before the age at which most schools teach basic facts about the reproductive system. Lowering the age for teaching sex education was suggested as essential to give young

people necessary knowledge before they are faced with choices that have major impacts on their future options, such as early pregnancies.

The transition from making decisions for children to providing information and supporting adolescents to make decisions for themselves happens gradually, but at a younger age than reflected in some policies that affect children's lives. In general, it was suggested that adolescents today have access to more information and increasing capability to make decisions, with adult advice and support. At the same time, they are not well informed about their rights and responsibilities.

Graduated approaches, such as the current laws regarding the age for driving in Ontario, were cited as good practices. Young people highlighted that participating in decision-making at school or in the community is an effective way to learn decision-making and citizenship skills. Young people expressed the view that voting at age 16 made more sense to them than 18. At the same time, there are good reasons to differentiate between adolescents and adults and protect the space before age 18 as a time of experimentation and maturation.

Age as a proxy for competence is questioned at different levels. In a thought-provoking panel, conference participants were challenged to provide scientific

Challenging the Concept of Best Interests of the Child

The following six questions were presented to stimulate critical thinking about the basic concept of the best interests of the child.

1 Would you be satisfied if your rights or capacity to participate in your community was a function of your best interests as decided by others?

2 Are all persons under 18 so incompetent, or significantly more so than all persons over eighteen, that others need to determine their best interests? If so, what is the scientific evidence for that?

3 If you answer "no" to questions one and two, ask yourself what is the effect of intellectual dishonesty for an entire constituency of earnest learners in our community? How can we explain to 16 and 17 year olds the inconsistencies in what they may decide for themselves and what is determined by others in their best interests under current Canadian policy? What good is protection of their rights under the Convention on the Rights of the Child, if it has no teeth in Canada?

4 Are the answers to these questions relevant to the fact that 16 and 17 year-olds, as they see it, are viewed as competent persons only when they (a) are alleged to have committed a crime (b) become a soldier, (c) enter the market as a selling agent of something or their bodies, or (d) are freak athletes or entertainers.

5 What would happen if we abolished the term "best interests of the child," and we had to struggle with creating a specific code of rights for those under 18 years in Canadian law?

6 How much money is earned by keeping alive the doctrine of best interests of the child? How many jobs are maintained by a doctrine that assumes all persons under 18 to be incompetent or unemployable?

Jeffrey Wilson

evidence to substantiate that under-18s are less competent decision-makers than over-18s. Restrictions placed on under-18s that over-18s would not accept for themselves need to be justified and be consistent, in order to maintain respect for the law.

As young people participate more fully, there is likely to be a more gradual process in the transfer of decision-making, with less focus on a particular age and more focus on other indicators of competency. Increasing participation and listening to the voices of children, argue some, may be the best way to respond to the concerns about age-based competency measures.

Action

A review of age-based legislation relating to young people at both federal and provincial levels could lead to clear rationales, greater consistency between different age-based policies, and more participation of young people in making decisions that affect them. The Convention on the Rights of the Child could provide a framework for balancing adult roles to provide information and support to help young people make good decisions and necessary restrictions to protect young people from harm.

Best Interests and Other Interests

The BIC is "a" primary consideration in the Convention, but not the only one. The Convention recognizes that parents are the primary caregivers for children and, as a consequence, deserve respect and support. The Convention also recognizes the importance of religion and culture for healthy child development and includes respect for different cultures and religious freedom. The conference considered how these various interests relate to each other, how tensions between them can be resolved, and how they can be applied in complementary rather than conflicting ways.

Within the Convention, parental rights are best understood as fiduciary rights, a different kind of rights than inherent rights that belong to each person by reason of being human. Parents are entrusted with the care of children and the responsibility to promote and protect the best interests of children. That gives parents a wide scope of freedom to make choices in relation to child-rearing, but it

is always subject to the principle of the BIC. While there is not a fundamental conflict between parental rights and the rights of children, there are tensions between them, often resulting from different perspectives on what is in the best interests of children.

In general, this understanding of the relationship between the rights of parents and the rights of children is upheld in Canadian law and Supreme Court decisions. There is a lack of consistency in individual decisions and need for clarification in various pieces of legislation, policies, and practice. More public education for both parents and children is needed to understand the Convention on the Rights of the Child and develop non-adversarial ways to resolve tensions that develop between parents and children over what is in their best interests.

Tensions between the rights of children, religious freedom, and respect for cultural diversity are of growing importance for implementation of the BIC in Canada. The Convention takes a nuanced approach to both religious freedom and cultural diversity, balancing the rights of children to develop and express their own beliefs and values with respect for cultural diversity and guidance by parents in these areas. In practice, it is a delicate balance and one that governments need to consider. (See also workshop report on Cultural Diversity.)

The conference heard evidence of a wide range of areas where religious practices in Canada threaten the realization of provisions within the Convention that amplify the BIC. In the case of health, evidence indicates that at least 300 children have died in Canada as a result of religious beliefs about medical interventions, when

their lives could have been saved through medical intervention. One child has died of exorcism, while many more have suffered physical violence through exorcisms, which contradicts provisions that prohibit violence against children. Early marriage and female circumcision continue to be issues among recent immigrant families, some of whom send their girl children to other countries for such practices. Religious rituals involving children can include sexual and psychological abuse of children, contravening articles 19, 34, and 36 of the Convention. Early marriage and sexual abuse of under-age girls have been identified in communities that practice polygamy as a religious belief. Isolation of children within religious societies and sects is not as widely discussed, but it significantly hampers their future options.

Two patterns characterize situations that result in tension between the BIC and religious practices. One is that religious practices either ignore or are given priority over any consideration of the child's interest. This is the case in forced marriages against the wishes of young people or in cases where parents fear their children are becoming too "Canadian" and use coercion to assert traditional values. A more common approach by religious groups is to impose their own view of what is in the best interests of children, according to their own worldview. This is often based on an assertion that spiritual salvation is more important and requires obedience to laws that run counter to the Convention, e.g. refusal of blood transfusions. Religious beliefs are used to justify actions that run counter to the provisions in the Convention.

Two options for dealing with these tensions were discussed. One is through laws that establish limits for expression of freedom of religion. This approach tries to solve the problem at the level of consequences without addressing the source of the tensions.

A second, preventive approach is dialogue between governments who are responsible for implementation of the Convention and religious leaders. The goal of such dialogue would be increased understanding of the BIC, identification of ways in which it can be accommodated within different religions, and modifications or substitutions for practices that are harmful for children. Community-based education about the rights of children that is sensitive to different religions and cultural traditions can also create opportunities for young people and their parents to discuss the tensions in a respectful way. Respectful and responsible public discussion of Article 14, which protects the religious freedom of young people, with guidance from parents, could also identify non-adversarial ways to resolve conflicts when they arise.

Action

Increased public education about the rights of children should include discussions about how parental rights complement the rights of children and dialogue with religious and cultural leaders about tensions between some elements in religious and cultural practices and the BIC as articulated in the Convention. Non-adversarial avenues for resolving conflicts should be available, as well as tools to help families and communities discuss these issues in a respectful and responsible manner.

Jordan's Principle, Canada's Constitution, and the Best Interests of Children

The BIC is mentioned in specific laws for family life, immigration, and child welfare, but it is not embedded as a general principle of law in Canada. The Convention on the Rights of the Child as a whole is sometimes used as an interpretive tool within the Canadian legal system, but it has not been incorporated into Canadian law. Canada lacks a coherent approach to children under the law, which has resulted in confusing and conflicting judgments.

Some countries embed children's rights in their constitution. In Canada, it is often assumed that the Charter of Rights and Freedoms covers all human rights. The Charter is applicable to children, but it does not adequately address the particular rights of children. Non-discrimination, one of the core principles of the Convention, is also prohibited in the Charter, but it has seldom been applied to issues relating to children, despite the inclusion of age as one of the prohibited grounds of discrimination.

A review of Charter cases involving the BIC reveals lack of clarity and inconsistency. In some cases, BIC has been used to protect the rights of children as persons. In other cases, however, it has been used to deny children equal standing with adults before the law. In one case, the Supreme Court held that the BIC is not a fundamental principle of justice in Canada, even with respect to decisions affecting children.

Several speakers discussed the confusing approach to BIC and children's rights in the Supreme Court's corporal punishment decision, and argued for clarification through legislation to repeal section 43 of the Criminal Code. Canada needs a clear statement that corporal punishment is not in the best interests of children, based on documented evidence of its impacts and the effectiveness of alternative

approaches to discipline. This would make Canadian law consistent with the Convention and the more recent Global Report on Violence Against Children. It would clearly establish that all violence against children is a violation of their rights.

In general, the lack of clarity and consistency about the rights of children in Canada's legal system remains a major barrier to implementation of the Convention in Canada. Children are not well served by the current legal framework.

Canada's federal system of government adds to the problem; the division of powers between federal and provincial jurisdictions has resulted in "passing the buck" when it comes to responsibility for protecting the rights of children. Most of the key policy areas appear to fall within provincial jurisdiction (e.g. education, health and child protection); yet all of these areas are important to First Nations children, who are under federal jurisdiction. Further, the federal government is responsible for youth criminal justice, but the provinces are responsible for delivering programs for youth involved in the justice system. Of utmost importance is the fact that the federal government maintains responsibility for implementation of the Convention and could take a more active role to facilitate its implementation across the country.

A presentation on the Quebec Charter highlighted how its treatment of children's rights and the BIC compares with the Convention and Canadian law, as interpreted by Supreme Court decisions. Implementation is through the Quebec Commission on Human Rights, which has a specific mandate to promote and protect the rights of children. It was noted that current cases in Quebec reveal tensions between recognition of parental rights to provide religious and moral education according to their convictions and the right of children to religious freedom in the Convention. It was also noted that the BIC was used to contest the federal young offenders legislation and intervene in support of repeal of Section 43 of the Criminal Code.

Jordan's Principle and Best Interests

Jordan's Principle was cited by many presenters and participants as one positive step in Canada, based on the BIC. In January 2009, Parliament unanimously adopted a resolution to support Jordan's Principle in the provision of services for Aboriginal children. It was developed in response to the harm done to Aboriginal

children by jurisdictional disputes in the provision of services. If implemented, Jordan's Principle would provide necessary services to the child without delay, and government agencies would then work out their respective responsibilities between themselves. Jordan's Principle highlights how application of the BIC can help to resolve such disputes by putting the best interests of the child first.

Despite unanimous support in a parliamentary resolution, Jordan's Principle is not being implemented across the country. The conference heard both evidence of how deliberate implementation of Jordan's principle has had a positive impact for Aboriginal children in parts of Manitoba and how failure to implement it continues to have tragic impacts for the health of Aboriginal children in other places.

Jordan's Principle is relevant beyond Aboriginal children. Recent reports by provincial children's advocates in New Brunswick, Ontario, Saskatchewan, and British Columbia all provide documentation of children in need who fall between the cracks of different government departments within provincial governments or gaps between federal laws and provincial services in the case of juvenile justice. If the BIC was a higher priority, there would be a significant reduction in cases of children falling through the cracks. Jordan's Principle is common sense and can be used to build public support for the actions needed to put it into practice. This approach is also more cost-effective.

Action

Jordan's principle should be implemented for all Aboriginal children and expanded to put the BIC first in all inter-departmental decision-making on children's issues within one level of government as well as other federal-provincial issues affecting children.

Indicators of Progress

2009 is the twentieth anniversary of the Convention on the Rights of the Child. It is an occasion for renewed commitment to progressive implementation of its principles and specific provisions. Following are suggested targets to achieve by the 25th Anniversary, five years from now, to measure progress in implementing a rights-based approach to the BIC in Canada.

- By 2015, no child in Canada will need to leave their parents and become a ward of the state in order to access health services judged to be essential for the best interests of the child.
- By 2015, no young person, parent, or legal counsel is in a situation where conviction for criminal activity is the only way to access mental health care or other assistance that is essential for the BIC.
- By 2015, the following question will be routinely asked as part of policy formation at all levels of government: "What is the impact of this policy or law for children?"
- By 2015, 75% of children over the age of 7 will have age-appropriate awareness of their rights and responsibilities to respect the rights of others and knowledge of what they can do or to whom they can go for help when their rights are violated.
- By 2015, every court case or hearing that involves children will have taken into consideration the views of the child or given a sound rationale for not doing so.
- By 2015, the regular application of Jordan's Principle will be routine for Aboriginal services and expanded to apply to inter-departmental delivery of assistance for all children.
- By 2015, Canada's national Children's Commissioner will be investigating and responding to requests for help from children in areas under federal jurisdiction and working with provincial children's advocates on a regular basis to close gaps between federal and provincial laws and programs for children.
- By 2015, Canada will have reduced child poverty to less than 5%, with a target for elimination by 2020.
- By 2015 Canada will have a national policy for early childhood that can be favourably compared with practices in other industrialized countries.

Political Leadership and Best Interests

At several points, conference participants struggled to understand the lack of political leadership on children's rights in Canada. In many cases related to BIC, the issues are well documented and practical solutions are known, but implementation is lacking. A common reason given for the inaction is lack of political will.

What does this say about Canada? Is this the Canada we want? That challenge was put to conference participants, with an appeal for all Canadians to stand up for equal rights for all children in Canada, including Aboriginal children, as an urgent matter and a political priority for all Canadians.

Action

Political leaders and Canadian citizens need to make children's rights a higher political priority in Canada, including adoption of the Convention as part of Canadian law and increased parliamentary oversight and accountability for its implementation.

The Voice of the Child in Family Law

"Most children want to have a say. They understand the difference between providing input into decision-making and making the final decision."

"We have come a long way. The discussion is no longer focused on if children should participate, but rather how, during times of parental separation."

Introduction

The Best Interests of the Child is the governing principle in the family law context (custody and access determinations after parental separation or divorce). In this area of law the BIC is accepted as the paramount principle. In recent years family law has come under intense scrutiny, with on-going debates about how to modify both the substantive law and the procedures for resolving post-separation parenting disputes to better implement the BIC. Both the adversarial process and the current legal framework of custody and access have been criticized, but it is a challenge to reach consensus on and implement alternatives. The breadth of the issues raised by the BIC in the family law context suggested narrowing the focus to facilitate useful discussion in the workshop. The chosen focus was the issue of incorporating the voice of the child into post-separation parenting determinations. This provided an opportunity to explore the relationship between the BIC and children's participation rights in this context. Inevitably, however, some of the discussion touched on broader issues of restructuring the family law system in the interests of children.

Discussion of Issues

The participation of children in the family law context raises difficult issues, both as to whether we should allow children to participate and how to do so. Some time was spent clarifying concepts at the beginning; an important point is that encouraging children's participation does not mean that children's views alone will determine the outcome. Participation is about giving children "voice not choice." The workshop did not focus on the weight to be given to children's voices, but rather on how children's voices can be better brought into the process.

The arguments commonly made against involving children are:

- Children need to be protected from the dispute; participation places them in the middle.
- Children cannot be expected to understand or assimilate the relevant information.
- Children may be manipulated by one parent or the other to take sides.
- Children may feel caught in the middle and tell one parent or the other what that parent wants to hear.

