



# **Capacity: A Principled, Rights-Based Approach to Child Participation**

The Society for Children and Youth of BC

SOCIETY FOR  
**children  
and  
youth**  
OF BC



REPRESENTATIVE FOR  
**CHILDREN AND YOUTH**



# CHILD CAPACITY

## TABLE OF CONTENTS

Acknowledgements	3
About The Society for Children and Youth of BC	4
<b>A. Executive Summary</b>	8
<b>B. Background and Purpose of Report</b>	9
<b>C. Scope of Review and Methods</b>	10
<b>D. Discussion</b>	10
<i>Definition of Child</i>	10
<i>A brief history of capacity in children's rights</i>	12
<i>Convention on the Rights of the Child</i>	14
<i>Best Interests</i>	15
<i>Multiple definitions of capacity</i>	17
<i>How children define capacity</i>	18
<i>Developmental approach to child capacity</i>	19
<i>Legal capacity</i>	24
<i>Participatory and decisional capacity</i>	25
<i>The question of "capacity to do what?"</i>	26
<i>Age alone is not a reliable indicator of capacity</i>	27
<i>Capacity as "present or not"</i>	28
<i>The development of capacity and the impact of Adverse Childhood Experiences</i>	29
<i>Children with disabilities</i>	30
<i>Mature minor doctrine</i>	31
<i>Criticisms and limitations of capacity concept</i>	32
<b>E. Models for Supporting Child Participation</b>	34
<i>Lundy Model of Child Participation</i>	34
<i>Circle of the Child Model</i>	35
<b>F. Summary of Key Findings</b>	36
<b>References</b>	38
<b>Youth Engagement Methodology &amp; Data</b>	42

# Acknowledgements

We would like to recognize the generosity of all youth and contributors in sharing their experiences and insights throughout the project. We thank you for allowing us to hear your stories across the various mediums in which your words were shared. Thank you to all stakeholder experts who provided their knowledge and wisdom for each project topic, providing our research team with invaluable information that shaped the emergent themes and key findings. This project began with the convening of community stakeholders at an initial roundtable, and we would like to give our thanks to the folks who joined us. Finally, thank you to everyone who provided guidance and feedback throughout the duration of this project.

The Society for Children and Youth of BC would like to acknowledge that we live and work on the traditional territories of the First Nations peoples of British Columbia. Our office is located on the Unceded Territory of the xʷməθkwəy̓əm (Musqueam), skwxwú7mesh (Squamish) and səl̓ílwətaʔɬ (Tsleil-Waututh) First Nations. We express our sincerest gratitude to the custodians of these lands and beyond across BC. We also wish to recognize the specific impacts on Indigenous Peoples and communities that are a result of the systems that are the focus of these papers. We invite readers to critically engage with the themes and key findings presented using this lens as well as an intersectional approach to take action.

Finally, we would like to acknowledge the invaluable contribution of the Office of the Representative for Children and Youth in facilitating this research. Their expertise, insights, and guidance throughout the research process were instrumental in shaping this work.

We would like to express our sincere gratitude to our Project Coordinator and Youth Engagement Lead, Simran Sarwara, for her invaluable contributions to this project. We would also like to thank Lisa Bellano for her extraordinary research leadership and report writing, as well as Sara Hernandez for her exceptional design of the report layout.

The British Columbia Representative for Children and Youth funded this report.

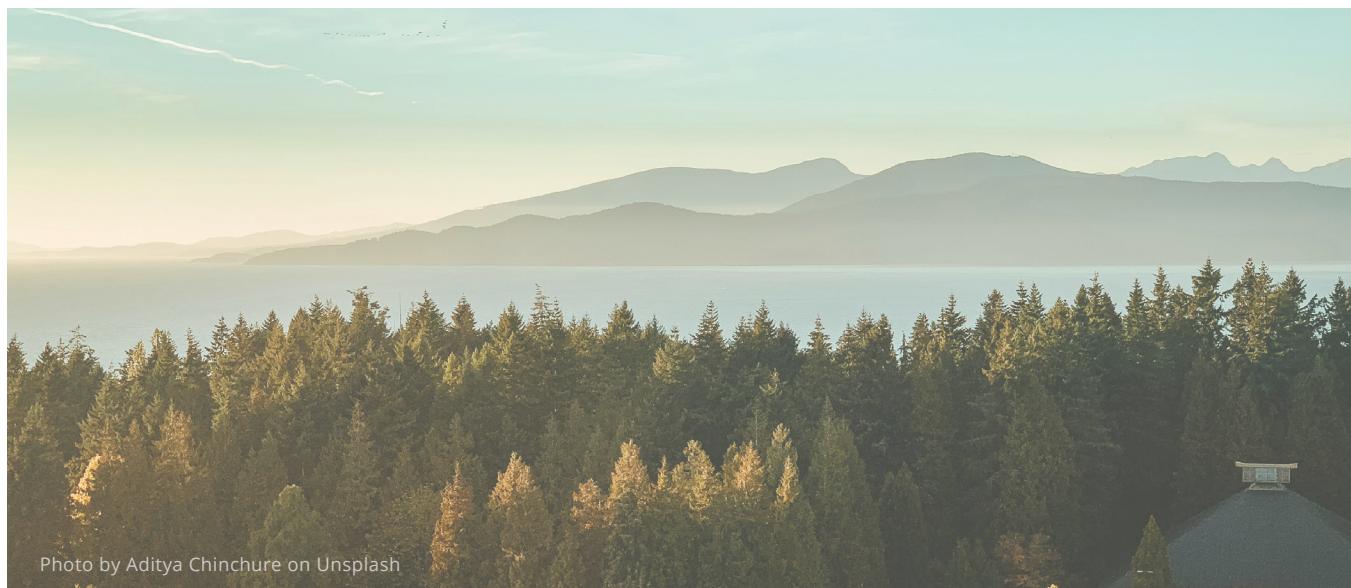




Photo owned by The Society for Children and Youth of BC

## ABOUT THE SOCIETY FOR CHILDREN AND YOUTH OF BC

The Society for Children and Youth of BC (SCY) is a provincial not-for-profit charity. Since 1974, the Society has focused on providing a strong voice representing children and youth. Our mission is to improve the well-being and resilience of children and youth in BC through the advancement of their civic, political, economic, social, cultural and legal rights. Using the UN Convention on the Rights of the Child as a foundation, SCY has a track record of creating and delivering programs that have motivated change in research, legislation, policy, and practice in Canada. This year, we proudly celebrate 50 years of advocacy for child and youth rights. The organization is comprised of three programming areas: The Child and Youth Legal Centre, Child and Youth Friendly Communities, and Child Rights Public Awareness.

The Child and Youth Legal Centre (CYLC), established in 2017, provides free support to young people experiencing issues related to Family Law, Child Protection, human rights violations, and other legal matters. The Legal Centre is made up of Lawyers, Intake Workers, Child and Youth Advocates and a Social Worker. The Legal Centre has seen significant growth since its inception, and in 2023 supported 1125 young people across 90+ Communities in British Columbia.

SCY's Child and Youth Friendly Communities (CYFC) program supports child-friendly community-building with young people. Over the past eight years we have worked in collaboration with various Metro Vancouver municipal planning teams to ensure that children and youth have a stronger voice in their community's planning initiatives. Our aim is to ensure that public engagement is a deep and meaningful experience for

young people. Some of our projects include the Walking School Bus, School Streets, Play Streets, and Urban Explorers.

The Child Rights Public Awareness Campaign began in 2006 when SCY, the Representative for Children and Youth, and the Institute for Safe Schools of BC came together to envision a plan for raising awareness of child rights. Throughout the years, the campaign has engaged in numerous activities including roundtables on children's rights, the creation of a child rights network, a multimedia campaign, community and youth engagement activities, and the development and dissemination of child rights resources across the province, including multilingual resources.

Drawing from our experiences over the past several decades across different sectors advocating for child and youth rights, SCY conducted a Child Capacity Research Project as commissioned by the Representative for Children and Youth of B.C. This work aims to highlight the importance of child participation rights by way of research papers on child capacity in the context of four key areas: 1) family law, 2) child welfare and adoptions, 3) decisions about healthcare, and 4) mental health and involuntary civil detention. We are pleased to present this report series as it reflects a culmination of comprehensive literature analysis and multi-faceted youth engagement specific to each area. It is our hope that the key findings identified within each paper will support systemic action and facilitate cross-sectoral collaboration within B.C.



#102 - 1678 W. Broadway, Vancouver, B.C. V6J 1X6

Telephone: (778) 657-5544 | [www.scyofbc.org](http://www.scyofbc.org)

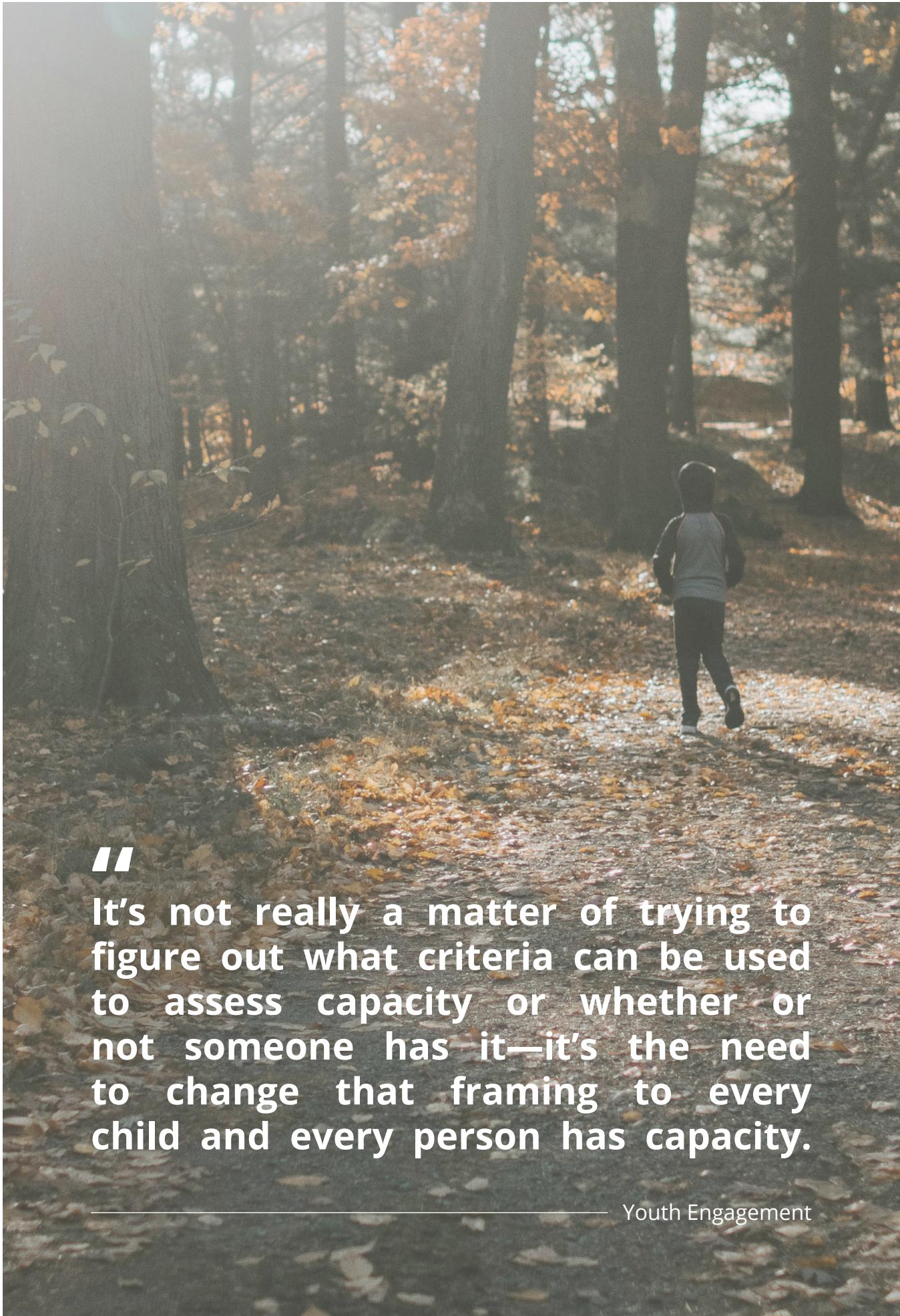
General inquiries: [info@scyofbc.org](mailto:info@scyofbc.org)

