

WHO LISTENS TO CHILDREN?



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Having recently mothballed my judicial robes to take the appointment as Representative for Children and Youth, the practices of the courtroom still resonate for me. One matter upon which I reflect given my recent experiences is what is access to justice for children and youth in British Columbia? How do children experience the justice system and are they “heard” in any sense by the adults responsible for the system?

While there is no uniform agreement among parents, justice officials, and lawmakers regarding how to appropriately gauge the level of autonomy which a particular child should be afforded in justice processes, this should not prohibit opening the system up to their voices. Disagreement regarding how best to weigh a child’s views regarding his or her fate will be left to parties in particular proceedings, but as a policy the child’s voice should not be silent. Children as persons may be subject to far lesser protections than other persons in the justice system in terms of the supports and efforts to

be heard or to participate in processes that determine key matters regarding their lives: such as who they will live with. The legality of spanking certainly raises fundamental issues regarding whether children are truly free from domestic violence on the same par as their parents.

As long as the normative ethics surrounding the involvement of voices of children are being debated, there will likely be little resolution to the current climate of uncertainty, and incongruent policy approaches across the province likely mean that some children are being heard and some are not. While issues of weight remain unresolved, there is a general consensus that *children should have a voice* of some kind in the processes surrounding family disputes and other conflicts, negotiations and decisions that will affect them. Therefore, the most immediate objective of those who work with and advocate for children must be to ensure that there is room provided *at the structural and procedural level* for the inclusion of children’s voices.

There are initiatives underway that suggest an evolution in the thinking about access to justice to reach out to hear children. The Nanaimo Family Justice Services Centre is a pilot initiative that focuses on communication and mediation between disputing parties, with an ethos that the courtroom should be viewed only as a last resort for family dispute resolution. Most significantly, children may be included directly in the mediation process at the Justice Centre. Such initiatives are significant developments in British Columbia and may be the seeds of policy change. Some of these seeds need active cultivation so that all children might have a right to be heard and participate in processes that impact upon them, aided by properly trained and supportive adults.

If disputes concerning children do end up in a litigious setting, there is much that can be done to remedy the absence of their direct voice in British Columbia. Ontario exemplifies a progressive approach; the phrase “best interest of the child” codified in the *Federal Divorce Act* is given enumerated criteria to aid interpretation in that province’s *Children’s Law Reform Act*. While in British Columbia we do not have the same articulated criteria, I do not suggest legislative reform is necessary to effect change. Indeed, there are examples of the legal community taking the initiative to remedy the situation, albeit in a localised setting. The “*Hear the Child Interviews*” project in Kelowna is one such initiative. Developed with the International Institute for Child Rights and Development and implemented in collaboration with the Kelowna legal community, the project encompasses alternatives to the cumbersome and costly channels previously available. The process involves interviewers drawn from a cadre of trained lawyers and counsellors who meet and speak with the children involved, and present the child’s views to the court. Interviews with children 8 years and older are encouraged. A recent report found that 100% of the lawyers and judges interviewed found that the process resulted in earlier settlement or a shorter trial. As with the Nanaimo project, the success of the Kelowna pilot must be swiftly duplicated to as great an extent as resources allow. Such overwhelmingly positive results must not be seen as isolated occurrences nor such initiatives as curiosities, rather as what could and should be the provincial norm.

These initiatives suggest that the climate is fertile for change in British Columbia, and that such change can effectively come from the ground up. Broader steps across the Province should be encouraged to affirm and build on these smaller initiatives. The use of child protection mediation as an important innovation, especially for vulnerable families and children, is a mechanism which could easily be shaped to support greater participation by children. Even children with cognitive impairments can be “heard” and creative initiatives are underway in other states, such as Scotland, to develop an intermediaries program to ensure that the child’s voice is not lost in the dispute resolution process, or in criminal proceedings.

What should motivate us in thinking about listening to the voice of the child, and building their participation into access to justice initiatives, is the UN Convention on the Rights of the Child. It provides a framework for policy development and human rights implementation. Article 3(1) directs that “*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration,*” and Article 12(2) of the Convention states that “*the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*”

There is much work to be done in British Columbia on the part of those who interact with children in the adjudicative and judicial processes. It is time for change and the seeds have been sown in Nanaimo, Kelowna and through innovative child protection and family law mediation. Everyone working in the justice system, and on access to justice initiatives, must ask themselves a threshold question: “Are children being heard in these processes?” The real test is whether we can find consensus on a province-wide basis to hear children and to enhance the quality of justice they receive through listening to them.

Mary Ellen Turpel-Lafond, BC’s Representative for Children and Youth, is a judge of the Provincial Court of Saskatchewan on leave.



THE OFFICE OF THE REPRESENTATIVE FOR CHILDREN AND YOUTH

Mary Ellen Turpel-Lafond was appointed in November 2006 for a five-year term. The Representative is an Independent Officer of the Legislature, a position created as a result of the Hon. Ted Hughes’ children and youth review last year.



The mandate of the Representative for Children and Youth is to support children, youth and families who need help in dealing with the child welfare system, and to monitor and advocate for changes to the system itself. The Representative’s role and jurisdiction are defined in the *Representative for Children and Youth Act* and focus on advocacy, monitoring and investigation.

The Representative can:

- Advocate on behalf of children and youth to improve their understanding of and access to designated services
- Monitor, review, audit and publicly report on designated services for children and youth
- Conduct independent reviews and investigations into the critical injuries or deaths of children receiving reviewable services

Ms Turpel-Lafond holds a bachelor of arts degree from Carleton University, a law degree from Osgoode Hall, a master’s degree in international law from Cambridge University and a doctorate of law from Harvard Law School.

For more information on the Representative for Children and Youth, please visit www.rcybc.ca.