The arguments in favour of encouraging children's participation are:

- It recognizes children's rights under Article 12 of the Convention.
- It shows respect for the personhood of children.
- It gives children a sense of the fairness of the process.
- Children want to be heard and they understand the difference between having input and making the final decision.
- Children's views are important to the decision making process; hearing children's views is beneficial for both the children and their families:
  - Focusing on the needs of the children early in the process of litigation can reduce both the intensity and duration of conflict.
  - Meaningful participation can be a protective factor by enhancing children's sense of self-esteem and control over their fate, thus enhancing their resiliency.

Action

Workshop participants emphasized the importance of encouraging children's participation as an important component of the BIC. The main concern is how to structure participation to ensure that it is a safe and positive experience for children, rather than whether children should be allowed to participate. There was recognition, however, that the Convention is rarely referred to in family law and that the institutional culture of family law in Canada does not yet place a high value on children's participation.

Review of Different Methods and Practices

The workshop reviewed the different ways that children's voices can be brought into the family law process, both indirectly and directly. The review highlighted some innovative practices in Canada and other countries:

- Child custody and access assessments and clinical investigations
- Clinical (social work) "assists" (Office of the Children's Lawyer, Ontario)
- Views of the child reports (BC, Alberta, Saskatchewan, Manitoba, Newfoundland, Labrador)
- Hear the child interviews (started in Kelowna, BC)

  Health professionals and lawyers interview the child and take information to the decision maker. This method was controversial at first but it is another way to get information before a judge.
- Children and youth voices F-9 form (Scotland)

  These are much like affidavits to say what children would like in the process.
- Child legal representation (Ontario, Alberta, Quebec, USA, England, Australia, NZ)

  Debate continues about the role of children's counsel. Is it representing views and wishes on similar terms as an adult client or is it presenting views and wishes in context (model of Ontario Office of Children's Lawyer)?
- Judicial interviews give rise to the following factors for consideration:
  - somewhat controversial; common practice in many other countries, eg. Germany, but not a widespread practice in Canada

- not all judges want to interview children due to impartiality issues and some do not feel comfortable doing so
- can be helpful; more consideration should be given to them; many children want to talk directly to the judge so that their views are not misinterpreted, misrepresented or discounted; it can impress on parents that the focus is on the children
- may not be helpful in high conflict cases or where children are alienated
- typically done during trial but could be done pre-trial in the settlement process, which might assist settlement, save money, and reduce delay

While the focus of child participation is often on the court process, many participants stressed the importance and prevalence of non-adversarial methods of dispute resolution to deal with post-separation parenting disputes. There is a need to consider ways of facilitating child participation in these processes. Specific practices discussed were:

- Child inclusive mediation (BC, USA, Australia, New Zealand)

  Australia takes the view that "we pay now or we pay later." Experience indicates that children who are involved in child inclusive mediation have better relationships with both parents, particularly with fathers who are often left out in other processes.

- Child specialist as part of the team in collaborative family practice (BC, Ontario, USA)

  A child specialist can speak to children about the separation, answer questions, and give information; having someone for children to talk to can reduce anxiety. A child specialist may give parents and other professionals at the table more options when developing parenting plans.

Because child participation in family law is still relatively under-developed in Canada, many questions remain to be answered:

- What does children's participation really mean?
- If children are heard, how much weight do we give to their voice?
- At what age should children be interviewed? Who determines their competency to provide input into the decision-making process?
- Should there be an age where their views and wishes are determinative?
- What about safety issues?
- What can be done to ensure that professionals are competent to interview children?
- What about issues of consent and confidentiality?
- What about children with learning challenges who cannot express themselves?
- What about children from different cultural backgrounds where they do not speak about the "family situation" or their feelings?
- What about children from homes where there is interparental conflict, domestic violence and /or child maltreatment?
- What kind of follow-up is done with children and who does it?

Suggestions for Action and Further Research

With respect to the specific issue of child participation in family law:

- More resources need to be devoted to supporting children's participation; government leadership is needed to allocate resources for this purpose.
- Children need support through the divorce process; participation doesn't just mean being consulted; it also means being provided with information and having someone who can answer questions.
- Children's safety must be paramount.
- Consulting with children should be ongoing and not just a one-time event.
- Interviewing children requires qualified, sensitive and competent interviewing skills; this should be a focus of professional training (lawyers, judges, mental health professionals).
- More consideration should be given to the usefulness of judicial interviews of children.
- Children should be asked whether they want to participate.
- Children's confidentiality must be respected and their views taken into consideration.
- Children need to be informed about the process and outcomes (e.g. their views are not determinative).
- Children should be informed about what their lawyers tell the court before and after the hearing.
- There should be follow-up with children to make them aware of the outcome.
- Child participation should also be encouraged in alternative dispute resolution processes.
- More monitoring and evaluation of all forms of participation is needed.
- Research needs to include children as part of the process.

With respect to the family law system and post-separation parenting disputes:

- Expand the use of unified family courts.
- Devote more resources to supporting children and focusing on children's needs early in the process (for example Families in Transition) so that the court is the last resort.
- Make sure that support services are not conditional on beginning court proceedings; stress early intervention. It is often too late by the time court proceedings begin because the parties are in an adversarial mind-set.
- Custody and access issues should not be dealt with in court; it is the least helpful process. Encouraging alternative processes outside of court is a major improvement.
- Australia's new less adversarial trial process should be considered as a model for reform.
- Recognize that low income families do not have the resources for private alternative dispute resolution (eg. collaborative law) and will end up in court; more professionals should be based in the court to take the burden off judges, who are the least suited to decide these issues.
- In situations involving low income or self represented litigants, judges are often the only resource and support system the family has. More professionals are needed in the courtroom to take this burden off the judge.

Child Welfare

"If we truly believe that children are at the centre of what we do, we will put ourselves at risk, not them."

Introduction

The Best Interests of the Child is incorporated into every provincial child welfare statute as the governing principle. It is accepted as the paramount principle. Application of the principle, however, reveals divergent views on how to make best interests determinations. Central to the issue of protecting children from harm is the need to ensure that intervention is in the child's best interests and does not cause greater harm. How are best interests and the concept of safety related and differentiated?

Equally important is the issue of incorporating the voice of the child into BIC determinations. The relationship between the BIC and children's participation rights is important in this context.

Discussion of Issues

The failure of mainstream child welfare approaches was a significant theme of the workshop. As one presenter noted, "Our great hope going forward is saying to ourselves that the child welfare system we have doesn't need to be fixed; it needs to be completely rethought." What does it mean when the state is removing kids from poor conditions? What services are we offering to deal with this problem?

Despite the fact that BIC is enunciated as the guiding principle in all child welfare legislation in Canada, practices seem primarily focused on preventing child deaths through removal. In fact greater removal of children doesn't reduce the death

rate. Approaches that look at root causes rather than effects are desperately needed in order to keep children with their families.

The dire circumstance of many Aboriginal children was explicitly discussed in the workshop. It was noted that, in Canada, 1 in 10 Aboriginal children will be in care versus 1 in 200 non-Aboriginal children, even though Aboriginal children are less likely to experience abuse. The major issue for most children in the child welfare system is neglect, not abuse. How we define neglect is significant in terms of the measures taken. Neglect means that one has the tools to be a good caregiver and chooses not to do so. For non-Aboriginal children, the primary category for substantiated child maltreatment was exposure to domestic violence.

The impact of Canadian federalism on the implementation of BIC in child welfare was noted, with a clear articulation of the need for the federal government to take a more active role. The participants identified the need for a federal children's commissioner and overall federal responsibility and mandate to keep children, especially Aboriginal children, from falling through the cracks.

For all children it was suggested that we should have a national family policy. Children are holistic beings; they are attached to parents, communities and extended families; but their world is often not attached to them. This starts at the top levels of government with no federal legislation that covers child welfare at a national level. Fragmentation into provincial and territorial legislation is a major problem. With no federal children's commissioner or cabinet minister responsible for children, there is no federal overall responsibility for children. Who is there to speak for the child in terms of the state?

Children with special needs were identified as a group in particular need and not well served by child welfare services. Although this workshop did not address this issue in depth, a lunchtime presentation addressed ways in which Aboriginal children with complex medical needs should be supported in their communities. Jordan's principle is a key policy initiative that applies to children with disabilities; it should apply to all children, not just First Nations children.

The issue of corporal punishment of children was also raised in this workshop. It was noted that the majority of substantiated child physical abuse cases fell within the definition of reasonable force set by the Supreme Court – the conclusion being that Section 43 of the Criminal Code perpetuates instead of preventing child abuse. This, along with the issue of domestic violence, shows that there are gaping holes in the way that the legal system deals with violence against children.

Suggestions for Action and Research

- Establishment of a national children's commissioner with a mandate to advise on incorporation of the BIC and the Convention in all federal policies and implementation across the country, starting with an implementation strategy for Jordan's Principle for Aboriginal children. The federal government should take responsibility for ensuring children do not fall between the cracks of federal and provincial jurisdiction.
- Establishment of a standard poverty measure in Canada to help differentiate between poverty and neglect and lead to more appropriate responses for families with needs.
- Priority should be given to keeping a child within their world if possible, rather than removing them to a new family and community; the child is inseparable from his/her culture and context.
- A cost-benefit analysis of child welfare responses should be conducted, as a basis to strengthen the case for investments in prevention/support to vulnerable families.

- Section 43 of the Criminal Code should be repealed because of the confusing message it communicates respecting violence against children.
- The federal government needs to take a lead by establishing a national family policy that puts the best interests of children at the centre.
- Focus on support for families with children rather than accountability/ blame. The BIC needs to be interpreted from the perspective of the child's well being rather than being a basis to assign blame for problems. Children can be neglected by the community and state, as well as by parents. Instead of focusing so much attention on who and how much each party is responsible, policies based on the BIC should focus on developing the child's capabilities as a citizen in her/his own right.
- Canada should model our child welfare system after systems that take an integrated and holistic view (e.g. Australia).
- With regard to child participation, the following suggestions were made:
  - Bring forward the child's voice in child protection mediation sessions to determine the BIC.
  - Listen to children in the formation and implementation of policies and programs, as well as in individual case management.
  - Develop policies from the ground up (from the people and communities).
  - Define BIC through the eyes of the child.

Adoption

Introduction

The BIC is the paramount consideration in matters related to adoption, based on Article 9 of the Convention on the Rights of the Child. This reference to BIC is stronger than its status as "a primary consideration," in Article 3. Other international standards also apply in adoption, such as the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. In all these instruments, the BIC is the central lens for policy and for individual casework, in the determination of eligibility for adoption and for placement of a child. Several issues and good practices have emerged in application of the BIC in adoption in Canada and were discussed in the workshop.

General Issues

The meaning and application of the BIC in adoption need to be addressed together. Understanding what the BIC means in a particular context needs to consider which cultural and socio-economic interpretations are being privileged and which other interpretations might be relevant. It also needs to take into account the full life cycle of a child and intergenerational impacts, as in indigenous customary law.

Permanency of family care has gained prominence in the consideration and determination of best interests in adoption, but it also raises questions of interpretation. Inter-country adoption may provide permanency, when a suitable family cannot be found in the child's own country of origin. However, permanency has specific cultural understandings that should be taken into consideration; for

example, in indigenous communities, the concept of permanency may extend beyond the individual nuclear family to the community. Each child's situation is different; therefore, each child's best interests must be considered within the broader policy environment. Understanding the concept of permanence within a community context could avoid some of the fractures that occur when children leave their communities entirely.

Adoption is not an isolated measure or response to a child in need of a family. The BIC takes into account all the provisions of the Convention; adoption, however, should remain anchored as a response to a child in need of a family – not as a response to perceived needs or rights to a certain level of economic security and other Western indicators of needs and entitlements. Adoption should be considered as only one possible response within a broader approach to child protection that includes support to vulnerable families and communities. Most children in orphanages and institutions in less affluent countries, for example, have living parents.

Most children identified as without a permanent family are older than age five. Therefore, children's participation in decisions about their availability for adoption and their placement should be included in best interests determinations.

The Hague Convention obligates a bilateral relationship between countries sending and receiving children for adoption, but there is little systematic support to ensure that the BIC is applied in inter-country adoptions.

Issues in Canada

A number of issues related to domestic adoption in Canada were raised during the workshop, with suggestions for policy and procedural reform. These issues have also been raised in the report that the Adoption Council of Canada made to the UN Committee on the Rights of the Child during Canada's second review in 2003, and in the 2007 report of the Senate Committee on Human Rights, Children: The Silenced Citizens.

The absence of a coordinated framework for the division of responsibilities between the federal and provincial governments creates problems for implementation of the BIC. The federal government has responsibility to ensure proper implementation of the Convention and other international human rights standards in all legislation and policy. That should mean more consistency across provincial jurisdictions in its application in adoption.

BIC for children as a group raises questions about the heavy emphasis on child protection and limited attention to preventing risk or returning children to a stable, permanent family placement. This is accentuated in Aboriginal communities. In general, there is too much serial foster care for too many children in Canada. Misperceptions often influence policy and practices, such as perceptions that children in care are unadoptable because of high needs or advanced age, that there are no children available for adoption domestically, and that there are huge numbers of infants and young children available for international adoption.

Lack of access to advocates and independent legal advice means children are generally not able to participate or have representation in the decision to remove them from their families and in decisions about their placement after removal. Adoption is one possibility, but there may be a number of other options (legal guardianship by grandparents, older youth mentoring, indigenous community-based care models, etc.). Decisions should include child and youth participation in the determinations of best interests in availability for adoption and in placement.

National and disaggregated data and information on adoption and children in care in Canada is inadequate. The federal government should lead in the collection and dissemination of this information.

The workshop also identified concerns about discriminatory legislation and policy that privileges the rights of non-adopted children. For example, adopted children and foster children do not have a legal right to access information about their own background and case files, in respect of their rights to identity and culture. No adopted child or child in care in Canada has an absolute right to identity information, while other children do; provincial legislation varies in the extent to which it provides for or limits these rights.

In another instance, amendments made to the Citizenship Act in 2008 and 2009 have unintended, potentially negative consequences for children adopted from foreign jurisdictions, in relation to their right to non-discrimination, family and identity. If transparent and participatory child impact assessments had been conducted, through the lens of the BIC, these problems would have been avoided. Other instances of policies that discriminate between adopted children and other children were identified, including certain provisions of Employment Insurance.

Canada's reservation to the Convention in respect of customary indigenous law (customary care) with reference to adoption placement gives Aboriginal communities control over their own adoption processes. However, in practice,

funding and policy limit this control. Attention should be directed to how and for whose benefit this reservation is implemented, as well as any changes in policy and practice suggested in the 2009 General Comment 11 on the Rights of Indigenous Children. The BIC should be reconsidered in the policies and practices that remove Aboriginal children from their own communities. Permanence of placement in indigenous communities may extend beyond the nuclear family to the community. Workshop participants recommended that communities have access to Aboriginal social workers and supports to vulnerable families, rather than prioritizing resources for removal of children from the community into care. Furthermore, older youth have the potential to be advocates for other children if supported to do so – a mentorship/advocacy role for other children should be supported in legal processes. There are some emerging good models, such as the Nisga'a treaty provisions. It was recommended that Aboriginal children who are adopted should be officially registered so that these children are not lost to their communities.