Child and Youth Legal Centre: [cylc@scyofbc.org](mailto:cylc@scyofbc.org)

# **CAPACITY: A PRINCIPLED, RIGHTS-BASED APPROACH TO CHILD PARTICIPATION**

## **RESEARCH REPORT ON CHILD CAPACITY**

Society for Children and Youth of BC  
Lisa Maria Bellano



“

**It's not really a matter of trying to figure out what criteria can be used to assess capacity or whether or not someone has it—it's the need to change that framing to every child and every person has capacity.**

---

— Youth Engagement

## A. EXECUTIVE SUMMARY

This research project explores child capacity in a participatory context in legal and administrative proceedings in Canada with a focus on British Columbia in the areas of family law; child welfare and adoptions; mental health and involuntary civil detention; and decisions about health care. Capacity is considered through the lens of the United Nations' Convention on the Rights of the Child (UNCRC) (1989), to which Canada is a signatory.

## KEY FINDINGS

1. There is no universally agreed upon definition of capacity although there are recurring themes throughout social science.
2. Age alone is not a reliable indicator of capacity. Decision makers should not use age as the sole determinative factor of children's capacity.
3. All children should be presumed to have capacity to express their views and preferences. Great harm is done to children who are not permitted to exercise their capacity to be heard in matters affecting them.
4. Capacity can be understood as both a function of cognition, as well as an ability or a right one possesses. What it is varies depending on its context or function. Capacity can be a legal right.
5. Capacity encompasses a variety of factors and develops at different rates. Children may possess more or less capacity in different contexts. The capacity to be heard is not the same as the capacity to be the decision maker.
6. The United Nations Convention on the Rights of the Child provides that a child need only be capable of forming a view in order for their view to be heard and considered. There is no further test of cognition or capacity that should stand in the way.
7. Children and youth must be equitably supported to express their views and desires on matters affecting them, using methods that meet their level of capacity.



Photo by Zach Lucero on Unsplash

## B. BACKGROUND AND PURPOSE OF REPORT

The purpose of this report is to summarize research findings on the topic of child capacity, largely in the context of child participation rights. This research was funded by the Office of the Representative for Children and Youth (RCY) of British Columbia and was undertaken to generate greater clarity on (a) the definition and scope of child capacity, (b) factors influencing the development and exercise of capacity, and (c) the impact of trauma or neurodiverse conditions on the same.

Specifically, this research considers child capacity in the context of four key legislated areas:

- family law;
- child welfare and adoptions;
- mental health and involuntary civil detention;
- decisions about health care.

Each of these legislated areas comprise their own, separate forthcoming paper.

The current paper offers a summary of the key findings emerging from research in the topic of child capacity in a participatory context. It provides a primer on the topic of child capacity and a discussion of the multiple definitions of child capacity, key themes emerging from research on capacity, and criticisms and limitations of the capacity concept. The paper ends with suggesting examples of models to support effective child participation consistent with Article 12 of the UNCRC.

## C. SCOPE OF REVIEW AND METHODS

The scope of this review is limited to the legislated areas of family law, child welfare and adoptions, mental health and involuntary civil detention, and decisions about healthcare. There are other significant legal domains within which child capacity is a live issue, including but not limited to immigration and refugee hearings, criminal or youth justice proceedings, educational matters (such as disciplinary hearings), and labour and employment (many youth under the age of majority are employed). While these areas are not directly discussed in this paper, they are nonetheless important to the lives of children and youth in British Columbia and may warrant separate investigation.

The approach to this research consisted of three stages. First, we reviewed literature—predominantly from law, psychology, anthropology, health sciences, and other disciplines—about child capacity, as well as legislation and select case law relevant to child capacity in the four key legal areas. The second stage consisted of community engagement. At this stage, we interviewed children and youth on their experiences of capacity generally and as they relate to the specific legal areas of inquiry, and from these interviews generated key conclusions and recommendations for reform. Part of this stage included distributing a survey to a larger number of children and youth to strengthen our key conclusions. The engagement stage also included hosting facilitated listening circles with groups of children and youth using key research questions. The third and final stage consisted of stakeholder consultations, during which time this research was presented to stakeholders and subject matter experts, and reviewed by them to ensure accuracy, clarity, and soundness—particularly of our key findings.

Our approach to this research has been to adopt an intersectional framework, while also recognizing the challenges inherent in writing about a legal and scholarly tradition rooted in imperial and colonial assumptions of children, childhood, and human rights. We have endeavoured to move beyond looking only at age as a factor in our capacity discussion, including also variations in children's experience pertaining to their class, ethnicity, race, religion, gender, sexuality, social background, ability, and the intersection of these elements (Adami, 2023). Given our regional and historical context, we have also paid specific attention to the experience of Indigenous children and youth in British Columbia.

## D. DISCUSSION

### Definition of child

The UNCRC defines a child as a human being below the age of 18, unless national laws recognize an earlier age of majority (Article 1). In Canada, the age of majority is 18 in Alberta, Manitoba, Ontario, Prince Edward Island, Quebec, and Saskatchewan; and 19 in British Columbia, New Brunswick, Newfoundland, Northwest Territories, Nova Scotia, Nunavut, and Yukon.

Given that this is a British Columbia-specific paper focused on the UNCRC, we will define child as a human being below the age of 19.

Note that although we are using this definition for the purposes of this paper, the definition of child is—like capacity—with consensus. For example, independent children, child-headed households, and children at work are all exceptions to the accepted narrative and call into question our assumptions about the line between childhood and adulthood. Is a 17-year-old human being—who may be a mother to a child, the sole supporter of her family, employed, and making adult decisions for herself and her child—a child or an adult? Depending on one's cultural reference-point and legal framework, among other factors, the answer given will vary.

Connected to the above, there is cultural and regional variation in the definition of childhood. It is beyond the scope of this paper to discuss these variations; however, it is important to state that many scholars have criticized the UNCRC for the fact that it standardizes a universal, largely North American and Western European understanding of childhood that does not cohere with the experiences of children and youth in other countries. There is a trove of literature written on the experience of African youth and children in particular—see for example Twum-Danso (2008), who has specifically addressed the deficiencies of the UNCRC and its questionable efficacy for African children and youth.



## A brief history of capacity in children's rights

The relationship between capacity and human rights is one that can be traced to the origin of our rights tradition. Whether or not one is able to exercise a right as a legal actor is often seen as dependent upon that actor's ability or capacity to effectively exercise that right.

Only those deemed capable can benefit from the ability to exercise a right and to have that right respected. According to Federle, this can be found in the origin of our rights tradition, "which emphasizes autonomy and individuality, perpetuates hierarchy and exclusion by limiting the class of rights holders to those with capacity" ( Federle 1993, p. 1028).

Classes of rights-holders traditionally excluded from being able to exercise their legal rights based on incapacity arguments include children, youth, women, racialized groups, Indigenous persons, disabled folks, and other marginalized groups.

*"I feel like people always assumed I wasn't capable of making good decisions because I was young, which was very frustrating and made me feel like I was too stupid or like I didn't know anything. I don't think this was the case, people just didn't want to listen to me."*

— Youth Engagement

In terms of socio-legal theory, the antecedents of this view—that capacity and legal rights are linked—are social contrarianism (Hobbes, Locke, Rousseau), utilitarianism (Bentham, Mill), and legal positivism (Hart). Each of these philosophies, which have informed the formation of rights-talk in Canadian law, "exclude children entirely from the class of rights holders because of their incapacities" (Federle, 1993, p. 1028). So too do natural law theories (Kant, Hegel, Rawls) limit the legal participation of children under a protectionist framework, even while recognizing that children are moral beings possessing their own, distinctive wants and needs separate from adults (Federle, 1993). A protectionist framework is one which emphasizes the vulnerability of children and the need to protect them from harm, rather than seeing them as empowered.

These theories more often view children not as human-beings, but "human-becomings" (Alderson & Goodwin, 1993, p. 6). The ability, then, for children to exercise rights is tied to their perceived competencies—and these theories tend to purport either that children "do not have the requisite will to obligate others", or that children's interests are insufficient, warranting protection, or otherwise characterized "in ways that promote their incapacities" (Federle, 1993, p. 986).

Given this relationship between capacity and rights, Federle and others have deemed it "essential...to recognize the centrality of capacity as an organizing principle in our rights talk" (1993, p. 1028). Other legal scholars, such as Gary Melton, have provided

similar such statements on competency as capacity; "competency is the overriding issue in the law affecting children" (as cited in Federle, 1993, p. 1011). In the words of Bruce Hafen, the "law has 'long assumed the necessity of competency'" (as quoted by Federle, 1993, p. 1012).

More pointedly, Federle asserts:

As long as we premise rights upon ability and view children as undeveloped or underdeveloped beings evolving into adulthood, we can discuss individual rights only in terms of hierarchy and exclusion. To speak of children's rights, however, means to hear children's voices without the filtering influence of our preconceived notions about children's incompetencies. To hear children's voices requires us to look beyond our status-based relationships and to set aside the power that we have. We need to acknowledge that rights have value because of their power to eliminate hierarchy and exclusion, but as long as capacity plays a role in defining rights, we minimize value. Reconceiving rights means reconceiving our sameness; this we can accomplish only if we cast capacity aside as an organizing principle in our rights discourse (Federle, 1993, p. 1028).

Theorists Richard Farson and John Caldwell Holt further argue that given the issues in drawing the line between competency and incompetency, it ought to be presumed that children have capacity; that is, children have the "same political and legal rights held by adults because children are competent" (Federle, 1993, p. 1012). Federle maintains that there are significant negative consequences to applying a stringent or exclusive definition of capacity. "[T]he exclusion of the child from greater political participation signifies a deeper consequence of capacity: incompetency does not merely limit rights; it denies them entirely" (Federle, 1993, p. 995).



Photo by Kelly Sikkema on Unsplash

## Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (UNCRC) is a human rights treaty adopted on November 20, 1989 by General Assembly resolution 44/25. It has been signed and ratified by almost every country in the world, including Canada.

Its basic principles pertain to non-discrimination of children, making decisions in the best interests of children, respecting the child's right to life and development, and child participation in all matters affecting them. Articles 5 and 12 of the UNCRC are most often engaged when a child's capacity and participatory rights are considered.

Article 5 provides that "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, **in a manner consistent with the evolving capacities of the child**, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention" (emphasis added).

The UNCRC does not provide a definition of capacity. Henderson-Dekort and colleagues (2022) note:

Within specific articles within the United Nations Convention on the Rights of the Child (1989), it is clear that there is frequent uncertainty surrounding the term capacity. It remains a difficult concept to assess with certainty, especially in the case of children. This is concerning considering how frequently the term is used or eluded to [sic] in matters that pertain to the participation or rights of children (p.3).

"Evolving capacity," as it is used in Article 5 of the UNCRC, refers to a child's progressive ability to exercise his or her rights (Canadian Bar Association, CBA, 2023). This is distinct from the view that capacity is a fixed trait; rather, it is a "fluid and evolving response to various situations"—it is situation and context-dependent (Henderson, 2022, p.6). More to this point, "evolving capacities recognizes children as active agents in their own lives entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth" (Lansdown, 2005, p. ix).

Article 12(1) of the UNCRC stipulates that States Parties provide a child capable of forming his or her own views the right to express those views freely in all matters affecting the child, and that the child's views be given due weight in accordance with the child's age and maturity (emphasis added). Article 12(2) further states that the child be provided an opportunity to be heard in any judicial and administrative proceedings affecting him or her, either directly or through a representative, in a manner consistent with the procedural rules of national law. Again, this Article references a developmental view of capacity, providing that as children develop and acquire capacity, they shall become entitled to higher levels of responsibility in areas that affect them (UN General Comment No. 12, 2009, para. 85).

UN General Comment No. 12 and the UNCRC make it clear that the child should be presumed to be capable of expressing his or her own views, rather than incapable. The General Comment states that “it is not up to the child to first prove her or his capacity” (para. 20, emphasis added). The General Comment does not define capacity but does define maturity within the context of Article 12 as being “the capacity of a child to express her or his views on issues in a reasonable and independent manner,” and “the ability to understand and assess the implications of a particular matter” (para. 30).

All that is required to demonstrate that a child is “capable” under Article 12 is a “formulation of a view, absent any understanding by the young person of how or why they formed the view, the basis of the view, or the consequences of voicing the view or acting on it” (CBA, 2023; Mol, 2019). Article 12 likewise reflects a view of capacity as evolving, as it provides that the child’s views be given due weight in accordance with his or her age or maturity, suggesting greater weight is given as the child ages and becomes more mature (CBA, 2023; UN General Comment No. 12, paras. 20-21).

Other notable sections of the UNCRC referring to capacity are Article 40(3)(a) (children may lack capacity and thus require special protection, here in the context of young children and regarding minimum age for criminal responsibility); Articles 9, 12, 26, 37, and 40 contemplate participation and representation of the young person in various processes and proceedings (e.g. sharing views, providing informed consent, applying for benefits); and Article 21 (“persons having the right to consent to an adoption, including a young person being considered for adoption, have a right to ‘informed consent’”, implying “both participation and capacity on the part of the young person as informed consent can only be given by someone who has capacity; that is, an understanding of what they are consenting to”) (CBA, 2023).

## Best Interests

*“If you wanted my best interests, you could have just asked me.”*

— Youth Engagement

There is some tension within the UNCRC—and in child participation generally—between the rights afforded to children and youth to express their views and have those views taken seriously, and the notion of best interests. Article 3(1) of the UNCRC provides that in all actions concerning children, the best interests of the child shall be a primary consideration. On the face of the UNCRC, it is unclear what ought to occur in a situation where the views of a child or a child’s exercise of his or her capacity is at odds with what is deemed to be in that child’s best interest. It is also unclear what constitutes best interests (Henderson-Dekort et al., 2021).

Certain scholars, like Daly, have argued that judges should adopt a children’s autonomy

principle in legal decisions wherein the best interests of the child is the primary consideration. In such cases—and in accordance with Article 12—children should get to “choose, if they wish, how they are involved (process autonomy) and the outcome (outcome autonomy) unless it is likely that significant harm will arise from their wishes” (Daly, 2017, p. 115). However, this does not resolve the question of whether a child’s views or their “best interests” is deemed primary when in contest. “Best interests” language has been adopted and incorporated into various laws in British Columbia (for example, the Family Law Act). Practice and case law suggest that “best interests” considerations, while important, have in some cases been used to devalue the views expressed by a child or otherwise preclude a child from meaningful participation in matters affecting them. It is important that there is appropriate balancing between “best interests” and a child’s right to be heard; they are separate yet overlapping rights.

In the context of health care decisions, the issue of best interests is again engaged in situations where a child or youth’s treatment decision is at odds with that of a parent, guardian, or healthcare provider. For instance, section 17 of the Infants Act (British Columbia) explicitly provides that a healthcare provider—in assessing a child or youth’s capacity—determine that the healthcare is in the child’s best interests. In situations of conflict between views, which should prevail: the decision of a child or youth for a particular course of treatment, or that of an adult who may oppose the child or youth’s decision? The concern is that the language and principle of best interests may be used to undermine a child or youth’s decision-making capacity. From SCY’s engagement with children and youth in British Columbia, a recurring theme that emerged was that the best interests model was sometimes used to reflect the best interests of the adults, rather than the interests of the child or youth. As one youth put it, “parents do not have to live with it, yet they are ones who make the decisions, they are deferred to.” Another young person said:

*“It is a two-edged weapon, your best interests, it is a way for your guardian to use/assert power. Like in child custody, a child may not have the capacity to make decisions, but they should still have the opportunity to feel like their opinion is still valued. If they do not feel like their opinion is valued, then it may cause problems later in life”*

— Youth Engagement

It is important to note that hearing from the child and acting in their best interests are not inherently at odds. Rather, children’s meaningful participation is a clear part of the determination of their best interests. The UN Committee on the Rights of the Child states in their General Comment 14 Article 3(1) “the concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child”. That a child’s views may be contrary to what an authority deems to be in their “best interests” should not be used as a reason to exclude their meaningful participation in the decision-making process, which should be central in most cases. A growing body of evidence

demonstrates that meaningful participation from children in decision making promotes improved outcomes and wellbeing, even when the decisions made are not ultimately in accordance with the child's views.

## Multiple definitions of capacity

The term capacity in the context of child participation, and in children's rights generally, encompasses at least the following two core concepts: (1) legal personhood or legal capacity, and (2) mental, cognitive, or developmental capacity. It is the latter which is most dominant in discussions of child capacity, which focus not on the legal capacity of the child and the nature of being a legal rights-holder, but instead on the child's cognitive, mental, or developmental capacity—that is, their (perceived) ability to exercise a right (see Bach & Kerzner, 2010).



## How children define capacity

Throughout our youth engagement, several themes emerged regarding how children and youth themselves define capacity. Particularly for younger children, capacity is a kind of feeling—you know how you feel about a situation, you know when something feels wrong for you. It is about the ability to decide for oneself, to make decisions in one's life. Most shared that it was present when they were young, but in a different way. This is aligned with the developmental or evolving view of child capacity—that it develops over time and develops in complexity.

For example, during a youth listening circle, a participant shared the following about their understanding of capacity as a younger child:

*“As a child making decisions about who you live with, who you feel safe with, you don’t know a lot about the technical things, you just know something is wrong, you just don’t feel safe. As a small kid it is a lot based on feeling out what you want to feel.”*

During a one-on-one interview, another youth shared their sense of capacity as they have grown older:

*“Now, I feel that my self-awareness guides whether or not I have capacity”.*

Capacity was also defined by the children and youth we spoke with as the ability to make decisions, to be aware of your rights, to understand what you want, and to understand the direction that you want your life to go:

*“I think sometimes the idea of capacity is caught up in whether the person’s decision is a good decision.”*

Others shared that capacity was also something that at times could be lacking. For example, one participant said that there were times when her mental health struggles impaired her ability to make proper decisions for herself. She felt like during these periods, she needed guidance and support that she did not receive. Conversely, she said that when she felt she did have capacity and her mental health felt secure, she was not given the opportunity to be heard or to have her desires respected in the context of an involuntary hospitalization.



Other aspects of capacity stood out during our one-on-one interviews with children and youth, demonstrating some of the adverse consequences of assuming that a child lacks capacity:

“

*The more my capacity was taken away, the less that I knew how to use capacity.*

“

*I do not think that I had a lack of capacity, but I needed someone to work with me.*

“

*Capacity was a weapon used against me.*

## **Developmental approach to child capacity**

The developmental psychology approach to child capacity is most dominant in the literature surveyed. Capacity is viewed not as a fixed trait, but a fluid and evolving context-dependent process. It is multidimensional: to assess a child's capacity, one must consider the physical, cognitive, relational, and emotional factors, with reference to a child's religious, cultural, racial, economic, community, and familial contexts—and the interplay between them (Henderson-Dekort et al., 2022; Kinniburgh et al., 2005). Appropriate assessment of capacity is thus a comprehensive, multidimensional process.

The developmental approach proceeds from the basis that there are certain developmental stages through which children pass as they acquire knowledge and understanding of the world around them. Jean Piaget is the psychologist often credited with popularizing the developmental stage model. His theory was that children experience four distinct developmental stages that inform the way they conceive of the world and impact their cognitive abilities: sensorimotor (birth to 2); preoperational (2-7); concrete operational (7-11); formal operational stage (11 and up).

It is important to note that Piaget's approach, while foundational, has since been refined by subsequent, contemporary theories—and criticized by others. For example, in Tisdall et al., (2018):

Research and theory now recognise that children are far more competent than Piaget's classic tests showed, depending on the situation and contexts ...Literature now documents how all people are in the process of "becoming" and development is inherently social, scaffolded by others and interfacing with meso and macro influences (e.g. Donaldson, 1978; Bronfenbrenner, 1979; Rogoff, 1998). We thus have considerable research that competence is situated and relational but that finding is largely ignored by the assessments and judgments about "capacity" in the UNCRC's General Comment No. 12 and "age and maturity" (p. 176).