The promotion of international standards in Canada is a way of infusing indigenous understandings from the outside, as well as from the inside, because indigenous perspectives have influenced the formulation of international standards.

Workshop participants also noted the lack of post-adoption services for inter-country adoption (exception of Quebec) unless the child goes into care.

Examples of Good/Promising Practice:

Workshop participants identified the following promising practices in the application of the best interests principle in adoption:

- Access to independent legal advice by children (e.g. Office of the Children's Lawyer in Ontario) is a model of better institutional support, but access is inconsistent at present. Support for children to participate in determining their best interests in adoption differs greatly across Canada.
- The Aboriginal practice of looking for other relatives to care for a child before looking outside the family or community for a new adoptive family.

Suggestions for Action

- Non-Aboriginal adoptions should emulate the Aboriginal practice of looking for other relatives to care for a child before looking outside the family or community for a new adoptive family.
- To address the problem that there is less support for families who adopt than for foster care, public support should follow the child independent of the kind of placement (guardianship home, kinship placement, etc.).
- The federal government should coordinate the collection of national and subnational information on foster care and adoption; the design for data collection about Aboriginal children should be based on consultation with and under the leadership of Aboriginal people.
- The federal government should lead in developing a national framework to co-ordinate federal and provincial responsibilities and to ensure that every child in Canada receives treatment consistent with international standards.
- A national Children's Commissioner should be established with a mandate that includes monitoring the implementation of children's rights standards in adoption related policy and legislation.
- The Canadian Government should employ its foreign assistance and diplomatic channels to help other countries ratify the Hague Convention and establish adoption systems that comply with international standards, avoiding the replication of problems in our own system, but drawing on indigenous models and perspectives.
- All jurisdictions should provide full disclosure of a child's identity, respecting adopted children's rights to their culture and identity.
- The discriminatory effect of federal and provincial laws that implement rights differently for adopted and non-adopted children should be remedied.

Children in the Refugee and Immigration System

Introduction

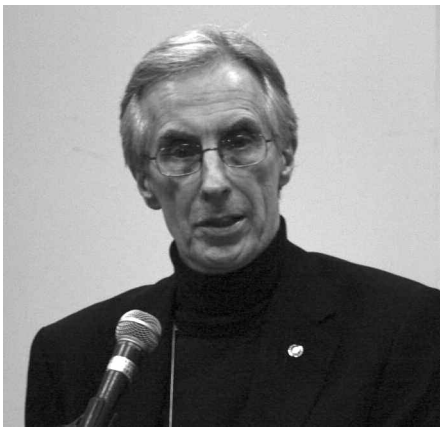
Canada's Immigration and Refugee Protection Act (IRPA) includes a statutory obligation to take into consideration the best interests of children affected by decisions made on humanitarian and compassionate grounds. In addition, the well-known 1999 Baker decision by the Supreme Court provides direction for the BIC in refugee cases. The judgment states: *"for the exercise of discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantive weight, and be alert, alive, and sensitive to them."*

At the international level, the United Nations High Commissioner for Refugees (UNHCR) has issued detailed *Guidelines on Determination of the Best Interests of Children*. These guidelines serve as a good practice example for work with refugees and a model for the development of guidelines in other areas where the BIC is applicable.

In practice, however, application of the BIC is inconsistent. A recent research project by the Canadian Council of Refugees documented both good examples and cases that did not respect the rights of children.

Discussion of Issues

There is no general obligation to consider the BIC in all applications, as required by article 3 of the Convention – only where it is specifically cited in the IRPA. This



means that BIC does not apply to family reunification for refugee children in Canada whose parents are in other countries. Parents may bring their children to Canada, but children may not pursue bringing their parents to Canada. Children who are still in the country of origin are not allowed to join their parents in Canada, if their parents did not declare them when they immigrated. (Example: After Rwandan genocide a parent came to Canada thinking her child was dead and then learned child is alive; sponsorship of the child was refused.) Children left behind are vulnerable and often subject to threats from local authorities. Long wait times for applicants with children also work against the best interests of children who need a permanent home.

Canada lacks a clear policy framework to protect the best interests of children who are unaccompanied asylum seekers, in spite of recommendations for this from the UN Committee on the Rights of the Child in 2003 and in the 2007 Senate Report on children's rights, entitled *Children: Silenced Citizens.* Concerns include guardianship, access to services, and, if children are being deported, what are the conditions in the country to which they are being sent.

Narrow, restricted definitions of family and use of DNA tests to confirm biological parentage are often contrary to the best interests of children, especially in contexts where children are taken into non-biological families as a result of war or the impacts of HIV/AIDS. The costs of expensive DNA tests are a barrier in themselves and formal adoption may not be easy or affordable. Rejection of children and their families because they cannot prove biological parentage does not make the BIC a top priority. Limited access to Canadian immigration offices and limited resources in field offices also create barriers for children and families who wish to apply to come to Canada.

Trafficking of children is a growing concern; it is important to consider differences between children and adults and include the BIC in the development of strategies to prevent trafficking, prosecute traffickers, and provide services to victims.

Issues related to the BIC arise in services for children in families of uncertain status, such as health services for asylum seekers and education for children of parents who are appealing designation as illegal immigrants. Coordination between governments is required to bridge gaps in laws and programs for immigrant families. In addition, Canadian born children of refugee claimants do not qualify for tax benefits that other children do, adding to poverty and unequal opportunities; a BIC assessment of tax policies would address this.

Training in the BIC is essential for officials dealing with children at ports of entry, officials making refugee determinations, and officials dealing with services for refugees. A review of cases shows uneven practice, including dismissing risks for children, lack of sensitivity to impacts of decisions for children, and ignoring reports based on the BIC.

Suggestions for Action and Further Research

- Make the BIC and the Convention part of Canadian law to protect the rights of children in all policies and programmes for refugees and immigrants.
- Adopt the UNHCR Guidelines for Determination of the Best Interests of Children for use by Canadian officials, or develop similar guidelines that provide clear criteria for evaluating the BIC.
- Ensure all officials who may come into contact with children are trained in BIC guidelines and the Convention and use procedures based on them.
- Broaden the definition of family to take into account the particular circumstances of the children involved and make the use of DNA testing to prove biological parentage an exception rather than a costly routine practice. Give priority to BIC in such cases.
- Give special attention to children in the development of strategies to prevent trafficking, and consider the BIC in provision of services to victims and prosecution of traffickers.
- Ensure access to education, health, and social services for all children, regardless of the status of their parents.
- Reduce waiting times for refugee applicants with children, in recognition that their best interests include a permanent home as soon as feasible. Improved access to Canadian offices and greater field resources could also help to reduce the time that some families spend in limbo without a permanent home for their children.

Aboriginal Children

" When the Aboriginal community is doing well, we are all doing well"

Introduction

The particular circumstances facing First Nations and Aboriginal children require a sophisticated approach to BIC, with an emphasis on accountability from all levels of government. Jordan's Principle figured prominently in the discussion of the application of BIC, as did the importance of respecting cultural approaches that place children at the centre of the community. Significant attention was paid to the recent General Comment No. 11 on the rights of Indigenous children under the Convention. It provides clear guidance on interpretation of the Convention as it applies to the rights of Aboriginal children. In particular, it addresses application of Convention articles 30, 31 and 33 and the importance of recognizing the community and cultural rights of indigenous children. A major focus of the workshop was on reconciling these rights with the historical application of BIC in Aboriginal communities.

Discussion of Issues

Differences were noted between Western and First Nations paradigms, which include different ideas about theBIC. A key issue is a Western/mainstream focus on protection and safety issues compared to a First Nations focus on cultural considerations. Cultural considerations have to be respected and given more weight in the context of the BIC. All communities need to work together and allow a more holistic approach that recognizes how a child enriches a culture. A strong desire to harmonize viewpoints was identified as a key policy issue.

It was noted that we have not agreed upon a definition of BIC and that significant barriers to embracing BIC in Aboriginal communities stem from the use of the standard as a sword with relation to First Nations children and removal from their communities. We must find a common language of what BIC entails in order to ask people to sign on to a legal system that reflects one voice. This interpretation has to be inclusive, recognizing different groups, and it must be child-centred.

The workshop focused mainly on child welfare practices in relation to Aboriginal children, noting that too many Aboriginal children are in care in Canada. Applying BIC appropriately means that we need to focus on root causes such as poverty rather than end results, in order to keep First Nation children out of the system. There are troublesome statistics regarding Aboriginal children in care, in particular in provinces such as Saskatchewan. First Nations communities are small but are consistently overrepresented in statistics on alcoholism, suicide, and in particular, child placement in care. Government approaches need to allow and support First Nations communities to take charge and provide their own solutions.

It was also noted that many Canadians are unaware of the First Nations situation. The general population is ignorant of the problems surrounding the overrepresentation of First Nations children in care and the importance of the values of First Nations cultures. Aboriginal issues are absent in mainstream discourse in Canada. Concern was expressed that poor media representation leads to a negative attitude toward Aboriginal issues and a lack of willingness to try to understand.

Federal/provincial jurisdictional issues need urgent attention because they result in discriminatory practices, a lack of services, or delay in providing for the basic needs for Aboriginal children. Key areas such as health care, education, child welfare and even recreation were identified as areas in which Aboriginal children can fall through the cracks of the divide between the federal and provincial jurisdictions. In this regard, BIC needs to encompass the concept of equality and prevent the continued discrimination against Aboriginal children based upon race. An equality rights perspective is one of the core values articulated by participants.

A major emphasis on Jordan's Principle is urgently needed, with all governments embracing its basic premise of equality and provision of services to Aboriginal children in accordance with BIC. Federal and provincial laws need to be consistent with this approach to ensure that jurisdictional issues never result in a child falling through the gap.

Suggestions for Action

- Jordan's Principle must be recognized and fully implemented throughout Canada.
- Canada needs to follow the General Comment No. 11 on the Rights of Indigenous Children in its implementation of the Convention in Canada.
- Recognize the importance of the First Nations model of the family/childcare (circle of protection). It is not the family's child but the child's family, which emphasizes connections within the entire community. The model is portrayed by a circle diagram in which the child is encircled by family, which is encircled by community, which is encircled by the nation. Together, each layer forms a protective sphere around the child; where there is a problem (fracture in one of the circles) the child will simply walk down the street to seek the support of the next layer and not simply be removed from the nuclear family and therefore the community.
- Youth councils should be encouraged within First Nations. Children of First Nation communities can be effective advocates. Such groups should be given equal footing with other adult groups in order to facilitate mutual participation.
- All Canadians need to take a stand when the government is not moving forward on children's rights; non-Aboriginal care providers need to do this as well.
- Governments need to provide resources and support to allow First Nations communities to take action to help their own children.
- Cultural considerations should be given more weight in courts, rather than safety considerations alone.
- Consideration should be given to other models of attachment theory that look beyond the nuclear family (i.e. circle diagram).

Youth Justice

"Children's rights are important because it is the child against the coercive power of the state"

Introduction

The Youth Criminal Justice Act (YCJA) applies to young people between the ages of 12 and 17. The YCJA combines a strong focus on respect for the rights and responsibilities of young people, similar to adults, with some protective measures based on age. It specifically prohibits, for example, using detention for child welfare interventions on the grounds of the best interests of the child. Other aspects of the YCJA, such as the publication ban on identification of accused young persons, are protective measures based on recognition that young people are different than adults – more vulnerable and at different developmental stages.

The preamble to the YCJA includes a reference to the Convention on the Rights of the Child, and the Convention's provisions for youth justice have been cited in judgments by the Supreme Court of Canada, establishing them as part of Canadian law. The BIC includes full implementation of Article 40, which deals specifically with youth justice, and other articles that also relate to justice for young people.

For youth justice in Canada, the best interests principle would suggest making it hard to trigger the criminal justice system and pay greater attention to preventive measures to keep young people out of that system. The compound needs of young people are better addressed outside of the criminal justice system, which is not designed to foster development of young people.

The YJCA also raises questions about competing interests, such as victim rights, societal interest in security, and the best interests of the young person.

Participation by young people in the youth justice system is limited by intimidation. Interrogation by police officers, court procedures, and detention all create fear, distrust of officials, and frustration with the complexities of the legal system.

When a young person is a victim of crime, especially violence, the BIC should play a larger role in the support services provided for them.

Discussion of Issues

In addition to intimidation by officials, lack of accessible information about youth criminal justice processes results in confusion and frustration by the accused, parents, and supporters. In turn, this often results in a frustration of justice. There is a lack of genuine youth participation, from the relationship an accused youth often has with an assigned lawyer to the opportunity provided to speak in front of a judge. The BIC would be better served by a system that supports the accused young person to meaningfully participate earlier in the process and to understand the gravity of their decisions. The right to speak in front of a judge is nullified if the young person is too intimidated to speak freely or does not clearly understand the law and its impacts. There is a need to build confidence in the stewards of the system (police, crown, judges, defence attorneys, etc.) in relation to young people.

Lack of resources for preventive programs is not in the best interests of young people. Research has documented the value of preventive interventions to keep young people out of the criminal justice system, and small projects have demonstrated results, but resources are not adequate to provide these programs on a sustainable basis. If the BIC were applied to the allocation of resources, more would be channelled to prevention.

Other approaches warrant more attention. Restorative justice models, such as those used by some First Nations, could be used in response to behaviours of concern and lead to earlier interventions without laying criminal charges. Restorative justice models put the young person at the center, define who is part of the circle that will decide the BIC, and design a process that is appropriate for that particular young person. In Quebec, offending behaviour is more often seen as an indication for need of child protection and the matter is directed to the child welfare system rather than the youth justice system.

On the rehabilitation side, there is a shortage of community-based programs in health, counselling and treatment for addictions. In addition, research is required to ensure that the type of services provided are effective for the young people who receive them.

Incarceration raises a number of issues. The incarceration of females with males creates an increased vulnerability for the females. In this context, there is a need for more gendered treatment in those facilities. The incarceration of young people in the same facilities as adults often creates problems. Canada's reservation on Article 37(c) of the Convention, which calls for separate detention of young people, has been highly criticized.

A lack of understanding about a particular disability can lead to serious charges. Actions resulting from a disability are sometimes over-punished. Training of police and corrections staff should include de-escalation techniques and better understanding of the behaviours of people with FASD, autism, ADHD and OCD in particular. Appropriate services for young persons with disabilities are needed.

Lack of consistency between pieces of legislation was discussed. In Ontario, for example, there are conflicts between youth justice and the safe schools provisions in education law, child welfare laws, and laws that govern immigration. In particular, concerns were raised about conflicts between the treatment of young people in the education context and the criminal context. While the YCJA seeks to protect young people by ensuring privacy, stigmatization in the school and local community context is often unavoidable.

One of the intentions of the YCJA was to decrease the overrepresentation of Aboriginal youth within the system. However, the impact in British Columbia, Saskatchewan and Ontario (at least) has not been what was hoped for. Merely stating in the law that the needs of Aboriginal youth should be considered, has not actually made a difference. There are a very high number of Aboriginal youth in care and custody with a great prevalence of mental health problems and learning disabilities. Appropriate resources are needed to provide preventive and restorative programming for Aboriginal young people, in cooperation with Aboriginal communities.

Suggestions for Action

- Determination of what the BIC means at every one of the junctures in the youth justice system needs to be taken seriously as a policy issue by governments and officials in the criminal justice system. Evidence-

based research should be used rather than anecdotes, intuition, or stereotypes about what is in the best interests of young people.

- Building youth participation into all aspects of the youth criminal justice system would include listening to the voices of young people in the design and planning of programs and the allocation of resources, as well as in program implementation. In individual cases, early support is needed for young people to know the gravity of their decisions and actively engage in the process.
- Serious effort should be given to strategies to keep young people out of the criminal justice system through the provision of preventive, community-based programming that can address the compound issues involved for young people who get in trouble with the law. This requires putting the BIC ahead of jurisdictional questions between federal and provincial governments and allocation of greater resources to prevention and early intervention.
- Increase the number of First Nations appropriate resources within the youth criminal system (i.e. youth court workers) and in the community to meet the YCJA provisions allowing for community based programming. Expand the use of First Nations restorative justice models, also within mainstream communities and for earlier intervention.
- Training police officers to give priority to the BIC in their work with young people would result in different attitudes toward young people. Interrogation techniques for young people, for example, often create fear, distrust, and feelings of injustice. Police who work as social supports for young people, instead of their enemies, such as school-liaison officers, is a promising practice, but some concern was raised about the impact of school officers carrying weapons.
- Training is needed to ensure that language that applies to adults does not enter into the youth criminal justice system. Examples: young people are "found guilty" and not "convicted;" young people have "youth records" and not "criminal records."
- All jurisdictions across Canada should adopt the two-step process for charging young people (internal charge approval prior to charging) used in British Columbia, Quebec and New Brunswick. This has resulted in fewer charges and diversion of young people from the criminal justice system to other programs that are more able to address the factors leading to incidents involving the police.

Education

Introduction

Application of the BIC in the field of education takes into account not only Article 3, but also Articles 28 and 29 of the Convention on the Rights of the Child, which specifically address children's rights related to education. Other provisions in the Convention also relate to application of the BIC in education, such as cultural continuation (Article 30); parental guidance (Articles 5, 18, 14.2); access to information and freedom of expression (Article 13); and freedom of thought and religion with parental guidance (Article 14). These rights should be reflected in policy and programming for curriculum, pedagogy, and delivery of education. School policy and governance also needs to respect and implement children's rights across the full spectrum, including non-discrimination, privacy, access and protection from harm.

In addition, there is a precedent in Canadian law for giving priority to the BIC in making education decisions with regard to special needs. A Supreme Court decision in Eaton v. Brant County Board of Education, (1997, 1 S.C.R. 241) held that decisions regarding special education are to be made in the best interests of the child. It also said that where the views and wishes of the child can be determined, they should be given serious consideration in the process for determining theBIC.

Discussion of Issues

The BIC applies to both the individual child and to children as a group. In education there are many tensions between different claims:

- the interests of one child and the interests of peers in a class, school, or across a jurisdiction such as a school board;

- different interpretations of best interests by students, parents, teachers and school administration;
- the BIC in competition with other interests (e.g. during negotiations between teachers' unions and school boards over policies and allocation of resources; between Aboriginal governance and non-Aboriginal school boards);
- the BIC and other objectives for education policy, such as workforce needs and economic policies of provincial governments;
- education rights and conflicting provisions of other laws for young people involved in the criminal justice system, the child welfare system and employment.
- cultural continuation, such as education for Aboriginal children and minority groups, and learning respect and accommodation for cultural diversity.

Discussion of these tensions lead to two primary questions:

1. Do decision-making processes in education clearly give priority to the BIC and build it into policy frameworks and mechanisms for making decisions and resolving disputes?

   As an example, how is the BIC taken into consideration in negotiations between teachers' unions and school boards on specific policies, such as noon-hour supervision, curriculum choices, and extra-curricular activities, and in broader negotiations about programming and resource allocation? Do special needs decision-making processes reflect the Supreme Court decision about the BIC?

2. How are the views of children taken into consideration in the decision-making processes in the field of education? BIC, under the Convention, includes Article 12 on children's right to have their views considered in matters that affect them. A growing body of applied research on rights-respecting school culture, as part of educating children about their rights, demonstrates benefits for all stakeholders when children's input is taken into consideration on decisions about school governance, policy and curriculum. This approach to education is not yet widely applied in Canada.

Discussion on BIC and discipline policies within education identified several issues:

- The need to reconcile competing interests when discipline results in denial of access to education, such as application of the Safe Schools Act in Ontario;

- Interpretation of the BIC in the application of the concept of "in loco parentis" by principals and vice-principals;
- Lack of voice and participation by children in discipline policies and decisions;
- Lack of access and support for advocacy by young people in education policy.

Discussion on BIC and special needs identified the following concerns:

- Legislation and provincial policies are silent on the implications of the Supreme Court decision in the Eaton case, which requires that the BIC be given priority;
- The question of who decides diagnosis and treatment for disabilities, e.g. learning disabilities, is inadequately resolved;
- Limited resources to respond to the best interests of special needs children after general salary negotiations and other obligations are met;
- Co-ordination of resources between different departments and programs for special needs to provide holistic care for one child;
- Capacity and ability to advocate by children themselves and others who are affected, as well as the parents, including other students and educational aides.

At a deeper level, questions are raised about whether the assumption of compulsory education is always in the best interest of an individual child, given the trend among provinces to increase the age of compulsory education. More attention to alternative forms of education can provide more options to meet the diverse needs of young people.

Research in the field of educating children about rights and responsibilities includes good practices for rights-based school practices as well as curriculum modules on the Convention and its implications. However, this is sporadically integrated in a minority of schools in Canada. Another practice with potential for implementing BIC is a school board policy to track the developmental path of individual students, using benchmarks that trigger review and follow-up when students are not meeting established bench marks – with particular attention to vulnerable children including children in care, linguistic minorities and racially marginalized groups.

Suggestions for Action

- Broad-based public education to ensure that all stakeholders in education are aware of and equipped to incorporate the BIC and the Convention on the Rights of the Child in policy and programming. This would include the systematic incorporation of education about children's rights and respect for the rights of others into school curricula and culture. Stakeholders include provincial education ministries, school board administration, teachers' federations, school equity staff and parent groups (councils, advocacy groups, etc.).
- Incorporating the provisions of the Convention into provincial laws that govern education, including mechanisms for considering the best interests for children as a group and for individual children within decision-making processes, for both mandatory policies and discretionary decisions.
- Providing guidance and training on strategies for disciplining children that respect them as people with rights and responsibilities to respect the rights of others.
- Changing the paradigm for decision-making in education from processes based on competing powers and interests to ones based on shared community, such as inclusion of all voices, accountability to those being served, and provision of alternative choices that respond to BIC considerations.
- Ensuring continuity in the development of children through a comprehensive tracking system based on the individual child, including children who may be out-of-school in state care under child welfare or the youth justice systems.
- Empowering young people by informing and enabling them to make choices about alternative approaches in education, including non-formal education options and alternative school options.
- Encouraging a national dialogue in Canada about who we are as Canadians and how that impacts education of young people across the country. Public discussion might include abolishing the concept of an "age of maturity" and shifting to capacity and competency-based criteria for participation in different societal activities.

Early Childhood Learning and Care

Introduction

The BIC collectively and individually should be at the centre of policy and programs for young children. Early childhood warrants special attention because the well-being of children and the quality of care and education during this stage of life lays the foundation for healthy living as adults, life-long learning, inclusion and respect for the value of every person. The UN Committee on the Rights of the Child issued a general comment on the rights of young children, emphasizing that they have as much right to supportive policies and services as older children, yet lack a commensurate investment in many countries.

Social science research has documented that supporting families with affordable, high quality options for early child learning and care has benefits for child development and for the social and economic well-being of communities. Yet Canada does not have a national policy framework for early childhood education and wellbeing; provincial policies vary widely, resulting in inequity for children across Canada; and funding for services in support of early child development is inadequate.

There is no evidence that current federal policy approaches take into account the BIC as a primary consideration. In addition to lack of federal-provincial and inter-departmental co-operation, children in Canada bear the impacts of ideological controversies about the role of women in society and ideal forms of family life. Debates about early childhood programs have primarily been framed in relation to whether women should work or stay at home. These battles ignore the reality for young children across the country, do not take into account the results of evidence-based research on child development, and fail to give priority to the BIC.

Canada fares poorly in relation to other industrialized countries in measures of policy effectiveness, investment, quality and access to early childcare and education. UNICEF published an international comparison of early childcare and education among industrialized countries in 2009, using quantifiable benchmarks for various aspects of early childhood policy and service provision. It was based on international research, rooted in the BIC. Canada met only one of ten benchmarks.

How does Canada fare?

REPORT CARD

BENCHMARKS	STATUS
Number of benchmarks achieved	1
Parental leave of 1 year at 50% of salary	X
A national plan with priority for the disadvantaged	X
Subsidized and regulated child care services for 80% of 4-year-olds	X
80% of all child care staff trained	X
50% of staff in accredited early education services tertiary educated with relevant qualification	✔
Minimum staff-to-children ratio of 1:15 in pre-school education	X
1.0% of GDP spent on early childhood services	X
Child poverty rate less than 10%	X
Near-universal outreach of essential child health services	X

Discussion of Issues

Workshop discussion focused on understanding why early childhood policy is not a high public priority in Canada and what could be done to increase public awareness about its importance for children and for building healthy communities in Canada. Specific policy options and good practices are well-researched; what is lacking is the political will to implement what is known to be in the best interests of children.

It is important to recognize that parents are the primary duty-bearers in the lives of young children; programs should be designed to support parents in raising and providing care for their children. But public policy should not be based only on the premise that child care is needed in order for parents to work. Policy and programs should be child-centered in order to ensure excellent quality and consideration for the BIC.

There are cultural differences in raising young children. There are also several factors that are well-established across cultures. Around the age of three, for example, children in all cultures begin to explore the world beyond the nuclear family. This curiosity is part of human development and necessary for social development. Early childhood learning is not just a functional process for preparing children for school; it helps to prepare children for life in society as community members and citizens.

Well-designed early childhood programming can contribute to many objectives. As well as child development, it can contribute to community-building and other supports for family life. Good practices have the following characteristics:

- flexibility to respond to various needs of children and families
- respect for cultural diversity and the development of each child
- common measures of quality and access to reduce discrimination, based on outcomes-based research.

Early childhood education can help children learn about both rights and responsibilities to respect the rights of other children and adults. Learning about the well-being of children and the importance of treating children as persons with rights needs to become part of learning for all ages. Trust and respect for children is part of treating children as equally important citizens in our society.

Early childhood educational programming has proven its ability to provide a

"head-start" and equalizer for children living in less advantaged circumstances. Special attention is required for groups of children with special needs. Examples include children whose parents work unusual hours; children with disabilities, and Aboriginal children on and off reserve.

Aboriginal child care models, including customary care, can provide alternative approaches that harmonize traditional values with modern education, including the whole community in the process. National and provincial policy frameworks need flexibility to incorporate different approaches while promoting non-discrimination.

Suggestions for Action

- A broad-based, public dialogue about the place and role of children in our society is needed as a basis for making policy decisions about early childhood. Discussion should focus on why early childhood care and education is important and what it contributes to the whole community as a public good. The goal of such dialogue would be greater public consensus about what is in the best interests of children and the community as a whole.
- National leadership is needed to develop a deeper understanding and vision for child development and the purpose of education in Canada, based on giving priority to the BIC. This would include greater awareness of how children learn to belong and contribute to the community, developing early notions of what it means to be citizens in Canada. Alternative approaches to early childhood, such as Aboriginal models and models from other cultures, should be explored to learn from them and develop a policy framework that is flexible in the way it supports young children and their families. In this context, children and adults need to learn about children's rights and responsibilities under the Convention on the Rights of the Child.
- The federal government needs to take a leadership role and accept responsibility and accountability for equitable treatment of all young children in Canada, working in collaboration with the provinces, as a long-term investment.
- Political leadership is needed at federal and provincial levels to build support and mobilize resources for a more comprehensive approach to early childhood learning and care across Canada, based on abundant evidence about what is required for good outcomes for children and society.

Health Care

Introduction

The BIC relates to three areas of health:

1. Preventive health policy/population health/social determinants of health: research has documented that paying attention to the BIC and children's rights is good public health policy and a good investment in preventive health.

2. Access to health care: in 2003 Canada was asked to address inequitable access to health care for children with disabilities, children in rural, northern, and Aboriginal communities, and children with sexual minority status.

3. Practices within the health care system: Who decides on treatment in the best interests of a child? Health Professionals? Parents/Guardian? Young person? Under what conditions do young persons have the right to refuse treatment? When should treatment be forced on a child in the name of BIC?

Many provisions in the Convention on the Rights of the Child relate to creating a healthy environment for child development. Article 24 articulates the rights of children within the health care system.

Discussion of Issues

In general, participants suggested that putting the BIC first would require significant changes in current models of formal health care. Increased attention to the social determinants of health by governments is a step toward implementing

the BIC, but a shift in resources toward more preventive health care models is needed to implement research findings on the social determinants of health for children.

Development and use of child health impact assessments was identified as a specific policy tool that needs further attention. Good practices for taking children's views into consideration in health care decisions, developed through pilot projects, need to become general practice. Development and sharing of ethical guidelines for applying the BIC in research and treatment decisions was identified as another useful policy tool.

The current health care system, based on response to crisis, does not put resources into supporting families to provide for children with special needs at home. The result is that parents of children with complex needs are sometimes forced to let their child become a ward of the state in order to get appropriate care. This is not in the best interests of the child. A similar problem is the criminalization of young people with mental health issues in order to access treatment. Conviction for crimes should not be required to get mental health treatment for young people who struggle with serious mental health issues.

In many cases, community-based approaches to health care are more able to deal with the child as a whole person and consider in a holistic way all the factors that contribute to healthy child development. More attention is needed to creating communities that can support children and families with special health needs, including mental health concerns, instead of focusing only on clinical treatment models.

Participants heard evidence of institutional health care decisions made in the best interests of parents without separate consideration of theBIC. Cases were cited of the devaluation of children with complex disabilities and in some cases refusing treatment based on quality of life assessments.

Children's mental health is another important area that is just beginning to get more attention. The recently formed Mental Health Care Commission will need to incorporate the BIC and children's rights into its national strategy for children's mental health. One promising practice cited is the use of mobile mental health crisis units instead of police intervention to deal with emergency mental health issues involving young people.