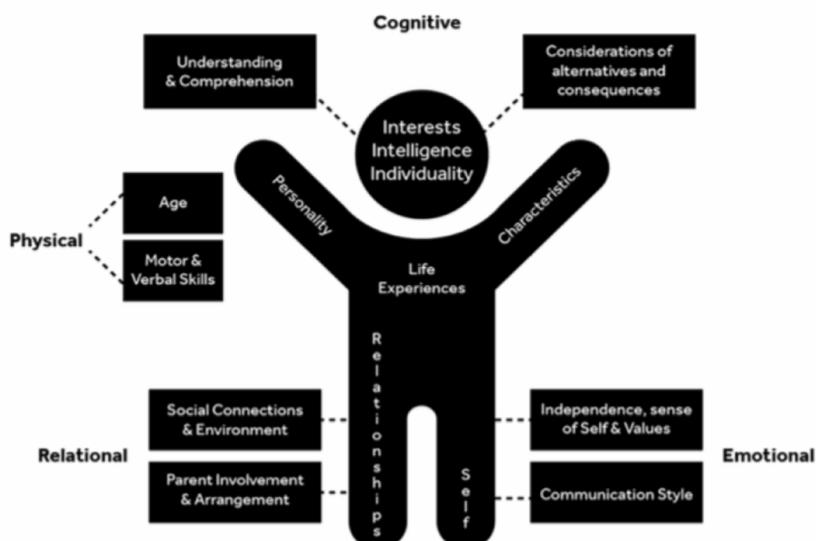
In their critical literature review provided by Zana Babakr and colleagues, the authors noted that Piaget's developmental theories may underestimate infant's capacity, and that the theories may likewise underestimate the significance of cultural and social factors to the development of children's cognitive abilities (Babakr et al, 2019). Likewise, there is contention within the field of developmental psychology as to whether developmental stages exist (see Orlando M. Lourenço, 2016, for a critical review of developmental stages).

Despite the shortcomings of his theory, Piaget's developmental stages remain the foundation of much of the current thinking on child development.

Henderson-Dekort and colleagues (2022) conducted an extensive interdisciplinary literature review on the topic of child capacity in the context of meaningful participation, with a focus on literature emerging from developmental psychology. According to their review, there are four primary domains or core elements to the capacity concept. These are:

- Physical capacity (age, motor development, and verbal communication);
- Cognitive capacity (understanding, intelligence, comprehension, ability to consider alternatives and consequences);
- Relational capacity (social connections and environment, parental involvement and attachment, sense of others); and
- Emotional capacity (independence, sense of self and set of core values and beliefs, communication style and delivery of voice, views, and preferences).

**Figure 1.**  
*The Four Primary Domains of Capacity (Henderson-Dekort et al., 2022)*



It is important to consider physical elements of capacity at the outset, as these are primary, and subsequently consider cognitive, relational, and emotional domains (Henderson-Dekort et al., 2022).

### **Physical capacity—age, motor development, and verbal communication**

---

There are large variations in the age at which a child should be deemed capable, thus age cannot be the sole consideration of capacity. Other physical considerations of capacity are the child's ability to verbalize and their motor skills (e.g. languages, accents, speech production, the use of physical voice, articulation, and pronunciation). Verbal abilities of the child are critical to consider for their active participation, since “[c]hildren may lack the necessary vocabulary to describe their thoughts and perspectives though they possess a deep understanding” (Einarsdottir et al., 2009, as cited in Henderson-Dekort, 2022, p. 9). For this reason, it is important to meet children at their verbal level.

Motor skills are not necessarily relevant to capacity level but are “simply another layer of the child's abilities and experiences, which can provide insight into a child's basic composition” (Henderson-Dekort, 2022, p. 9). If a child has a physical disability, they will “require appropriate methods of accessibility in order to display their capacities in other ways” (Henderson-Dekort et al., 2022, p. 9).

### **Cognitive capacity—understanding, intelligence, and comprehension; ability to consider alternatives and consequences**

---

A child must possess basic intelligence and comprehension to enable them to understand what is happening around them (Alderson & Goodwin, 1993), where understanding means the ability to “grasp the fundamental meaning of the information communicated” (Appelbaum, 2007, p. 1836). Understanding does not necessarily mean that a child can proficiently express their comprehension of a matter verbally (Henderson-Dekort et al., 2022,). That is, while a child may understand something, they may not have the ability to explain their understanding “in the expected verbal method” (Henderson-Dekort et al., 2022, p. 9).

Developmentally typical children often follow basic patterns (Brown et al., 2020). However, the capacity of children with developmental delays or atypical patterns of development will be unique to each child's specific developmental pattern (Brown et al., 2020). Capacity for such a child can be ascertained after “gathering information [specific to] that child's development level or atypical patterns of development” (Henderson-Dekort et al., 2022, p. 9).

A key concept emerging from the literature is that children demonstrate their understanding in different ways, distinct from adults, and that it is essential to allow children to display their own unique understanding. Tisdall et al. (2018) calls for a paradigm shift in family law proceedings, where we move away from exclusion of children based on the age and competence bias, and instead focus on creating the necessary environmental and social supports that allow children to develop and communicate their views.

Consequential thinking is understood to mean the ability of a child to identify and understand potential consequences, outcomes, and alternatives in a situation that will significantly impact a young person's life, such as in a custody proceeding (Henderson-Dekort et al., 2022, citing Grisso et al., 1997). It is imperative to identify and discuss these potential outcomes, alternatives, and consequences with a child in such a situation.

Comparative thinking "involves having the child develop ideas and identify potential outcomes of each, which they then contemplate and compare. Comparing alternative options to any other preferences is also crucial, and is known as comparative thinking" (Henderson-Dekort et al., 2022, p. 9, citing Grisso et al., 1997). Consequential and comparative thinking are viewed by the literature as central to understanding child capacity: "A 'capable' child will be able to formulate a perspective that is followed by a logical explanation of alternatives and consequences in order to convey comprehensive reasoning for the preference"—that is, "rather than just stating their views, thoughts must also include consequences to show alternatives were considered and the thinking process was thorough" (Henderson-Dekort et al., 2022, p. 9-10, citing Grisso et al., 1997).

However, it is important also not to set an inordinately high standard for children—one that would be higher than that required for adults.

#### **Relational—social connections and environment; parental involvement and attachment; sense of others**

---

The relationships with important people in their lives and the life experiences of a child will impact that child's capacity, and while "children are [...] now seen to be more competent earlier than previously thought, [...] adults still tend to underestimate children's capacities" (Parkinson & Cashmore, 2008, p. 4). The capacity a child exhibits depends on the context, on supports that facilitate the development of capacity, and on how much a child is given the opportunity to be part of decision-making.

Bronfenbrenner's Ecological Systems Theory advocates for understanding the way in which various contexts surrounding children impact a child's development. This theory "views children within the multiple, complex, interconnected, and layered contexts in which they live" (Henderson-Dekort et al., 2022, p. 10, citing Bronfenbrenner, 1986). These contexts or systems include friends, family members, teachers, cultural and social contexts (informing a child's development and worldview), family dynamics, caregivers, and educational experiences. The child's family and other important social systems affect how the child develops socially, physiologically, and behaviourally, and this in turn directly impacts their capacity (Henderson & Dekort et al., 2022).

#### **Emotional independence; sense of self and set of core values and beliefs; communication style and delivery of voice, views, and preferences**

---

Core values refer to basic beliefs guiding feelings, actions, or thoughts. Stable values likely correlate with stability in voicing preferences or displaying decisional capacity (Lansdown, 2005). According to numerous scholars, it is critical that a child "possess

a stable set of core values" in order to have functional capacity (Henderson-Dekort et al., 2022, p. 7, citing Applebaum, 2007; Dunn et al., 2006; Grisso & Applebaum, 1988; Lansdown, 2005).

Children "acquire lasting values from very early ages and these values will be unique and distinct for each child" (Henderson-Dekort et al., 2022, p. 11, citing Alderson, re1992; Fidler & Bala, 2010). Family practices and cultural beliefs will have a significant impact on a child's core values. Additionally, it is necessary to look at a child's sense of self to ascertain their values (Henderson-Dekort et al., 2022).

Regarding communication style (delivery of voice, views, and preferences), it is critical to maintain children's rights to be provided with the appropriate space, voice, audience, and influence, to have their voice heard as aligned with Lundy's model of participation, which we discuss later in this paper. There are a variety of ways in which a child may express and communicate (Henderson-Dekort, 2022, citing Grover, 2004)—for example, a child may use drawings, dolls, narrative creation, or other methods to demonstrate their understanding (Christensen, 2004).

### Summative statements

---

Some summative statements about capacity from a developmental perspective are as follows:

- "Across the literature, central concepts of capacity include understanding, independence, assessing and appreciating risk, possessing values, and expressing choice" (Henderson-Dekort et al., 2022, p. 6, citing Applebaum, 2007; Dunn et al., 2006; Grisso & Applebaum, 1988; Lansdown, 2005).
- "Generally speaking, capacity involves a basic level of understanding and communication, consideration of alternatives, expression of preferences, and providing concerns and questions" (Henderson-Dekort et al., 2022, p. 6-7).
- "Understanding, appreciation, reasoning, and self-expression are four critical elements of capacity highlighted in the literature" (Henderson-Dekort et al., 2022, p. 7, citing Henderson-Dekort et al., 2022, p. 7, citing Applebaum, 2007; Dunn et al., 2006; Van Rooyen et al., 2015).
- "Understanding what is being discussed, appreciating the situation at hand, reasoning to form views and thoughts, and communicating those views are all important elements...[as is] an ability to consider the benefits, risks, and consequences" (Henderson-Dekort et al., 2022, p. 7).
- "When developing opinions, thinking of alternatives as well as considering the positive factors and negative factors of each thought is critical to display that the thought was contemplated to its fullest" (Henderson-Dekort et al., 2022, p. 7).



Photo by Vadim Fomenok on Unsplash

## Legal capacity

While the above discussion refers to the components of capacity from a developmental perspective, there is another, less discussed component of capacity which refers to the child's legal capacity.

Legal capacity refers to a person's authority under law to make a particular decision, engage in a particular undertaking, or have a particular status (Anderson et al., 2023). It is often considered together with legal personhood, which refers broadly to a person's capacity to have rights and duties within a legal system. Legal capacity refers to a socio-legal status, in which "people may have a right to but may not be able to exercise in full or in part" (Anderson et al., 2023, p. 2).

The UN Convention on the Rights of Persons with Disabilities (CRPD) and UN Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) define legal capacity as people's capacity to have rights, and to have the capacity to act on those rights on an equal basis with others without discrimination on the basis of gender or disability. It is a recognized status.