Jordan's Principle was discussed as an important application of the BIC for the health of Aboriginal children, but implementation is too slow. The conference heard examples of positive impacts where there have been deliberate efforts to implement it, and continuing negative examples of harm done to Aboriginal children by jurisdictional disputes that do not put the BIC first.

Jordan's Principle is also applicable to health issues that require co-ordination between different departments within one level of government as well as between federal and provincial health agencies. One good practice cited is collaborative efforts between departments to deal more effectively with addictions so that young people can get help before they get caught up in the justice system and develop a criminal record.

Directions for Change

The range of issues in health care led the discussion into two directions for change:

1. How can the formal health care system become more responsive to the BIC and children's rights, including respect for children's voices?

2. How can citizens create the political will to make changes in health policy and allocation of resources toward preventive investments in the best interests of children, especially for vulnerable groups?

One promising practice is an initiative to train health care professionals on the BIC and the rights of children. Universities that train health care professionals could pay more attention to this, and colleges of health professionals could strengthen their codes of conduct in relation to the BIC and rights of children.

With regard to forced treatment and refusal of treatment, discussion turned to the question of determining if, when, and under what circumstances a child has the capacity to make a well-informed decision. Age-based policies lack the necessary flexibility to recognize differing abilities to make decisions. Capability-based approaches and training of health professionals, families, and children are areas needing further development.

Suggestions for Action and Research

- Development and use of tools for child health impact assessments of proposed public policies that affect children.
- Implementation of Jordan's Principle for Aboriginal children and application to other children's health issues that involve multiple agencies and government departments.

- Use of benchmarks and report cards to highlight progress in rights-based approaches to children's health, consistent with the BIC. Two specific benchmarks of progress would be reduction and elimination of the need for children to become wards of the state in order to access necessary help for special needs and reduction of the criminalization of young people with mental health issues in order to get treatment.
- Increased attention and resources to holistic, preventive health models for children, based on research in the social determinants of health for children and mental health.
- Increased attention to supporting families and communities to meet the health needs of children, including those with special needs, through community-based models.
- Repeal of Section 43 of the Criminal Code to prohibit corporal punishment, based on public health evidence that it is harmful and therefore not consistent with BIC, and there are effective alternatives for discipline.
- Development of codes of conduct, guidelines, and tools to help clinicians assess the capacity of children to make decisions; expanded use of models of shared decision-making between children, family, and health care teams to determine what is in the best interests of a child; and resources and mechanisms for help when there is uncertainty or disagreement about assessment of capacity, e.g. mediation mechanisms rather than adversarial court cases.
- Development of codes of conduct by the colleges of health professionals in relation to children's rights, children's voice in health care decisions, and determination of the BIC.
- Incorporate training on children's rights into training programs for health care professionals.
- Review of guidelines for health research with children to reflect the BIC and children's rights.
- Building a network of advocates for children's rights in health care to mobilize support for implementation of evidence-based good practices for children.

Children and Cultural Diversity

"Young people need information, safe places, and support to sort through family cultural pressures, peer group pressures, and what it means to be Canadian, in order to develop their own identity."

Introduction

The relationship between the BIC and cultural diversity is an area of tension. Several themes in the Convention on the Rights of the Child come into tension with each other during consideration of the BIC:

- A child's right to his/her cultural identity and the state's duty to protect that (Preamble and Article 30).
- A child's right to freedom of thought, conscience, and religion (Article 14).
- Respect for the rights and duties of parents to provide direction in these matters (Article 14).
- The concept of "evolving capacities of a child" to make decisions for themselves and participate in making decisions about cultural practices.
- Harm to a child and health as limits for cultural practices (Article 24.3 and General Comment on the Rights of Indigenous Children).

In practice, the BIC has been applied in various ways. It has been used to threaten the right to cultural identity, as in the residential schools policy. It has also been used as a protection for minority groups of children, e.g. indigenous children/Roma. It can also be a protection for the rights of individual children within a group.

The recently released General Comment on the Rights of Indigenous Children provides important guidance on balancing collective and individual rights, including specific commentary on application of the BIC for indigenous children.

Discussion of Issues

In Canada, immigrants often want to preserve the culture they brought with them, even though it may be changing in the country of origin to reflect more modern conceptions of children's rights (frozen culture). Children often get caught between a parent's desire to preserve their past and young people's desire to be accepted in the new country. In some ways, Canada's multiculturalism policy has fostered the continuation of "frozen cultures." All cultures change and there are different views about children within any culture.

The workshop heard individual stories of harm done to young people by the imposition of religious and cultural values without awareness or respect for the right of young people to develop their own identity and religious expression. Stories were also shared about young people navigating between their familial cultural backgrounds, which are often mixed, and their peers, to develop their own understanding of who they are.

Identity can be confusing, particularly in Canada. What is a Canadian identity? Whereas assimilation into the dominant culture was essential for survival in the past, that may be less true in contemporary Canada. Young people increasingly talk with ease about multiple identities, but there are many cases of tensions between parents and children.

For Canada's Aboriginal population, children are part of the collective culture; their culture is an essential part of their identity. Many do not have a concept of the child as separate from the culture. Aboriginal people approach the question of balance as finding ways to harmonize Canadian law and Aboriginal ways, rather than a balance between individual identity and cultural traditions. In Canada, the history of the residential schools endures as an example of a policy that was justified by reference to the BIC, but had negative impact and threatened the rights of children to their own culture. It was a misuse of the BIC without consideration for the rights of children, prior to adoption of the Convention on the Rights of the Child, which provides a rights-based approach to the BIC.

Suggestions for Action

Discussion focused on what could be done to help young people navigate these issues.

- Top priority was given to community-based approaches to education about the rights of children, as well as school-based education.

Community programming can create safe spaces for dialogue between young people, parents, and community leaders on these matters. Young people value a listening ear and alternative spaces where they can voice their developing views about identity in safety, with respect, and learn about the importance of respect for the views of others.

- Avenues for non-adversarial dispute resolution are important for young people who find themselves caught in tensions with their family around identity issues. This can be very important to avoid difficult separations from family, leaving home prematurely, or turning to less constructive behaviours.

Bibliography

Alston, Phillip, "The best interests principle: towards a reconciliation of culture and human rights. (1994) 8 *International Journal of Law and the Family* 1.

Alston, Phillip, *The Best Interests of the Child: Reconciling Culture and Human Rights.* (New York: Oxford University Press, 1994).

Alaggia, Ramona, Angelique Jenney, Josephine Mazzuca & Melissa Redmond, "In Whose Best Interest? A Canadian Case Study of the Impact of Child Welfare Policies in Cases of Domestic Violence." (2007) 7 Brief Treatment and Crisis Intervention 275.

An-Na'im, Abdullahi, "Cultural transformation and normative consensus on the best interests of the child" (1994) 8 *International Journal of Law and the Family* 62.

Archard, David, *Children, Family and the State.* (Burlington: Ashgate Publishing, 2003).

Bala, Nicholas, "Youth as Victims and Offenders in the Criminal Justice System: A Charter Analysis – Recognizing Vulnerability" 39 (2008) Supreme Court Law Review (2d) (in print)

Bala, Nicholas, "Canada's Juvenile Justice Law & Children's Rights", Conference Paper from *Making Children's Rights Work: National & International Perspectives,* International Bureau for Children's Rights, November 19, 2004, Montreal.

Bala, Nicholas, "The Best Interests of the Child in the Post-Modern Era: A Central But Paradoxical Concept" in Harold Niman and Gerald Sadvari, eds, *Special Lectures of the Law Society of Upper Canada 2000: Family Law. A Colloquium on 'Best Interests of the Child'* (Law Society of Upper Canada, 2001) (collection of papers presented at a conference in Toronto, Dec 13, 1999 and subsequently revised)

Bala, Nicholas, "Developments in Family Law: The 1993-94 Term: The Best Interests of the Child", (1995) 6 Supreme Court Law Review (2d) 453.

Bala, Nicholas, Peter J. Carrington, & Julian V. Roberts, "The Youth Criminal Justice Act After Five Years – A Qualified Success" (2009) *Canadian Journal of Criminology and Criminal Justice* (upcoming).

Bala, Nicholas, Janine Alison Isenegger, and Bernd Walter. "'Best Interests' in protection proceedings: implications and alternatives" (1995) 12 *Canadian Journal of Family Law* 367.

Bernard, Claire, Robin Ward and Bartha Maria Knoppers, ""Best Interests of the Child" Exposed: A Portrait of Quebec Custody and Protection Law" (1992) 11 Canadian Journal of Family Law/Revue canadienne de droit familial 57-149.

Bailey, Martha, "Custody, Access, and Religion: A Comment on Young v. Young and P(D) v. S(C)" (1994) 11 *Canadian Family Law Quarterly* 317.

Bonthuys, Eva. "The Best Interests of Children in the South African Constitution." (2006) 20 *International Journal of Law, Policy and the Family* 23.

Bunting, Annie, "Elijah and Ishmael: Assessing cultural identity in Canadian child custody decisions." (2004) 42 *Family Court Review* 471.

Bunting, Annie, "Complicating culture in child placement decisions" (2004) 16 *Canadian Journal of Women and the Law* 137.

Centre on Housing Rights and Evictions. Defending the housing rights of children. (Geneva: COHRE, 2006), http://www.cohre.org/store/attachments/COHRE%20Defending%20the%20Housing%20Rights%20of%20Children.pdf.

Committee on the Rights of the Child. General Comment No.11 on Indigenous children and their rights under the Convention (2009).

Cook, R.J. & B.M. Dickens. "Recognizing adolescents' 'evolving capacities' to exercise choice in reproductive healthcare" (2000) 70 *International Journal of Gynecology & Obstetrics* 13.

Cook, R., J., J.N. Erdman & B.M. Dickens. Respecting adolescents' confidentiality and reproductive sexual choices. (2007) 98 *International Journal of Gynecology & Obstetrics* 182.

Covell, Katherine and Rebekah Snow, "Adoption and the Best Interests of the Child: the Dilemma of Cultural Interpretations." (2006) 14 *The International Journal of Children's Rights* 109.

Department of Justice, "Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access." May, 1999, available at: http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/sjcarp02.html.

Edge, Peter W, *Legal Responses to Religious Differences.* (Hague: London: Kluwer Law International, 2002).

Eekelaar, John, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" (1994) 8 *International Journal of Law and the Family* 42.

Engebrigsten, Ada, "The child's – or the state's – best interests? An examination of the ways immigration officials work with unaccompanied asylum seeking minors in Norway." (2003) 8 Child and Family Social Work 191.

Freeman, Michael, Article 3: *The Best Interests of the Child.* (Lieden: Martinus Nijhoff Publishers, 2007).

Freeman, Michael (ed.), *Children's Rights: A Comparative Perspective.* (Aldershot: Dartmouth Publishing Company, 1996).

Freeman, Michael, "The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?" (1997) 11 *International Journal of Law, Policy & Family* 360

Freeman, Michael, "Whither Children: Protection, Participation, Autonomy? (1994) 22 *Manitoba Law Journal* 307-327.

Freeman, Michael and Philip Veerman, *The Ideologies of Children's Rights.* (Dordrecht, Boston: N. Nijhoff Publishers, 1992).

Goubau, Dominique, "L'intérêt de l'enfant et les pouvoirs résiduels du parent non gardien", (1996) 13 Canadian Journal of Family Law/Revue canadienne de droit familial 11, also published in Barreau du Québec, Service de la formation permanente, *Développements récents en droit familial (1995)*. (Cowansville: Éditions Yvon Blais, 1995) pp. 25-51

Greene, Sharon D., "The Right of Children to be Protected from Physical Assault: The Unconstitutionality of Section 43 of the Criminal Code, Part I, [1998] Criminal Law Quarterly, Vol. 41, pp. 288-317; and Part II, [1999] Criminal Law Quarterly, Vol. 41, pp. 462-484.

Gilmour-Walsh, Bridget and Phillip Alston, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values.* (Florence: Innocenti Research Center, 1996).

Goldman, Rick, "The understanding and application of 'Best Interests of the Child' in H & C decision-making by Citizenship and Immigration Canada", September 2008, available online at http://www.ccrweb.ca/documents/BICreport.pdf

Hammarberg, Thomas, "Le principe de l'intérêt supérieur de l'enfant : ce qu'il signifie et ce qu'il implique pour les adultes" texte de conférence du Commissaire aux droits de l'homme du Conseil de l'Europe, Varsovie, 30 mai 2008, CommDH/Speech(2008)10/ "The principle of the best interests of the child - what it means and what it demands from adults", Lecture by Thomas Hammarberg, Commissioner for Human Rights, Council of Europe, Warsaw, 30 May, 2008, CommDH/Speech(2008)10.

Huddart, C.M. and J.C. Ensminger, "Hearing the Voice of Children" (1992) 8 C.F.L.Q. 95.

James, Adrian L., "Children, the UNCRC, and family law in England and Wales" (2008) 46 Family Court Review 53.

Jenkins, Jaclyn Jean, "Listen to Me! Empowering youth and courts through increased youth participation in dependency hearings" (2008) 46 Family Court Review 163.

Joyal, Renée, "La notion d'intérêt supérieur de l'enfant, sa place dans la Convention des Nations Unies sur les droits de l'enfant" (1991) 62 Revue internationale de droit pénal 785.

Kaime, Thoko, "The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections" (2005) 5 African Human Rights Law Journal 221.

Kline, Marlee, "Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations" (1992) 2 Osgoode Hall Law Journal 375.

Kopelman, Loretta M., "The Best Interests Standard as Threshold Ideal, and Standard of Reasonableness" (1997) 22 Journal of Medicine and Philosophy 271.

McAdam, Jane, "Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection" (2006) 14 The International Journal of Children's Rights 251.

Milne, Cheryl, "The Limits of Children's Rights under Section of the Charter: Life, No Liberty and Minimal Security of the Person" (2005) 17 National Journal of Constitutional Law 199.

Mnookin, Robert, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy" (1975) 39 Law & Contemporary Problems 226.

Mundulai, Aliamisse O. "Stretching the Boundaries in Child Access, Custody and Guardianship in Canada." (2005) Canadian Journal of Family Law 267-313.

Murphy-Berman, Virginia, Helen L. Levesque & John J. Berman, "U.N. Convention on the Rights of the Child: A cross-cultural view." (1996) 51 American Psychologist 1257.

Park, Tae Mee, "In the Best Interests of the Aboriginal Child" (2003) 16 Windsor Review of Legal and Social Issues 45.

Parliament of Canada, "'For the Sake of the Children': Report of the Special Joint Committee on Child Custody and Access" December 1998, available online at http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031529&Language=E&Mode=1&Parl=36&Ses=1&File=2.

Piper, Christine, "Assumptions about children's best interests" (2000) 22 *Journal of Social Welfare and Family Law* 261.

Riggio, Eliana, "Child friendly cities: good governance and the best interests of the child" (2002) 14 Environment and Urbanization 45.

Roy, Alain, "L'adoption intrafamiliale : une institution à remanier en fonction des besoins identitaires de l'enfant", in Barreau du Québec, Service de la formation continue, *Développements récents en droit familial (2007)*. (Cowansville, Éditions Yvon Blais, 2007), pp. 1-32.