The International Disability Alliance's legal opinion on the CRPD describes legal capacity as consisting of two components: the capacity to hold a right and the capacity to act and exercise the right. This is reflected in international human rights law (Bach & Kerzner, 2010).

Legal capacity is recognized internationally as a term but not commonly used in Canadian law—instead, capacity is often used and defined as an ability to understand information relevant to making a decision and an ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. "In this sense, capacity refers to the cognitive requisites considered necessary for exercising one's right to legal capacity, and having it respected by others" (Bach & Kerzner, 2010, p. 17).

Why does the concept of legal capacity matter? As Bach and Kerzner (2010) explain,

The concept of legal capacity is significant because it represents a shift in the understanding that many members of the legal community have attributed to it. A common understanding of legal capacity law in Canada views it in relation to a person's cognitive functioning [...] thus, having the status of being considered legally capable is determined based on a person's own ability to understand information and assess consequences of making a decision. Legal capacity, in this sense, is attached to the attributes of a person. In contrast, legal capacity as it is used in the [CEDAW] and CRPD is a social and legal status accorded independent of a person's particular capacities (p. 17-18).

Based on their analysis of the laws in Canada and international conventions, Bach and Kerzner state that "legal capacity does not reflect an individual's ability to make decisions" but instead "reflects an individual's ability to make decisions and have those decisions respected" (2010, p. 18). This is a social model approach to defining and understanding disability and it defines legal capacity by focusing not on the individual's attributes or relative limitations, but rather on "the social, economic and legal barriers a person faces in formulating and executing individual decisions, and the supports and accommodations they may require given their particular decision-making abilities" (Bach & Kerzner, 2010, p. 18).

Bach and Kerzner (2010) argue for supporting people with disabilities in their decision-making where appropriate, in order to ensure and protect their fundamental legal capacity (i.e. their protected social and legal status). We may extrapolate from this to youth and children generally—that is, an approach whereby a child's fundamental legal capacity is respected and their ability to exercise that capacity is supported as needed.

## **Participatory and decisional capacity**

Capacity can be further divided into two distinct applications: (1) the capacity to participate, and (2) the capacity to make a decision (Henderson-Dekort et al., 2022).

Participatory capacity refers to a child's ability to "engage with other people around issues that concern their individual and collective life conditions" (Malone & Hartung, 2009, p. 27).

Decisional capacity is "the ability of an individual to make their own decisions; this could be regarding medical decisions, the ability to stand trial in a court of law, or make decisions relating to personal care" (Henderson-Dekort et. al. 2022, p. 4 citing Dunn et al, 2006). In children, decisional capacity is associated with the ability to make relatively independent choices without adult direction or control.

One young person from our youth engagement said:

**"I understand my ability to have capacity as whether I can make a decision, in my rational brain or my emotional brain."**

## The question of “capacity to do what?”

The literature reviewed and youth engagement conducted by SCY suggest that the definition of capacity shifts depending on the situation at hand. Accordingly, there “should not be a universal test for capacity” because capacity is “not a global condition but rather domain and/or decision-specific; hence, the requirement to ask, ‘capacity to do what?’” (CBA, 2023).

The answer to this question determines the context and the corresponding capacity required (CBA, 2023). “Consideration of the full bundle of the child’s rights is required to ensure the developmental, participatory and protective elements of the child’s evolving capacities are respected” (CBA, 2023).

The Canadian Bar Association provides the following non-exhaustive list of situations that engage a child’s capacity:

- Consent to/refuse release of records;
- Consent to/refuse medical treatment;
- Consent to/refuse treatment for mental disorders;
- Consent to/refuse consent to evaluation or assessment;
- Consent to/refuse testing;
- Consent to doctor-assisted death;
- Admit/refuse admission to hospital;
- Enter a solicitor-client relationship;
- Waive solicitor-client privilege;
- Instruct counsel;
- Testify/give evidence;
- Stand trial;
- Register in school;
- Determine the school in which to register;
- Make access arrangements with a non-residential parent;
- Open a bank account;
- Apply for a driver’s licence;
- Enter into a contract: (a) to buy a car; (b) to buy a cell phone); (c) to rent an apartment;
- Travel as an unaccompanied minor;
- Enter a foreign country as a refugee;
- Consent to sexual activity;
- Consent to marry; and
- Vote

(CBA, 2023).

Different levels of capacity may be required, relative to the decision that is being made. For example, in the medical decision-making context, a child’s capacity is defined as their ability as a patient to “understand information relevant to a treatment decision

and to appreciate the reasonably foreseeable consequences of a decision or lack of decision" (Coughlin & Canadian Paediatric Society, 2018, p. 138). The level of capacity required will scale depending upon the seriousness of the condition or treatment at hand.

## Age alone is not a reliable indicator of capacity

Numerous scholars have stated that age alone is not a reliable indicator of capacity; instead, age is viewed by many as a "reductive categorization of a child's development and cognitive function" (Martinson & Tempesta 2018).

To deny a child's "fundamental rights on the basis of a perceived, arbitrary age or maturity level fundamentally undermines the UNCRC framework and perpetuates a blanket standard that young people under the age of eighteen are unable to rationalize their legal interests in particular" (emphasis added, Jackson & Martinson et al., 2020, p. 2, citing Grover, 2015).

Age is useful as one indicator of capacity and can provide information about the developmental stages in that child's life but using it as a sole or as a primary indicator of capacity is inconsistent with the results of our literature review and youth engagement. That research shows that youth at varying ages—and indeed adults and people generally—develop and maintain various capacities at varying rates depending on multiple factors, because capacity is a multi-dimensional, multi-factorial construct.

One youth shared that at a young age (8-years-old) they possessed the capacity to understand and decide which parent they wanted to live with during a custody dispute, stating that:

*"I want to live with my mom, full time. I know that my dad will be angry, but for me, it makes sense for me to live with my mom. My dad is always angry, so it does not matter where I live, he will be angry anyway."*

————— Youth Engagement

UN General Comment No. 12 (2009) to the UNCRC states that a child is "**able to form views from the youngest age, even when she or he may be unable to express them verbally**" (emphasis added). Thus, to fully implement Article 12, children may require alternative forms of expression, such as non-verbal forms of communication like "play, body language, facial expressions, drawing, and painting" (Adami et al., 2023, p. 139).



Photo by Eduardo Soares on Unsplash

## Capacity as “present or not”

Traditionally in legal settings, child capacity has been viewed as either present or not, “meaning the child either has the capacity to make a sound decision or they do not” (Henderson-Dekort et al., 2022, p 4, citing Parkinson and Cashmore, 2008). This binary approach of capable or incapable is not supported by current developmental psychology research (Tisdall, 2018). It is also contrary to the notion of capacity as evolving and fluid.

There is an argument that capacity should be presumed present, rather than absent, in family law proceedings (Henderson-Dekort et al., 2021; Tisdall, 2018). We expand this to refer more broadly to matters affecting children. This is supported by UN General Comment No. 12 and the UNCRC, which (as noted earlier) presume that a child is capable of expressing his or her own views, rather than incapable. The General Comment states that **“it is not up to the child to first prove her or his capacity”** (para. 20, emphasis added).

This approach is further supported by the experiences of children and youth. Their experiences consistently highlight that when they were assumed incapable, and thus prevented from being heard or otherwise participating in matters affecting them, they experienced great harm—they felt isolated, unheard, violated, and disempowered. These experiences caused them to experience mistrust of authorities and the legal system. This is particularly true of Indigenous children and youth, and those who are marginalized and vulnerable, whose experience with and view of authorities is poor as a starting point.

From an interview with a youth participant:

"It's not really a matter of trying to figure out what criteria can be used to assess capacity or whether or not someone has it—it's the need to change that framing to every child and every person has capacity, it's just a matter of the medium to really engage that capacity or support someone to exercise that capacity."

## The development of capacity and the impact of Adverse Childhood Experiences

"

*Everyone needs one safe person, someone who will listen*

————— Youth Engagement

Another theme emerging in the literature is the way in which trauma, or Adverse Childhood Experiences (ACEs) during a child's early life, impacts their capacity. It is important to note at the outset that although a child or youth may have multiple ACEs present, this does not in and of itself eliminate their ability to possess or exercise capacity, just as it does not for adults. The presence of ACEs cannot be used as justification for deeming that a child or youth is incapable, or otherwise serve as a barrier to their meaningful participation in matters affecting them. Instead, the presence of ACEs should alert one to specific challenges or differences that may (or may not) be present in how a child or youth is able to possess or exercise capacity in a variety of contexts, and correspondingly, to offer appropriate, context-specific support to that child or youth in their ability to exercise their capacity.

ACEs are defined as potentially traumatic events occurring in childhood, and include:

- Experiencing violence, abuse, or neglect;
- Witnessing violence;
- The death of a family member;
- Exposure to adults with substance use or mental health problems;
- Instability due to parental absence;
- Lack of adequate food or housing;
- Discrimination;
- and many others

(Centers for Disease Control and Prevention, 2023)

Children experiencing ACEs may ultimately develop a "low sense of self-efficacy—where self-efficacy is the belief that we can be agents in improving our own lives—which is needed to engage in planning, goal-oriented behaviours" (Center on the Developing Child, 2016, p. 8), thus impacting the development of a child's capacity.

Conversely, positive early experiences with adults—even the presence of only one supportive, stable adult—will help a child adapt to and ultimately overcome early adverse experiences. Positive early experiences with adults provide the foundation of what is referred to as “resilience”.

## Children with disabilities

The literature provides that children with disabilities should be considered capable, but that their participation should be scaled or altered to meet their capacity level. Children with “low intelligence, a disability, learning difficulties, or poor relational/attachment with parental figures...[should] be included and considered as primarily capable as well, but their participation must be altered to meet their capacity level. [...] [E]ach child must be given ample opportunity to display their abilities, in whichever manner works most efficiently for them” (Henderson-Dekort et al., 2021, p. 12).

The literature suggests that “even...children...with intellectual disabilities benefit when granted autonomy with enhanced protections and support in decision-making” (Jackson & Martinson, 2020 p. 2, citing Saaltink et al., 2012).

Delving deeper into the applicability of the UN Convention on the Rights of Persons with Disabilities (CRPD) to child capacity, scholars note that Article 12 of the CRPD “creates a new model of legal personality and legal capacity” (Tisdall, 2018 p. 165, citing Series, 2015). That Article provides: (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law; (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life; and (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (emphasis added).

According to Series (2015), “this new approach treats a person’s agency as shaped or even constituted by their environment and relationships with others. Instead of casting ‘mental incapacity’ as an individual deficit, resulting in a loss of legal capacity, it calls for the provision of whatever support is necessary to ensure that disabled people are able to exercise full legal capacity on an equal basis with others, and addressing discriminatory attitudes and barriers that might limit the recognition and exercise of legal capacity by disabled persons” (p. 79, emphasis added). This is a support model; that is, individuals should be supported in exercising their legal capacity and expressing their views.

However, scholars have questioned how to reconcile such an approach with the best interests paradigm. Tisdall (2018) opines that the support model in effect rejects the best interests model. The General Comment 2014 on Article 12 further considers best interests determinations as “inconsistent with the support paradigm, giving insufficient respect to an individual’s will and preference” (Tisdall, 2018, p.166, citing General Comment 2014, para. 21).

While the General Comment (2014) insists that there are “no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited” (para. 5), it nevertheless qualifies this right for children in paragraph 36. The reason cited for this is the “developing capacities” of children. In short, “the General Comment itself demonstrates a competence bias” (Tisdall, 2018, p. 166).

“

*I have capacity because of lived experience*

\_\_\_\_\_  
Youth Engagement

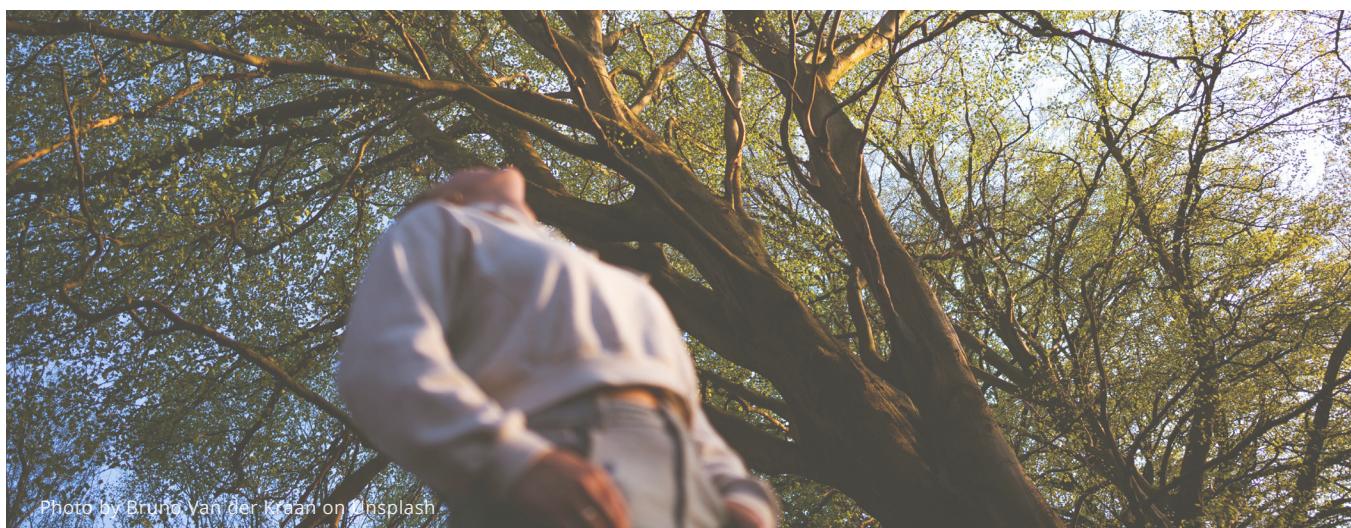
## Mature minor doctrine

Another aspect of capacity in practice is the mature minor doctrine. The mature minor doctrine recognizes the capacity of some children to make decisions for themselves, especially medical decisions, even when contrary to their parents' positions. The doctrine arises from *Gillick v. West Norfolk and Wisbech Area Health Authority and another* (1985 3 All ER 403, [Gillick]).

The Gillick case is viewed as “fundamental to the modern understanding of how law can include considerations of the capacities of children and has had a massive influence on efforts to establish what this may look like in practice. Gillick has also evolved to a standard for questions regarding children’s capacity across various legal proceedings such as family law proceedings” (Henderson-Dekort et al., 2022, p. 5).

In Gillick, the Court found that “parental right yields to the child’s right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision” (Gillick, 1985, p. 421-422).

The test of “sufficient understanding and intelligence” to consent to the matter in question, however, has led to confusion about the level of understanding children should have and in which context (Cave, 2014), and there is a lack of consistency regarding its application (Daly, 2020).



## Criticisms and limitations of capacity concept

Many of the myths and assumptions underpinning modern notions of capacity are rooted in what scholars have termed “childism”.

Childism is “prejudice against children that leads to structural discrimination and oppression against [them]” (Adami, 2023 p. 127). It “characterizes children as defined by their lack of adult abilities and, therefore, as inferior to adults” and on this basis children are “assigned or denied certain perceived abilities, skills, or character traits” (Adami, 2023, p. 128). Adami likens this to discrimination on any other grounds—racism, sexism, ableism. It pertains to the discrimination of children (below 18 years) and occurs when a person is “treated less favourably because of age (0-18), including age stereotyping” (Adami, 2023, p. 128).

Childism is critical to identify and name in the realm of child participation, because a child’s “perceived lack of ability or capacity relative to that of adults, risks leading to a poor realization of their rights as set forth in the UNCRC” (Adami, 2023, p. 134). Put more directly, when children are deemed incompetent due to prejudice, they are prevented from exercising their legal rights. The global maltreatment of children and unaddressed human rights violations against them has been termed a “silent pandemic” (Adami, 2023, p. 134).

Under this framework, adultism is a “power structure[...]maintained through adult and ableist normativity” (Adami, 2023, p. 144). This perspective also calls into question the best interests framework, if it is the case that the child’s best interests are determined by adults and not the child themselves.

It is important to consider the social context and cultural beliefs about the nature of childhood when asking the capacity question (Gaylin & Macklin, 1982; Kopelman & Moskop, 1989). Asking this question reveals a number of myths and assumptions giving rise to childist views.

Alderson and Goodwin note:

Twentieth century Western notions of childhood are dominated by developmental theories which implicitly perceive children as partly formed human-becomings rather than as human-beings capable of full experiences and relationships as critically reviewed by the Stainton Rogers (1992). Beyond associating childhood with incompetent ignorance and folly, such notions take incompetence as the definitive and essential nature of childhood, the distinguishing feature from adulthood. A few interviewees in the consent study accepted this dichotomy, assuming that ‘children can’t possibly decide for themselves until they grow up/ leave home/ have done A-level biology’. They dismissed the possibility of the competent child, or felt troubled or threatened by it. Most interviewees did not identify competence with age and believed that children could be competent. Yet influential ethicists (Buchanan and Brock 1989) and lawyers continue to accept simplistic status

definitions of competence and assert that most minors do not have the cognitive and moral maturity to evaluate complex decisions.

Anthropologists argue that the vague concept of the competent person is mainly defined negatively, by classifying certain groups as 'incompetents' (Young 1990). Then adults, for example, do not need to question their own abilities, and can rest assured that they fit comfortably within the status of competent adulthood. Children's rights are far more than an intellectual matter; the unease and anger aroused during talk of children's autonomy indicate that such discussion deeply threatens adults' convenience, power and beliefs about the moral order. As discussed in the next section, if children are defined by their incompetence, ignorance and folly, then 'children's rights' is essentially a contradictory term (1993, p.6).



## E. MODELS FOR SUPPORTING CHILD PARTICIPATION

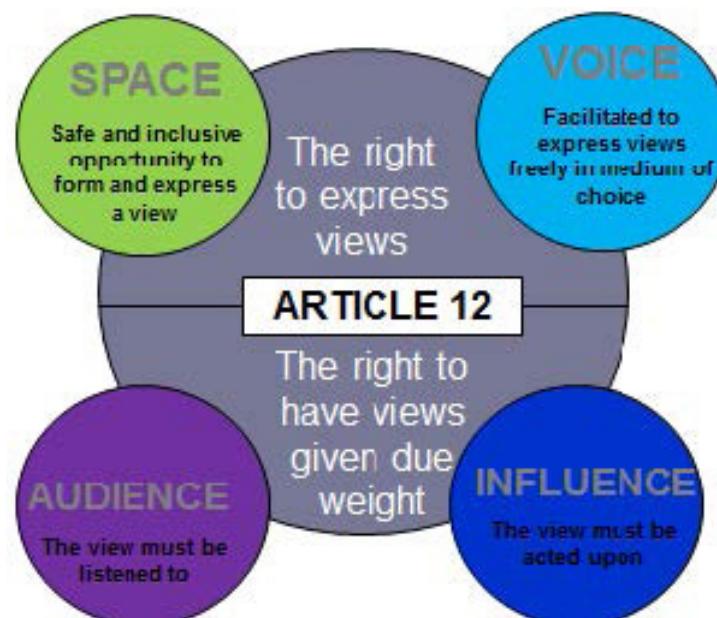
Moving forward and implementing the above research on child capacity, we look to some examples of models for child participation. Two models in particular--the Lundy Model of Child Participation (Byrne & Lundy, 2019) and the Circle of the Child Model (Morgan, 2018) -- provide robust examples.

### Lundy Model of Child Participation

The Lundy Model was created by Professor Laura Lundy and has been adopted internationally by various national and international organizations, agencies, and governments (Byrne & Lundy, 2019).

The purpose of the Lundy Model is to assist duty-bearers in meaningfully involving children in decision-making, in compliance with Article 12 of the UNCRC (Byrne & Lundy, 2019), which provides that "State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

The model, also called a Voice model, includes four key factors: (1) space; (2) voice; (3) audience; and (4) influence (Byrne & Lundy, 2019). Decision-makers, those working with children and youth, and those involved in matters affecting children, should consider these four key factors to ensure that the children and youth are able to effectively participate and exercise their capacities.



## Space

The space factor provides that it is essential to children's participation to provide a safe and inclusive space for children and young people to express their views.

## Voice

The voice factor provides that it is essential to provide the necessary information and support to children and young people so that they may express their views; that is, that children are given the opportunity to be heard and to use their voice.

## Audience

The audience factor provides that it is essential to ensure children and young people's views are communicated to the right people, or the right audience.

## Influence

The influence factor provides that it is essential that children and young people's views are taken seriously and acted upon, wherever possible—that is, the views that they have shared are given appropriate weight and have influence in matters affecting them.

## **Circle of the Child Model**

The Circle of the Child Model was developed by Hélène (Sioui) Trudel, a lawyer and member of the Wendat First Nation, in partnership with pediatrician Dr. Gilles Julien (Morgan, 2018). It is rooted in Indigenous perspectives and is a mediation tool that has been used in the child welfare context—particularly when attempting to determine what may be in the child's best interests. The model is based on an integrated social medicine approach and focuses on the needs, interests, and rights of children in vulnerable circumstances.