Roy, Nicole, "L'autorité parentale et l'obligation alimentaire des parents envers leur enfant: deux institutions proposant une conception de l'intérêt de l'enfant et de la famille" (2001) 61 Revue du Barreau 51.

Save the Children, *The Best Interests of the Child in the European Union.* Report from the conference held in Swedish Parliament, May 28-29, 1997.

Schuratizki, Johanna, "The Best Interests of the Child in the Swedish Aliens Act" 14 *International Journal of Law, Policy and the Family 206*.

Séguin, Éric, "Le refus de soins injustifié d'un mineur âgé de 14 ans et plus : quand l'établissement de santé doit-il intervenir pour le protéger?", in Barreau du Québec, Service de la formation permanente, *Pouvoirs publics et protection (2003)*. (Cowansville, Éditions Yvon Blais, 2003), pp. 147-164.

Sheehan, Rosemary, *Magistrates' Decision-making in Child Protection Cases.* (Aldershot: Ashgate, 2001).

Small, Joan, "Parents and Children: Welfare, Liberty, and Charter Rights" (2005) 4 *Journal of Law & Equality* 103.

Sykes, Katie, "Bambi Meets Godzilla: Children's and Parents' Rights in Canadian Foundation for Children, Youth and the Law v. Canada" 51 (2006) *McGill Law Journal* 131.

Tobin, John William, "Time to remove the shackles: The legality of restraints on children deprived of their liberty under international law" (2001) 9 *International Journal of Children's Rights* 213.

Toope, Stephen J., "Riding the Fences: Courts, Charter Rights and Family Law" (1991) 9 *Canadian Journal of Family Law* 55.

UNHCR. *Guidelines on Formal Determination of the Best Interests of the Child.* UNHCR, 2006, Available online: http://www.crin.org/docs/unhcr_best_in.pdf

Van Praagh, Shauna, "Religion, Custody and a Child's Identities" (1997) 35 *Osgoode Hall Law Journal* 309.

Waage, Trond, Per Schulz Jorgensen, Louise Sylwander & Thorhildur Lindal, *The Best Interests of the Child in Our Times: A discussion paper on the concept of the best interests of the child in a Nordic perspective.* (Norway: Children's Ombudsman, 1999).

Williams, Suzanne, "Perspective of the Child in Custody and Access Decisions: Implementing a Best Interests and Rights of the Child Test" (2008) 86 Canadian Bar Review 633.

Qingwen Xu, "In the 'best interest' of immigrant and refugee children: Deliberating their unique circumstances" (2005) 84 Child Welfare 747.

Conference Schedule

Day 1 – Thematic Sessions: Friday, February 27

NOTE: All events on February 27th take place in the Bennett Lecture Hall in Flavelle House at the Faculty of Law, University of Toronto

8:00 a.m. – 8:45 a.m.	**Arrival and Registration:** Flavelle House, Faculty of Law
8:45 a.m. – 9:45 a.m.	**Opening Remarks and Keynote Address** *Keynote Speaker:* Mary Ellen Turpel-Lafond, British Columbia Representative for Children and Youth
9:45 a.m. – 10:45 a.m.	**Panel I: Meaning and Interpretation of the Best Interest Principle** Nick Bala, Faculty of Law, Queen's University Jeffery Wilson, Wilson Christen Barristers LLP Justice June Maresca, Ontario Court of Justice *Chair:* Kathy Vandergrift, Canadian Coalition on the Rights of the Child
10: 45 a.m. – 11:15 a.m.	**Health Break**
11:15 a.m. – 12:15 p.m.	**Panel II: Best Interests and Participation** *Youth panelists:* Sarah Carlson, Katie Vlanich, Mary Watt from Town Youth Participation Strategies Rachel Birnbaum, Faculty of Social Work, University of Western Ontario *Chair:* Les Voakes, Executive Director, Town Youth Participation Strategies
12:15 p.m. – 1:00 p.m.	**LUNCH**
1:00 p.m. – 2:00 p.m.	**Panel III: Best Interests and Other Interests** (Parental Rights, Culture, Public Security) Anne McGillivray, Faculty of Law, University of Manitoba Lorraine Derocher, SODRUS, University of Sherbrooke Tara Collins, Faculty of Social Sciences, University of Ottawa *Chair:* Nigel Fisher, President & CEO, UNICEF Canada

2:00 p.m. – 3:00 p.m.	**Panel IV: Best Interests Applied to Children as a Group** Senator Raynell Andreychuk Mark Sieben, Chief Operating Officer, B.C. Ministry of Children and Family Development Tina Tam, Executive Director, Society for Children and Youth B.C. *Chair:* Landon Pearson, Landon Pearson Resource Centre for Children's Rights, Carleton University
3:00 p.m. – 3:30 p.m.	**Health Break**
3:30 p.m. – 4:30 p.m.	**Panel V: Best Interests and Canada's Constitution** Cheryl Milne, Asper Centre for Constitutional Rights, University of Toronto Cindy Blackstock, Executive Director, First Nations Child and Family Caring Society Claire Bernard, Legal Counsel, Commission des droits de la personne et des droits de la jeunesse, Quebec *Chair:* Carol Rogerson, Faculty of Law, University of Toronto
4:30 p.m. – 5:00 p.m.	**Introduction – Preparation for Day 2 Workshops**
5:30 p.m. – Evening	**Reception in the Rowell Room, Flavelle House**

Day 2 – Workshops: Saturday, February 28

NOTE: The workshops on February 28th take place in various rooms in the Faculty of Law, Flavelle House. Rooms will be assigned at registration.

9:30 a.m. – 10:15 a.m.	**Keynote Address** (Bennett Lecture Hall) *Keynote Speaker:* Bernard Richard, New Brunswick Child and Youth Advocate
10:15 a.m. – 12:00 p.m.	**Concurrent Workshops:** **Immigration:** Rick Goldman, Nadja Pollaert **Voices of Children in Family Law:** Carol Rogerson, Justice Grant Campbell, Katina Kavassalis, Judith Huddart, and Rachel Birmbaum **Health Care:** Kathy Vandergrift **Education:** Martha MacKinnon **Aboriginal Children:** Cheryl Milne, Cindy Blackstock
12:00 – 1:30 p.m.	**LUNCH and Plenary** *Plenary Presentation:* Papers in Brief – Various presenters will speak about current research and practices relevant to the best interest principle.
1:30 – 3:30 p.m.	**Concurrent Workshops:** **Child Welfare:** Cheryl Milne, Cindy Blackstock, Pámela Gough **Adoption:** Lisa Wolff, Susan Bissell, Sandra Scarth **Youth Justice:** LeeAnn Chapman **Early Childhood Education and Care:** Anna MacQuarrie, Martha Friendly **Cultural & Religious Practices:** Kathy Vandergrift
3:30 – 4:00 p.m.	**Wrap-Up and Next Steps**

Discussion Paper for Conference Participants

A. Introduction

A.1. Why focus on the Best Interests of the Child?

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
>
> (Convention on the Rights of the Child, Article 3.1)

The best interests of the child (hereafter BIC) is one of the basic principles of the Convention on the Rights of the Child (hereafter Convention). Effective application of it is key for improving implementation of the Convention in Canada. While the principle was applied in some areas of domestic law prior to the Convention, e.g. custody and access determinations, it is now applicable to all policies and practices that affect children individually and as a group.

Better understanding and effective application of the BIC would have significant benefits for children in Canada. On the other hand, lack of clarity, inconsistency, and failure to apply the principle have negative impacts in the lives of children that can be avoided.

The principle, stated in Article 3, is also referenced in seven other articles, dealing with a wide range of matters in the lives of children:

- In Article 9, BIC is the only reason for separation from parents (Article 9.1) and the only reason for denial of contact with a non-custodial parent (Article 9.3).

- Article 18, one of the articles on parental responsibility, states that the best interests of the child will be their basic concern.
- Article 20 links the BIC with the right to cultural identity by explicitly stating that the BIC for wards of the state includes due regard for the desirability of continuity in a child s upbringing and to the child s ethnic, religious, cultural and linguistic background.
- Article 21 makes the BIC the paramount principle for adoption.
- Articles 37 and 40 use the BIC as a threshold factor within criminal justice. Article 37 says children should be detained separately from adults unless it is in their best interests to be together.
- Article 40 guarantees children s right to a fair trial, unless that is not in their best interest by reason of age or circumstance.

The Convention is indivisible and its articles interdependent. Application of the BIC is expected to influence the interpretation and application of all Convention articles and to interact with the other principles, notably the rights to non-discrimination, survival, and respect for the child s views (articles 2, 6 and 12).

A. 2. Why now?

In 2003 the UN Committee on the Rights of the Child asked Canada to review and improve application of the BIC in Canada. This resulted from Canada s second report on implementation of the Convention in Canada. In 2009 Canada will present its third report and we will celebrate the 20th Anniversary of the Convention. The issues highlighted in the 2003 recommendation need to be addressed in Canada:

> "The Committee values that the State party upholds the principle of the best interest of the child to be of vital importance in the development of all legislation, programs and policies concerning children, and is aware of the progress made in this respect. However, the Committee remains concerned that the principle that primary consideration should be given to the best interest of the child is still not adequately defined and reflected in some legislation, court decisions, and policies affecting certain children, especially those facing situations of divorce, custody and deportation, as well as Aboriginal children. Furthermore the Committee is concerned that there is insufficient research and training for professionals in this respect."

> **The Committee recommends that the principle of best interests of the child contained in article 3 be appropriately analyzed and objectively implemented with regard to individuals and groups of children in various situations (e.g. Aboriginal children) and integrated in all reviews of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions and in projects, programmes and services that have an impact on children. The Committee encourages the State party to ensure that research and educational programmes for professionals dealing with children are reinforced and that article 3 of the Convention is fully understood, and that this principle is effectively implemented.** (Concluding Observations of the Committee on the Rights of the Child: Canada, CRC/C/15/Add.215, 3 October 2003, paragraphs 24 and 25.)

A.3. What do we hope to achieve?

The effective application of the BIC in Canada is an on-going objective that requires the collaboration of many actors. The objectives for this initiative are to develop:

1. a deeper and broadly shared understanding of the BIC
2. shared knowledge of good practices, tools, and processes to determine best interests in individual and group applications within a variety of domains;
3. directions for policy and legislative development;
4. a basis for the development of professional training;
5. a network of persons interested in effective implementation of BIC.

B. Themes Arising in Implementation of the Best Interests of the Child

B.1. Meaning and Interpretation of BIC

The BIC is not defined in the Convention, but there is agreement that the BIC puts the interests of children at the centre of decision-making, rather than the interests of adults, parents, or the State. Some say the rest of the Convention serves as a definition, while others use the BIC to interpret the other provisions. While flexibility in interpretation can be an advantage, the BIC has also been criticized for

its vagueness and for being nothing more than an empty vessel that allows broad discretion by decision-makers. Inconsistency in interpretation means unequal treatment between children across Canada.

On the content side, the factors to be considered and the weight of different factors in determining the BIC in a particular context are matters of debate. There are divergent views about what is in the best interests of a child or children, based on research, culture, professional training, personal experience and values, and dominant ideologies. Sometimes there is a tension between present and future interests. Does the BIC include the interests of the adults who care for the child? Judgments between conflicting claims are sometimes difficult to adjudicate.

On the process side, who should decide and how is equally contentious. Many processes try to use an objective evaluation of all options and outcomes based on scientific evidence. Others argue that all judgment is subjective and biased by the predispositions of the decision-maker/s. Some tests focus on the absolute best for a specific child, while others focus on choosing between realistic options. Some assert that different approaches to determining the BIC are needed for different contexts, while others promote greater consistency through use of consistent guidelines. A particularly challenging question is whether attempts to determine the BIC can have a detrimental impact for children, because of costs and/or unintended consequences. Competing concepts lead some to assert that the only decision to be made is who should be the decision-maker.

Questions for discussion include:

- How do different interpretations affect application of the BIC? Does social science research provide a more objective basis for making decisions?
- Who should decide? Are there good practices in resolving disputes over BIC?
- Are guidelines useful? Is consistency important for equitable treatment or does BIC require individual decisions? Should there be different approaches to BIC in different contexts?
- Are child impact assessments a useful tool to determine BIC in a policy context?
- Can attempts to determine BIC do more harm than good for affected children?

B.2 Best Interests and Participation

The right of children to be heard and to have their views considered in decisions that affect them is another key principle in the Convention. Child participation in processes to determine the BIC is a developing field, with a wide divergence in practice across Canada. A child s emerging right of self-determination is variously interpreted in legal statutes (according to age) and sometimes comes into tension with the BIC, which is often interpreted as protecting the interests of children who are not considered able to make decisions for themselves. As a whole, the Convention combines protection rights and participation rights, which depend on the age and developing capacity of the child.

In practice, there is a growing commitment and interest in active participation by young people in decision-making processes that affect them. Research shows a wide range of practice in Canada, from total exclusion to full inclusion of children in processes used to determine best interest. In the Convention, the principle of participation applies both in individual cases and in policy-setting and program planning. The challenge is applying it effectively, taking into account differing ages, different circumstances of children and their communities, and the specific context for participation.

Questions to be considered include:

- How can decision-making processes be made child-friendly?
- Are there good practices for the participation of children in determining best interests? Are they transferable? Are there situations where it is harmful?
- How much weight should be given to views of children relative to other factors?
- Are decision makers equipped to receive a child s opinions and views?
- How can child witnesses in formal court processes be protected and enabled to participate without undue influence, intimidation, or later repercussions?
- Participation practices vary widely across Canada; should there be more consistency to ensure fair treatment of all children, and avoid tokenism?

B.3. Best Interests and Other Considerations

The BIC is a primary consideration in the Convention, not the primary or paramount consideration. In some situations compromises are made between

the BIC and other considerations. Considerations that come into tension with the BIC include parental claims that they have the right to make decisions for their children, cultural traditions, public security concerns, and other laws. When there are competing interests, questions are raised about the basis for compromise and the relative weight to be given to the BIC and to the Convention generally relative to other interests or laws.

Questions to be considered include:

- Under what conditions does the BIC become secondary to other considerations?
- Are there ways to reduce the tension between the different interests that come into play in decisions relating to children?
- Are there good practices and/or guidelines to help resolve competing interests?
- Are policy changes needed to clarify the relationship between individual rights and communal/cultural rights in the application of the BIC?

B.4. Best Interests of Children as a Group

The BIC is most commonly applied in individual cases, such as custody, health care, and refugee claimant decisions. Article 3 refers to both the child and children as a group; it includes application of the BIC to legislative measures, policies, and programs for children. Using the BIC as a test for legislative proposals and public policy decisions has had limited application in Canada.

There is potential to prevent negative and unanticipated impacts on children by using BIC as a screen for proposed legislation, policy and programming. One suggestion is that child impact assessments become part of the public policy process. This could be similar to gender analysis or environmental impact assessments. In some countries, the impact of annual budgets for children is evaluated as part of the budget process. Institutional structures, such as children s advocates or ministers responsible for children, can be mandated to take a proactive role and raise the profile of children in relation to other stakeholders and constituencies. Sometimes there are tensions between the interests of children as a group and the best interests of a particular child.