The Circle of the Child Model empowers children to be heard and to create a process that reflects their interests (Morgan, 2018). The circle is designed by the child. The child may decide who to invite, how to arrange the seating plan, and who they would like to participate and to what degree. The process includes in-depth discussions around the needs of the child and how best to meet those needs, with the discussion always being centred around the child. During the circle, the participants may share a meal and the focus is on a collaborative approach to designing an action plan that reflects the child's needs and objectives.

## F. SUMMARY OF KEY FINDINGS

To summarize some of the key findings emerging from the literature surveyed and youth engagement:

1. There is no universally agreed upon definition of capacity although there are recurring themes throughout social science.
2. Age alone is not a reliable indicator of capacity. Decision makers should not use age as the sole determinative factor of children's capacity.
3. All children should be presumed to have capacity to express their views and preferences. Great harm is done to children who are not permitted to exercise their capacity to be heard in matters affecting them.
4. Capacity can be understood as both a function of cognition, as well as an ability or a right one possesses. What it is varies depending on its context or function. Capacity can be a legal right.
5. Capacity encompasses a variety of factors and develops at different rates. Children may possess more or less capacity in different contexts. The capacity to be heard is not the same as the capacity to be the decision maker.
6. The United Nations Convention on the Rights of the Child provides that a child need only be capable of forming a view in order for their view to be heard and considered. There is no further test of cognition or capacity that should stand in the way.
7. Children and youth must be equitably supported to express their views and desires on matters affecting them, using methods that meet their level of capacity.

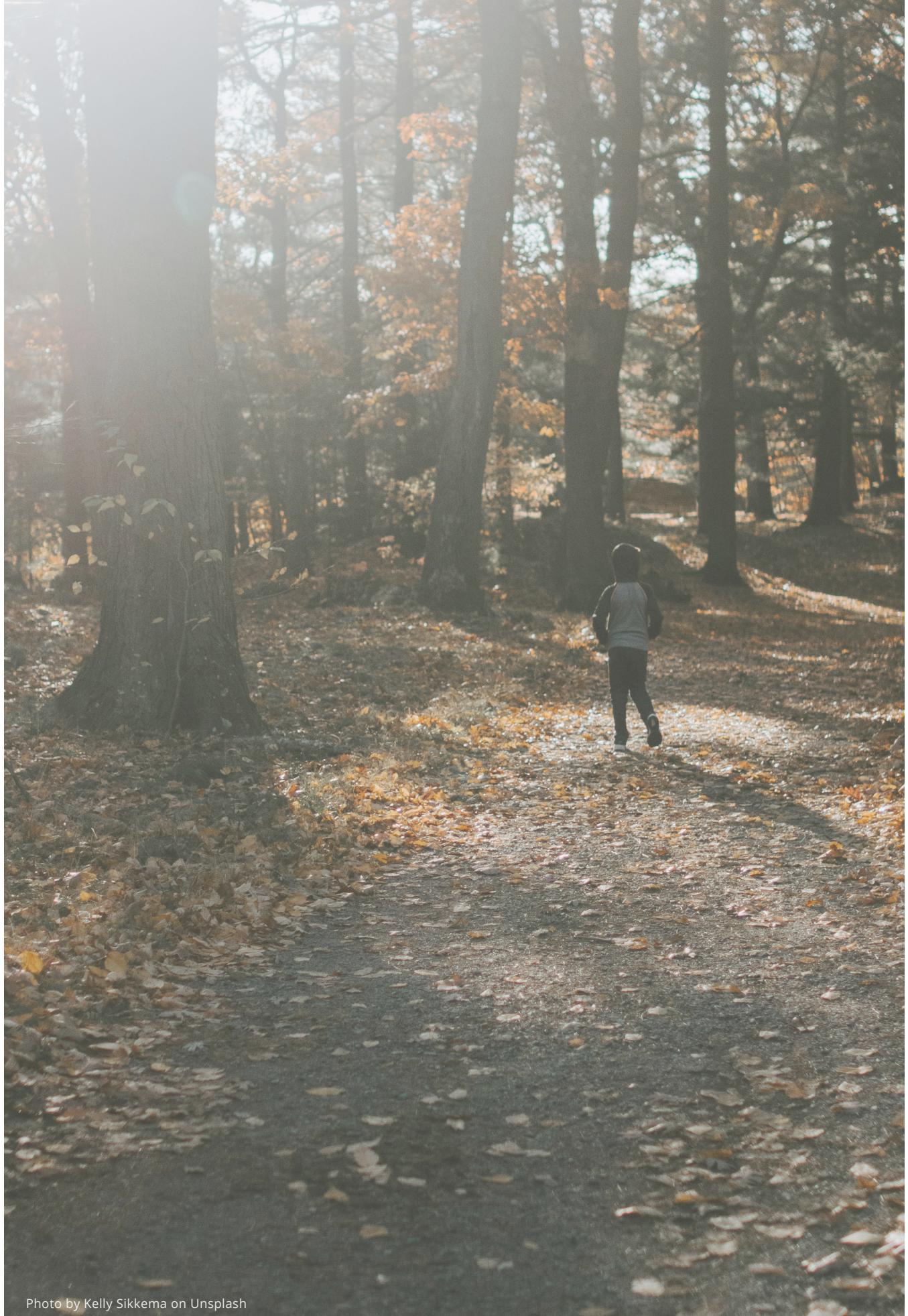


Photo by Kelly Sikkema on Unsplash

## REFERENCES

Adami, R., (2023). Childism—on adult resistance to children's rights. In R. Adami, A. Kaldal, & M. Aspan, M. (Eds.), *The rights of the child. Legal, political and ethical challenges* (pp. 127-147). Brill-Nijhoff.

Adami, R., Kaldal, A., & Aspan, M. (Eds.). (2023). *The rights of the child. Legal, political and ethical challenges*. Brill-Nijhoff.

Alderson, P., & Goodwin, M. (1993). Contradictions within concepts of children's competence. *International Journal of Children's Rights*, 1, 303-313.

Anderson, P., Davidson, G., Doherty, F., Hanna, H., Harper, C., Lynch, G., McClelland, R., & McKenna, C. (2023). Legal capacity, developmental capacity, and impaired mental capacity in children under 16: Neurodevelopment and the law in Northern Ireland. *International Journal of Law and Psychiatry*, 87.  
<https://doi.org/10.1016/j.ijlp.2023.101872>

Appelbaum, P. S. (2007). Assessment of patients' competence to consent for treatment. *The New England Journal of Medicine*, 357(18), 1834-1840.

Babakr, Zana & Mohamedamin, Pakstan & Kakamad, Karwan. (2019). Piaget's Cognitive Developmental Theory: Critical Review. DOI: 10.31014/aior.1993.02.03.84.

Bach, M., & Kerzner, L. (2010). *A new paradigm for protecting autonomy and the right to legal capacity*. Paper commissioned by the Law Commission of Ontario for its 'Advancing Substantive Equality for Persons with Disabilities Through Law, Policy and Practice' project.

Bala, N., Talwar, V. & Harris, J. (2005). The voice of children in Canadian Family Law cases. *Canadian Family Law Quarterly*, 24, 221-279.

Birnbaum, R., & Saini, M. (2012). A qualitative synthesis of children's participation in custody disputes. *Research on Social Work Practice*, 22(4), 400-409. DOI:10.1177/1049731512442985

Brown, K. A., Parikh, S., & Patel, D. R. (2020). Understanding basic concepts of developmental diagnosis in children. *Translational Pediatrics*, 9(Suppl 1), S9-S22. DOI: 10.21037/tp.2019.11.04

Buss, E. (1999). Confronting developmental barriers to the empowerment of child clients. *Cornell Law Review*, 84, 895-966.

Byrne, Bronagh & Lundy, L. (2019). Children's rights-based childhood policy: a six-P framework. *The International Journal of Human Rights*, 22:3, 357-373. <https://doi.org/10.1080/13642987.2018.1558977>

Canadian Bar Association (CBA) (2023). The CBA child rights toolkit. The child. Capacity. <https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Competence,-Capacity-and-Consent>

Coughlin, K. W. & Canadian Paediatric Society (2018). Medical decision-making in paediatrics: Infancy to adolescence. *Paediatrics & Child Health*, 138-146. DOI: 10.1093/pch/pxx127

Cave, E. (2014). Goodbye Gillick? Identifying and resolving problems with the concept of child competence. *Legal Studies*, 34(1), 103-122. DOI: <https://doi.org/10.1111/llest.12009>

Christensen, P. H. (2004). Children's participation in ethnographic research: Issues of power and representation. *Children & Society*, 18(2), 165-176. DOI: 10.1002/CHI.823

Center on the Developing Child at Harvard University, (2016). Applying the science of child development in child welfare systems. Science to Policy and Practice. <https://developingchild.harvard.edu/resources/child-welfare-systems/>

Coenraad, L.M. (2014). Voices of minor children heard and unheard in judicial divorce proceedings in the Netherlands. *Journal of Social Welfare and Family Law*, 36(4), 370-380. DOI: 10.1080/09649069.2014.967984

Daly, A. (2017). *Children, autonomy and the courts: Beyond the right to be heard*. Brill: Leiden, the Netherlands.

Daly, A. (2020). Assessing children's capacity: Reconceptualising our understanding through the UN Convention on the Rights of the Child. *The International Journal of Children's Rights*, 28(3), 471-499. DOI: 10.1163/15718182-02803011

Einarsdottir, J., Dockett, S., & Perry, B. (2009). Making meaning: Children's perspectives expressed through drawings. *Early Child Development and Care*, 17, 217-232. DOI: 10.1080/03004430802666999

Federle, K. (1993). On the road to reconceiving rights for children: A postfeminist analysis of the capacity principle. *DePaul Law Review*, 42(983). <https://via.library.depaul.edu/law-review/vol42/iss3/3>

Fidler, B. J., & Bala, N. (2010). Children resisting post separation contact with a parent. Concepts, controversies, and conundrums. *Family Court Review* 48(1), 10-47.

Gaylin, W., & Macklin, R. (Eds.). (1982). *Who speaks for the child: The problems of proxy consent*. Plenum Press.

Gillick v. West Norfolk and Wisbech Area Health Authority and another, 3 All ER 402 (1985). <https://www.globalhealthrights.org/wp-content/uploads/2013/01/HL-1985-Gillick-v.-West-Norfolk-and-Wisbech-Area-Health-Authority-and-Anr..pdf>

Grisso, T., Appelbaum, P.S., & Hill-Fotouhi, C. (1997). The MacCAT-T: A clinical tool to assess patients' capacities to make treatment decisions. *Psychiatric Services* 48(11), 1415-19. DOI: 10.1176/ps.48.11.1415

Henderson-Dekort, E., van Bakel, H., & Smits, V. (2022). The complex notion of the capacity of a child: Exploring the term capacity to support the meaningful participation of children in family law proceedings. *Social Sciences*, 11(98). <https://doi.org/10.3390/socsci11030098>

Henderson-Dekort, E., Smits, V., & van Bakel, H. (2021). The meaningful participation and complex capacities of children in family law. *The International Journal of Children's Rights*, 29, 78-98. DOI:10.1163/15718182-29010004

Jackson, M., & Martinson, D. (2020). Implementing children's participation rights in Family Law and Child Welfare court proceedings. A Literature Review prepared by the FREDA Centre, School of Criminology, Simon Fraser University for the BC Office of the Representative for Children and Youth.