Questions to be considered include:

- What would a child impact assessment include?
- Where should responsibility for conducting and considering child

impacts be located? Who should be consulted in assessing child impacts?

- What structures, approaches, or good practices exist for including BIC in policy processes?
- How can young people participate in public policy processes to ensure BIC are considered?

B. 5 Best Interests and the Canadian Constitution

Understanding the links between the BIC and Canada s legal framework can help to advocate for appropriate policy changes. One factor in Canada is coordination of federal and provincial jurisdictions within our federal system of government. Many children s issues fall under provincial jurisdiction, while the federal government has monitoring and reporting authority for children s rights generally and has more direct responsibility for issues affecting Aboriginal children. Jurisdictional disputes often hamper realization of a child s rights in individual cases and can result in delay or inaction at the level of policy and programming. In the case of Aboriginal children, the recent initiative to establish Jordan s Principle highlights how application of the BIC could help to resolve jurisdictional disputes. If implemented, it would provide necessary services to the child without delay and government agencies would then work out their respective responsibilities between themselves.

Some countries embed the rights of children in their constitutions. In Canada it is often assumed that the Charter of Rights and Freedoms covers all human rights, but there is no reference to specific rights for children in the Charter. Discrimination, one of the core principles of the Convention, is also prohibited in the Charter of Rights and Freedoms, but it has seldom been applied to issues relating to children, despite the inclusion of age as one of the prohibited grounds of discrimination. In some cases, courts have found no discrimination when the differential treatment of the child is based on developmental factors, using the BIC to justify it. In other cases there may be discrepancy between approaches to BIC under the Charter and its central role in the Convention; in one Charter case the Supreme Court held that BIC, although an important legal principle, was not vital to our societal notion of justice. While the BIC is incorporated in specific laws for family life, immigration, and child welfare, it is not embedded as a general principle of law in Canada.

Questions to be considered include:

- What constitutional protection or grounds exist for the BIC and children s rights in general?

- What legislative changes are needed to embed the BIC in Canadian law?
- How can both levels of government ensure that BIC is central to their approach to programs, policies and laws affecting children?

Application of BIC in Specific Contexts

Exploring how the BIC has been applied in the context of specific policy and program areas for children can provide lessons learned, good practices, and models for application. The workshops are designed to allow participants to share information based on their experiences and research in specific fields. If possible, each workshop will identify measures that could be taken for more effective application of BIC in their field.

The contexts are being chosen in response to interest of participants. Participants in each workshop are asked to consider the following questions:

- What are key issues in relation to the BIC in this field?
- What are good practices in applying the BIC in this field?
- How is child participation incorporated into decision-making on the BIC in this field?
- What other Convention articles and principles have a considerable effect in the application of the BIC in this domain? Other sources of rights?
- How could the implementation of current practices relating to the BIC be improved?
- What policy changes could facilitate more effective application of BIC?
- What issues still need to be resolved to achieve a more common and effective approach to the application of the BIC in this domain?

Workshops

- Family law
- Youth Justice
- Child Welfare
- Aboriginal Children
- Adoption
- Health Care
- Education
- Immigration
- Early Childhood and Care
- Cultural Diversity

Biographies

MARY ELLEN TURPEL-LAFOND was appointed B.C.'s first Representative for Children and Youth in November 2006. The Representative is an Independent Officer of the Legislature.

Ms Turpel-Lafond is on leave from the Saskatchewan Provincial Court, where she was the Administrative Judge for Saskatoon. She was appointed to the bench in 1998, and was actively involved in projects relating to access to justice, judicial independence, and public outreach. She has also worked as a criminal law judge in youth and adult courts, with an emphasis on developing partnerships to better serve the needs of young people in the justice system, particularly sexually exploited children and youth, and children and youth with disabilities, such as those who suffer from fetal alcohol spectrum disorder.

Ms Turpel-Lafond was a tenured law professor at Dalhousie University Faculty of Law, and taught law at the University of Toronto, the University of Notre Dame and other universities. She has been a visiting professor at University of British Columbia and University of Victoria law schools. She holds a doctorate of law from Harvard Law School, a master's degree in international law from Cambridge University, a law degree from Osgoode Hall, and a bachelor of arts degree from Carleton University. She also holds a certificate in the international and comparative law of human rights from the University of Strasbourg in France.

In 2007, the Indigenous Bar Association awarded her the distinction of 'Indigenous Peoples' Counsel'. As well, Time Magazine has twice bestowed honours upon Ms Turpel-Lafond, naming her one of the '100 Global Leaders of Tomorrow' in 1994, and one of the 'Top 20 Canadian Leaders for the 21st Century' in 1999.

A member of the Muskeg Lake Cree Nation, she is active in her First Nations community. In 2005, she published a book on the history of the Muskeg Lake Cree Nation that was short-listed for a Saskatchewan Book Award.

Ms Turpel-Lafond, her husband George Lafond, their son and three daughters, (including twins), reside in Victoria, B.C.

Panel I: Meaning and Interpretation of the Best Interest Principle

NICHOLAS BALA has law degrees from Queen's University (LL.B. 1977) and Harvard (LL.M. 1980). He has been a Professor at the Faculty of Law at Queen's University since 1980, and was a Visiting Professor at McGill, Duke and the University of Calgary. He has twice won teaching awards at the Faculty of Law at Queen's University, and served as Associate Dean for five years. From 2006 to the present Prof. Bala has been the Academic Director of the Osgoode Hall Law School Part-time Family Law LL.M. Program. He won the Queen's University Prize for Excellence in Research in 2006, and in 2008 he was awarded the Stanley Cohen Distinguished Research Award by the Association of Family & Conciliation Courts.

Prof. Bala is an expert on Family and Children's Law, with research focussing on issues related to child witnesses and child abuse, spousal abuse and its effects on children, parental rights and responsibilities after divorce, young offenders, and the Convention on the Rights of the Child. Much of his research work is interdisciplinary and he has undertaken collaborative projects with psychologists, social workers, criminologists and health professionals. Prof. Bala has published extensively in journals in law, psychology, social work and medicine. He has written or co-authored 14 books and 130 articles and book chapters. His work has been cited by all levels of court in Canada, including the Supreme Court of Canada (26 times) and courts of appeal in several provinces. Prof. Bala has worked with the National Judicial Institute on planning and delivering educational programs for Canadian judges on such issues as child witnesses, domestic violence and young offenders, and is presently the editor of the NJI materials for judges on Child Witnesses. He has presented on over 350 occasions at professional education programs for judges, lawyers, probation officers, youth workers, teachers, doctors, psychologists, child welfare workers, and social workers in Canada and the United States, and at scholarly and law reform conferences in these two countries, the United Kingdom, Australia, Italy and Hong Kong.

Prof. Bala is a member of the Board of the International Bureau of Children's Rights and of the Canadian Research Institute on Law and the Family. He also works as a volunteer with young offenders in Kingston, Ontario where he lives.

JEFFREY WILSON — Certified Law Society of Upper Canada "Specialist in Family Law". Practitioner for 30 years.

Author, *Wilson On Children and the Law* (Butterworths·LexisNexis), 1500 page loose-leaf service publication, in its 31st year of publication with quarterly updates and Editor, Ontario Family Law REPORTER (Butterworths·LexisNexis), monthly family law reporting service and practice commentary, in its 30th year of publication.

Wilson lectures within and outside of Canada, preferring to do so in a NGO non-aligned capacity. He did so in San Diego at the first tri-nation child labour conference conducted under the authority of the North American Agreement on Labour Cooperation. (NAALC). He was the Canadian speaker at the 10th Anniversary of the Convention on the Rights of the Child Commemorative Meeting and attended in Geneva on behalf of the Canadian Coalition on the Rights of Children and addressed the Committee on the Rights of the Child on the matter of Canada's performance under the Convention on the occasion of Canada's only report to the Committee. Wilson was the founding director to the Toronto-based clinic Justice for Children and Youth.

He is a partner at the family law firm of Wilson Christen LLP in Toronto, with specialists in court advocacy, collaborative law, mediation and arbitration, and Wilson is an accredited family law arbitrator. Wilson Christen LLP sponsored the first Canadian multi-lingual children's English Canada film festival in Toronto in 1996, known as ZOOM!

For his work, The Advocacy Society honored him in June of 1999, with its "Award of Justice". Most recently, Wilson has created the first "The Law and Youth [:] Taking Ownership of Knowledge for Power" Workshop Series. For further information, tour www.thelawandyouth.org, and for uncensored NGO information, inhale a bit of "On Guard" at www.childrenandthelaw.ca. The last "The Law and Youth" Workshop took place on November 5, 2008 at Greenwood College School in Toronto.

MADAM JUSTICE JUNE MARESCA received her LL.B. in 1980 and her LL.M. in 1997, both from Osgoode Hall Law School. She spent most of her career as a lawyer in private practice, where she concentrated on children's issues, alternative dispute resolution, and teaching. She co-founded the Centre for Child and Family Mediation, offering child protection mediation, in 1990. She is an adjunct professor of law at Osgoode Hall. She was awarded the Excellence in Teaching Award from the University of Toronto in 1999 and the Award of Excellence in Alternative Dispute Resolution by the Ontario Bar Association in 2000. She was appointed to the Ontario Court of Justice in August, 2004, and currently hears both family and criminal cases in Brampton.

KATHY VANDERGRIFT is Chairperson of the Canadian Coalition for the Rights of Children. She brings to this role years of experience in policy analysis in Canada, in both government roles at the municipal and federal levels and NGO advocacy roles. Prior to focusing on children's rights in Canada, Kathy was instrumental in improving protection for the rights of children caught in armed conflicts, through advocacy at the UN Security Council, founding the Watchlist on Children and Armed Conflict, and coordinating the Canadian Forum on Children and Armed Conflict. She has authored numerous reports on strategies for improving implementation of the Convention on the Rights of the Child.

Kathy is also a candidate for a Master's Degree in Public Ethics at St. Paul's University; her thesis focuses on the ethical tensions within the Convention, with a focus on different approaches to the Best Interests Principle. In 2008, Kathy received the global UNICEF Aldo Farina Prize for Children's Rights Advocacy.

Panel II: Best Interests and Participation

RACHEL BIRNBAUM, Ph.D., RSW, LL.M. is an Associate Professor of Social Work at King's University College at the University of Western Ontario. Dr. Birnbaum has over 20 years of clinical practice experience working with children and families of separation and/or divorce. She has presented and published both nationally and internationally on child custody and access assessments, child legal representation, as well as the collaboration between law and social work.

She recently published with her co-authors, Child Custody Assessments: A Resource Guide For Legal and Mental Health Professionals, Challenging Issues in Child Custody Disputes: A Guide for Legal and Mental Health Professionals and Law for Social Workers (4th Edition) published by Carswell. She has also published several papers for the Department of Justice on children's participation in the separation and/or divorce process. Her current research focus is on evaluating an instrument to differentiate different levels of conflict in disputing families. The goal of this research is to be able to match high conflict families experiencing different levels of conflict with the appropriate services. Dr. Birnbaum has been the President of the Ontario College of Social Workers and Social Service Workers since 2005.

Panel III: Best Interests and Other Interests (Parental Rights, Culture, Public Security)

ANNE MCGILLIVRAY is Professor of Law at the University of Manitoba. Her research centres on the rights of the child and in particular the right of the child to live free of all forms of violence. She has published four books and some 50 chapters, articles and reports on children's rights, child corporal punishment and law, child sexual abuse and exploitation, parens patriae and childhood, governing childhood, the Aboriginal child in Canadian history, the child as witness, domestic violence, violence against Aboriginal women in childhood and adulthood, elder abuse, the defences, the Homolka case, and law and literature including Dracula (history and ethics of the legal profession), among others. She serves on the board of the International Journal of Children's Rights, was a member of the Canadian children's rights delegation to Cuba, served on the Steering Committee for the Canadian Incidence Study on Child Abuse and Neglect II, and addressed the Senate Human Rights and Constitutional Affairs Committees on theory and history of children's rights.

LORRAINE DEROCHER is presently pursuing her Ph.D. at the Université de Sherbrooke (Quebec). She is interested in finding new ways to intervene in problematic situations involving neglected or abused children living in religious authoritarian groups. She has just published Vivre son enfance au sein d'une secte religieuse: Comprendre pour mieux intervenir (Presses de l'Université du Québec, 2008), which explores the challenges faced by those who were raised in cultic groups when they leave their groups. At this conference, this sociologist will introduce the tensions between some religious/cultural practices and the BIC principle.

TARA M. COLLINS is a replacement professor with the Faculty of Social Sciences at the University of Ottawa. She has worked in international human rights for over twelve years. Her professional experience includes work as the coordinator of a national non-governmental organization, and as a policy adviser and researcher for the federal government (the Human Rights Division at the Canadian Department of Foreign Affairs and the Gender Equality Division at the Canadian International Development Agency) and Parliament (Honourable Landon Pearson, Senate of Canada). Her publications include a co-authored report on Canada's implementation of general measures of the UN Convention on the Rights of the Child to be published by UNICEF. She has been invited as a child rights expert by the Council of Europe to a consultation in Strasbourg and has presented project results to the UN Committee on the Rights of the Child. She is currently a member of the Board of Directors of the Canadian Coalition for the Rights of Children.

NIGEL FISHER became President & CEO of UNICEF Canada on November 1, 2005. Formerly an Assistant Secretary General of the United Nations since 2002, Mr. Fisher was most recently Executive Director of the United Nations Office for Project Services (UNOPS), a position to which he was appointed in August 2003, by the U.N. Secretary-General. UNOPS, the only self-financing entity within the UN system, provides operations management services and capacity development support to assist other UN organizations, international financial institutions and developing countries to achieve their development and humanitarian goals. Mr. Fisher's remit was to lead UNOPS to consistent, high-quality service provision and sustained financial viability.

Prior to this appointment, Mr. Fisher had served, since February 2002, as Deputy Special Representative of the Secretary-General for Relief, Recovery and Reconstruction in Afghanistan, holding the rank of Assistant Secretary-General. In this capacity, he was responsible for direct oversight of all UN humanitarian, reconstruction and development activities in Afghanistan, as well as for co-ordination with the Government and with the international assistance community.

Mr. Fisher was Regional Director for the United Nations Children's Fund (UNICEF) in South Asia (1999-2002), overseeing UNICEF's country programmes in South Asia and Afghanistan. He worked on development partnerships for children, which included a number of private sector initiatives and a partnership with MTV Asia. He served as UNICEF's Special Representative for Afghanistan and neighbouring countries in the immediate aftermath of the events of 11 September 2001, coordinating and profiling UNICEF emergency operations in Afghanistan and neighbouring countries. Mr. Fisher worked with UNICEF for over 20 years in Africa, Asia, and the Middle East, as well as at UNICEF headquarters in New York.

During 1998, he took leave from the UN and returned to his native Canada where, as United Nations Visiting Fellow at the Department of Foreign Affairs and International Trade, he advised the Minister and other senior officials on development of Canadian foreign policy regarding children in armed conflict, participating in the development of Canada's peace-building initiative and human security strategy. He also led a joint Canada-Norway initiative to Algeria, to promote dialogue with that country on child rights and was active in the initiation of a trilateral programme of cooperation to support Algerian children exposed to extreme violence.

Prior to his sabbatical year in Canada, Mr. Fisher was Director of UNICEF's Office of Emergency Programmes for three years, responsible for oversight of UNICEF's humanitarian operations worldwide and advocated widely for recognition of children as zones of peace.

In 1997, he chaired the United Nations Inter-Agency Working Group of the Secretary-General's Executive Committee on Humanitarian Affairs, overseeing the formulation of a series of recommendations, which formed the basis for reforms in the humanitarian operations of the United Nations.

Mr. Fisher has considerable experience in advocacy for the protection of civilians, especially children, in zones of conflict. As UNICEF Special Representative for Rwanda, he led that agency's post-genocide recovery operations in the Great Lakes region of Africa (Rwanda, eastern Zaire, western Tanzania and southern Uganda) in 1994-1995. In 1990-1991, he coordinated the agency's emergency response in the Middle East during and after the Gulf War, and initiated UNICEF lead-agency operations in northern Iraq after the Gulf War. He has been UNICEF Deputy Regional Director for the Middle East and North Africa, and Representative in Rwanda, Yemen, Jordan, Syria, and the Occupied Territories of the West Bank and Gaza. He has also lived and worked in Nigeria, Mozambique, India and the Lao People's Democratic Republic.

Mr. Fisher has worked extensively in the field of basic education and child development. From 1988 to 1990, he was Deputy Executive Secretary of the World Conference on Education for All, the global United Nations conference on basic education, which took place in Jomtien, Thailand, in 1990. He has published in the areas of basic education, leadership and impunity, child trauma recovery, child rights and protection of children in zones of conflict. He is, or has been, a board member of several academic and philanthropic institutions in Canada, the United States and Norway, and is past Honorary President of the Middle East Centre for Human Studies in Jordan. In 1998, Canada awarded Mr. Fisher the Meritorious Service Cross in recognition of his leadership of UNICEF's humanitarian work in Rwanda.

Panel IV: Best Interests Applied to Children as a Group

SENATOR RAYNELL ANDREYCHUK was educated at the University of Saskatchewan graduating in 1966 with a Bachelor of Arts degree and, in 1967, with a Bachelor of Laws degree; thereafter practicing law in Saskatchewan.

In 1976, Senator Andreychuk was appointed a Judge of the Saskatchewan Provincial Court, at which time she set up a Family Court in Regina under the jurisdiction of the Provincial Court. She served two terms as the Chancellor of the University of Saskatchewan.

In 1987, Senator Andreychuk was named High Commissioner to Kenya, Uganda, Ambassador to Somalia, the Comores and in 1990 Ambassador to Portugal. Concurrently, she served as Canadian Representative to the United Nations Human Rights Commission and the United Nations Environment Program.

In 1993 Senator Andreychuk was called to the Senate of Canada where she has served on numerous committees including chairing the Senate Standing Committee on Human Rights. Her other Senate committees are: Foreign Affairs and International Trade; Legal and Constitutional Affairs; Rules, Procedures and Rights of Parliament; Conflict of Interest for Senators; and the Committee in the Review of the Anti-terrorism Act.

Senator Andreychuk was awarded the Order of Yaroslav the Wise V grade for her substantial contribution in development of Ukrainian-Canadian relations. She is a recipient of the Y.M.C.A. Fellowship of Honour, the Vanier Outstanding Young Canadian Award, the Centennial Medal and the Regina Y.M.CA. Women's Award. In 1993, she was granted a Doctor of Laws, honoris causa, by the University of Regina.

Senator Andreychuk had served as the International Law and Human Rights convenor for the Parliamentarians for Global Action for the past five years, a role which led her to lead a worldwide coalition of Parliamentarians dedicated to the ratification and implementation of the Rome Treaty and the establishment of the International Criminal Court. She is presently the convenor of the Population and Substainable Development Program.

Senator Andreychuk is Co-Chair of the Canada-Africa Parliamentary Association, member of the Canadian Committee on Women, Peace and Security and serves on many international committees and organizations.

MARK SIEBEN – Formerly the Director of Child Welfare for British Columbia and Assistant Deputy Minister for Integrated Policy and Legislation, Mark Sieben was appointed Associate Deputy Minister and Chief Operating Officer for the B.C. Ministry of Children and Family Development (MCFD) in June, 2008. In this role, Mark oversees the development of cross-policy initiatives along a broad continuum of services for vulnerable children and families, including: child welfare, adoption, child and youth mental health, and children and youth with special needs.

Over the last twenty years, Mark has compiled a varied set of experiences in child welfare-related positions ranging from youth and family counselor and child protection social worker to senior administrator in a large child welfare system. Such experience continues to inform his work in policy and legislative development, child fatality reviews and responses, service delivery

management, administration, and strategic initiatives. Mark has led large social policy legislative initiatives in combination with broad community and stakeholder based consultations. Informed by his experience as a front line worker, he seeks principle-based practice solutions to increase family and community participation in case planning, case decision-making, and care giving for vulnerable children, while remaining committed to child safety and well-being.

Mark holds a Bachelor of Arts (Sociology) and a Bachelor of Law degree both from the University of Victoria. He is an often requested speaker on child welfare, collaborative and principle-based practice, and facilitating change through multi-leveled initiatives targeted at work culture, policy, and legislation.

TINA TAM is the Acting Executive Director of the Society for Children and Youth of BC (SCY). For over 35 years, the Society has focused on providing a strong voice representing children and youth and advocating for their well-being in British Columbia. Using the UN Convention on the Rights of the Child (UNCRC) as a foundation, SCY has a track record of creating and delivering programs that have motivated change in legislation, policy and practice in Canada.

The Society's pioneer role in the field of child sexual abuse prevention starting in 1979, has resulted in the development of a nationally acclaimed school-based program and has influenced many policies including changes in the Evidence Act (BillC-15).

For over three decades, SCY has also focused on children's environments and the importance of play which has lead to improvements to large numbers of play environments, the development of national guidelines and an increased understanding of children's needs. Based on the principles of the UNCRC, SCY has been actively engaged in the promotion of Child and Youth Friendly Communities and has been developing a series of community assessment tools for housing, community development, early childhood, Aboriginal communities and municipalities.

Since Canada's ratification of the UNCRC, SCY has taken a leadership role in child rights promotion and the production of education materials and tools to facilitate and monitor compliance. SCY's groundbreaking work on the "Four Star Rating System" that rates legal statutes 'through the eyes of a child and the lens of the UNCRC' has been applied to provincial legislation in BC, Alberta, and Ontario as well as federal legislation. In 2004, SCY developed Canada's first youth-led child rights monitoring process.

Tina Tam was educated at Wilfrid Laurier University, Kansai Gaidai University, and the University of Cambridge. She began her career in Capital Markets and left the sector to focus her work on children's rights and social responsibility.

THE HONOURABLE LANDON PEARSON O.C. is a long-time advocate for the rights and well-being of children. As the wife of a Canadian diplomat she brought up their five children in five countries and learned first-hand about the challenges confronting the world's children. She also learned to listen to her own.

Prior to her appointment to the Senate of Canada in 1994, where she became known as the Children's Senator as well as the Senator for Children, she had extensive experience as a volunteer with a number of local, national and international organizations concerned with children.

As Vice-Chairperson of the Canadian Commission for the International Year of the Child (1979), she edited the Commission's report, For Canada's Children: National Agenda for Action. From 1984 to 1990, she served as President and then Chair of the Canadian Council on Children and Youth.

She was a founding member and Chair of the Canadian Coalition for the Rights of Children from 1989 until she was summoned to the Senate.

In May 1996, Senator Pearson was named Advisor on Children's Rights to the Minister of Foreign Affairs, and in 1998 became the Personal Representative of the Prime Minister to the 2002 United Nations Special Session on Children. She then coordinated Canada's response to the Special Session entitled A Canada Fit for Children.

Upon her retirement from the Senate in 2005, Landon Pearson moved with all her documents and papers to Carleton University where she directs a Resource Centre for the Study of Childhood and Children's Rights that has been established in her name. The Landon Pearson Resource Centre is devoted to promoting the rights of children and youth through disseminating knowledge about the UN Convention on the Rights of the Child, mentoring students, sponsoring youth participation in a variety of settings, organizing lectures and seminars and coordinating a growing network of child rights scholars across Canada. Landon Pearson is also adjunct professor in the Pauline Jewett Institute of Women's Studies.

Landon Pearson has published two books and a number of articles on child-related issues and she continues to write about and to lecture on children's rights, especially the rights of children in difficult circumstances. She has received many awards, including the Canada Volunteer Award in 1990 and several honourary doctorates. In 2005, she was one among 1000 women world wide nominated for the Nobel Peace Prize for her work on behalf of children. In July 2008 she was appointed to the Order of Canada as an Officer.

Panel V: Best Interests and Canada's Constitution

CHERYL MILNE is the Executive Director of the David Asper Centre for Constitutional Rights at the Faculty of Law at the University of Toronto. Prior to this position she had extensive experience as a legal advocate for children with the legal clinic Justice for Children and Youth. There she led the clinic's Charter litigation at the Supreme Court of Canada advocating for children's rights including the challenge to the corporal punishment defence in the Criminal Code, the striking down of the reverse onus sections of the Youth Criminal Justice Act for adult sentencing, and most recently an intervention involving the right of a capable adolescent to consent to her own medical treatment. She is currently the Chair of the Ontario Bar Association's Constitutional, Civil Liberties and Human Rights section. She teaches constitutional advocacy at the University of Toronto, Faculty of Law and Social Work and the Law at Ryerson University. She has written extensively on children's rights.

CINDY BLACKSTOCK, M.M., PhD (candidate)
Executive Director, First Nations Child and Family Caring Society of Canada
www.fncaringsociety.com

A member of the Gitksan Nation, she has worked in the field of child and family services for over 20 years. Key interests include exploring the over representation of Aboriginal children in child welfare care, structural drivers of child maltreatment in First Nations communities, human rights and the role of the voluntary sector in expanding the range of culturally and community based responses to child maltreatment.

Current professional interests include serving as the co-convener of the Indigenous Working Group, United Nations NGO Working Group on the Rights of the Child, co-director of the Centre of Excellence for Child Welfare and a board member of National Aboriginal Youth Organization.

CLAIRE BERNARD is a legal counsel for the Research and Planning Division of the Commission des droits de la personne et des droits de la jeunesse du Québec, Québec's Human Rights and Youth Rights Commission. Her fields of expertise include human rights and freedoms and children's rights. Member of the Québec Bar since 1988, Maître Bernard holds law degrees from McGill University (LL.B. 1987; B.C.L. 1987) and from the University of Montreal (LL.M. 1991). She was awarded the prize for the best master's thesis by the Québec Association of Law Teachers in 1992. She was a member of the Québec Bar Committee on the Legal Representation of Children from 1992 to 1995 and from 2003 to 2006.

PROFESSOR CAROL ROGERSON received an LL.B. from the University of Toronto in 1982 and an LL.M. from Harvard Law School in 1983. She is a Professor at the Faculty of Law, University of Toronto, where she has taught since 1983. Professor Rogerson received the SAC-APUS teaching award in 1985 and was Associate Dean of the faculty from 1991 to 1993. She teaches and writes in the areas of family law, constitutional law, and children and the law. She has written several major articles on spousal and child support issues, including: "Spousal Support After Moge" "(1997), 14 Can. Fam. Law Quarterly 281; "Child Support Under the Guidelines in Cases of Split and Shared Custody" (1998), 15 Can. J. of Fam. Law 11;"Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001), 19 Can. Fam. Law Quarterly 185; "The Child Support Obligation of Step-Parents" (2001), 18 Can. J. of Fam. Law 9; and "The Canadian Law of Spousal Support" (2004), Family Law Quarterly 69. She is also a co-author and editor of a leading casebook on constitutional law, Canadian Constitutional Law, published by Emond Montgomery. Professor Rogerson is a frequent lecturer at continuing legal education programmes and the National Family Law Programme. She has worked with both the federal and provincial governments on issues of family law reform. Her most recent project, together with Professor Rollie Thompson from Dalhousie Law School, has been directing a project on spousal support advisory guidelines supported by Justice Canada.

Saturday, February 28 2009

BERNARD RICHARD, a lawyer and a former social worker, was born April 11, 1951, in Toronto, Ontario. His family returned to Cap-Pelé and he attended local schools. He received a Bachelor of Arts degree (psychology) from Université de Moncton and a Bachelor of Laws from the University of New Brunswick.

He is a member of the Canadian Bar Association, the Law Society of New Brunswick and the Association des juristes d'expression française du Nouveau-Brunswick. He practiced law at Cap-Pelé with the law firm of Richard, Savoie, Belliveau. Prior to attending law school, he worked as a social worker.

In the 1974 provincial election he offered as a candidate for the Parti acadien in the new single-member riding of Shediac. He was later elected to the council of the Village of Cap-Pelé and he served as deputy mayor from 1977 to 1980. He also served as Secretary General of the Société Nationale de l'Acadie from 1980 to 1984.

Mr. Richard served as a member of the Legislative Assembly of New Brunswick from September 23, 1991 to November 25, 2003. During that period, he held the following responsibilities: Minister of State for Intergovernmental and Aboriginal Affairs; Acting Minister of Justice and Attorney General, Minister of Education and Minister responsible for social policy renewal.

On March 21, 2001, he was chosen as Leader of the Official opposition and Interim Leader of the Liberal Party of New Brunswick. He held this post until May 11, 2002. On May 14, 2002, he assumed the role of Opposition House Leader. He was also chair of the Official Opposition caucus. Mr. Richard has twice been the chargé de mission for the Americas region of the Assemblée Parlementaire de la Francophonie.

He was re-elected in the provincial general election held June 9, 2003. He continued as Official Opposition House Leader. He announced his decision to leave political life on November 25, 2003. On January 3, 2004, Mr. Richard assumed the responsibilities of New Brunswick Ombudsman. He is the 6th person to occupy this position. In May 2005, Mr. Richard was elected president for a term of two years, of the Forum of Canadian Ombudsman, an association of Ombudsman from the public, university and private sectors. In November 2006, Mr. Richard was appointed New Brunswick's first Child and Youth Advocate. In May 2007, he was elected president of the Canadian Council of Parliamentary Ombudsman. He is the president of the Association des Ombudsmans et Médiateurs de la Francophonie since December 2007. In July 2008, Mr. Richard was presented with the Senator-Muriel-McQueen-Ferguson Award for his work in preventing family violence.

Mr. Richard has spoken on the subject of independent oversight of public administration, good governance and has participated in election observations in places as diverse as Bamako (Mali), Recife and Santos (Brazil), Djibouti and the Ukraine.