Kinniburgh, K. J., Blaustein, M., & Spinazzola, J. (2005). Attachment, Self-Regulation, and Competency: A comprehensive intervention framework for children with complex trauma. *Psychiatric Annals* 35(5), 424-430. DOI:10.3928/00485713-20050501-08

Knight, R. (2005). The process of attachment and autonomy in latency: A longitudinal study of ten children. *The Psychoanalytic Study of the Child* 60(1), 178-210. DOI: 10.1080/00797308.2005.11800751

Kopelman, L. M., & Moskop, J. C. (Eds.). (1989). *Children and health care. Moral and social issues*. Philosophy and Medicine Book Series (Vol. 33). Springer. DOI: [https://doi.org/10.1007/978-0-585-27406-5\\_1](https://doi.org/10.1007/978-0-585-27406-5_1)

Lansdown, G. (2005). *The evolving capacities of the child*. UNICEF Innocenti Research Centre. <https://www.unicef-irc.org/publications/384-the-evolving-capacities-of-the-child.html> ISBN: 88-89129-15-8

Malone, K., & Hartung, C. (2009). Challenges of participatory practice with children. In B. Percy-Smith, & N. Thomas, (Eds.) *A handbook of children and young people's participation: Perspectives from theory and practice* (pp. 24-38). New York, NY: Routledge.

Martinson, D. J., & Tempesta, C. E. (2018). Young people as humans in family court processes: A child rights approach to legal representation. *Canadian Journal of Family Law*, 31(1), 151-198.

Mol, C. (2019). Children's representation in family law proceedings: A comparative evaluation in light of Article 12 of the United Nations Convention on the Rights of the Child. *International Journal of Children's Rights*, 27, 66-98. DOI: 10.1163/15718182-02701001

Morgan, B. (2018). Training child-welfare leaders to centre kids' perspectives. Advocates want to see Circle of the Child model implemented in B.C. *Child Welfare Nation*. <https://thediscourse.ca/urban-nation/training-child-welfare>

Organization for Economic Cooperation and Development (OECD) (2016). Family Database. Social Policy Division. [https://www.oecd.org/els/family/PF\\_1\\_8\\_Age\\_threshold\\_Childhood\\_to\\_Adulthood.pdf](https://www.oecd.org/els/family/PF_1_8_Age_threshold_Childhood_to_Adulthood.pdf)

Orlando M. Lourenço (2016). Developmental stages, Piagetian stages in particular: A critical review, *New Ideas in Psychology*, 40 (Part B), 123-137.

Parkinson, P., & Cashmore, J. (2008). *The Voice of a Child in Family Law Disputes*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199237791.003.0001>

Piaget, J. (1962). The stages of the intellectual development of the child. *Bulletin of the Menninger Clinic*, 26, 120.

Series, L. (2015). Relationships, autonomy and legal capacity: Mental capacity and support paradigms. *International Journal of Law and Psychiatry*, 40, 80-91.

Smart, C. (2002). From children's shoes to children's voices. *Family Court Review*, 40(3), 307-319. DOI

Tisdall, E. Kay M. (2018). Challenging competency and capacity? Due weight to children's views in family law proceedings. *International Journal of Children's Rights*, 26(1), 159-182. DOI: 10.1163/15718182-02601003

Twum-Danso, A. (2008). A cultural bridge, not an imposition: Legitimizing children's rights in the eyes of local communities. *The Journal of the History of Childhood and Youth*, 1(3), 391-413. DOI: <https://doi.org/10.1353/hcy.0.0023>

United Nations. (1989). Convention on the Rights of the Child. Treaty Series, 1577, 3.

United Nations (n.d.). *Peace, dignity, and equality on a healthy Planet*. Global Issues: Youth. <https://www.un.org/en/global-issues/youth>

# YOUTH ENGAGEMENT METHODOLOGY & DATA

The Child Capacity Research Project sought to embed key values and principles in the research process that in turn shaped the research methodology, community engagement, and analysis of the results. These values and principles pertained to striving for accessibility, highlighting intersectionality, valuing lived and living experiences, and others crucial for meaningful engagement and research.

It was this approach, as well as the calls to action from participants, that allowed for the recognition that while the project was intended to look at four key topics with complex systems of their own, they are also interconnected in many ways. In addition, it was noted throughout the youth engagement that it was sometimes difficult for participants to speak to one system without describing the impact of another. Thus, we advise readers to recognize the intersectionality of the lived experiences reflected in the information below and that also has contributed to the richness of qualitative data that emerged.

## ENGAGEMENT METHODS:

Three distinct engagement methods were utilized to provide accessible opportunities for contribution from youth and young people, primarily below the age of 30, with lived and living experiences in relation to the research topics. All three options were offered to every participant prior to written consent being provided:

### **Survey:**

- An anonymous, online survey consisting of 3 questions was made available during the entire duration of the project
- The nature and structure of the questions allowed for participants to respond based on the experience they deemed relevant to contribute

### **Interviews:**

- 1-hour virtual Zoom sessions with a participant and two members of the CCRP team
- Discussion questions\* were provided in advance
- Follow-up interview opportunity offered

### **Listening Circles:**

- 1-1.5 hour virtual Zoom sessions with existing youth advisories, councils, and other programming groups
- Sessions were coordinated in collaboration with group/organization leads, coordinators, and/or supporting staff
- Discussion questions\* were provided in advance
- Follow-up session and/or interview with interested participants offered

**\*Note:** The following three questions were used in all methods of engagement and were specified (in Listening Circles and interviews) based on the topic participants wished to address. However, it is crucial to note that while these were the primary questions asked, discussions often built on what was shared in the session. The evolving conversations differed per group / participant, and as a result, the extent of questions that organically emerged were not able to be included in the list below.

### ***Discussion Questions:***

- 1) *How do you define "capacity"? Based on your understanding, do you feel you have had capacity to make decisions, or the opportunity to use your capacity to participate in decisions?*
- 2) *Can you tell us about a time [in a family law / mental health / healthcare decision / child protection matter] when you felt like your opinion was valued and taken into consideration?*
- 3) *Based on your experience [in a family law / mental health/ healthcare decision / child protection matter], how do you think things could be improved so that your capacity to make decisions and be heard is better respected?*

### ***Stakeholders & Subject Matter Experts:***

- Stakeholders and subject matter experts across sectors were invited to provide feedback on the draft outlines for all four research papers at a virtual roundtable held during the earlier stages of the project
- Individuals part of community networks were also selectively invited to provide feedback on research paper drafts as they were developed by topic

### ***Outcomes:***

- 78 participants across all methods of the youth engagement contributed their feedback by sharing their lived and living experiences
- An analysis of themes from the youth engagement by topic can be found below

**Note:** While the project sought to uplift intersectional experiences of young people across all four topics, there are limitations to those reflected in this paper. It is recommended that future research initiatives dedicate efforts to highlight the specificities of identities of young people that may uniquely inform the nature of their experiences with respect to the four topics examined in this project (e.g. gender and sexuality).

THEME CODE	THEME:	DETAILS/VARIANCES
1	Decision-making ability	<ul style="list-style-type: none"> <li>• <b>Action and process-oriented</b></li> <li>• Ability related to decisions and providing consent as contingent upon being <b>informed</b></li> <li>• Ability as characterized by <b>autonomy with limited to no coercion</b></li> <li>• Ability as characterized by <b>appropriateness and ethicality</b> of the decision ("best" decision, "correct" decision, "right" decision)</li> <li>• Ability as aligned with "<b>best interest</b>"</li> <li>• Ability as characterized by <b>participation</b></li> <li>• Ability as related to <b>emotional regulation</b></li> <li>• <b>Lack of decision-making ability equated to lack of capacity</b></li> </ul>
2	Comprehension	<ul style="list-style-type: none"> <li>• Ability to <b>receive and process information</b></li> <li>• Ability to <b>provide input based on understanding</b> a situation</li> <li>• <b>Understanding consequences as an indicator of comprehension</b></li> <li>• Understanding reasons and process to make decisions including assessment</li> <li>• Awareness and understanding of <b>rights, desires, and self-interests</b></li> </ul>
3	Quality of flexibility	<ul style="list-style-type: none"> <li>• Capacity <b>shifts over time and based on circumstance</b></li> <li>• Nature of decisions differ with age but <b>existence of capacity remains consistent</b></li> </ul>
4	External factors	<ul style="list-style-type: none"> <li>• <b>Lived experiences shape variances</b> in capacity amongst young people</li> <li>• <b>Systemic contexts play a significant role</b> in the ability to exercise capacity</li> <li>• <b>Ageism impacts ability to exercise capacity</b> in multi-faceted ways (e.g. having to 'prove' maturity)</li> <li>• Opportunities to build capacity contingent upon <b>systemic privilege</b></li> <li>• <b>Potential consequences</b> impact how individual capacity is exercised</li> </ul>
5	Early development	<ul style="list-style-type: none"> <li>• Children <b>involved in decision-making earlier</b> supports long-term capacity-building</li> </ul>
6	Purpose	<ul style="list-style-type: none"> <li>• Capacity to be <b>consulted</b> differs from capacity to <b>engage in decision-making</b></li> </ul>
7	Cultural context	<ul style="list-style-type: none"> <li>• <b>Many Indigenous cultural practices reflect systems/models that are inclusive of youth</b> and bringing all people together – differs significantly from colonial government's perception of children</li> </ul>
8	Intuitive	<ul style="list-style-type: none"> <li>• Capacity as reflected by <b>intuition and emotional awareness</b> (i.e. "gut sense")</li> </ul>
9	Basis for assessment	<ul style="list-style-type: none"> <li>• Assessment of capacity (if any) must occur on an <b>individual and contextual basis</b></li> <li>• Need to shift framing (and onus) of '<b>capacity assessment</b>' to '<b>best engagement method</b>'</li> <li>• Capacity as <b>subjective</b> and possibly in <b>opposition to that as perceived by 'adults'</b></li> </ul>
10	Relationship to age	<ul style="list-style-type: none"> <li>• Age as a <b>factor not a defining characteristic</b></li> <li>• <b>Inconsistent and arbitrary</b> as related to age</li> </ul>
11	Predisposition of individual	<ul style="list-style-type: none"> <li>• Having capacity as related to <b>state of mental and emotional well-being</b></li> <li>• Recognizing that one's understanding of "capacity" is <b>informed by their understanding of the world</b></li> </ul>