Child Capacity and Participation in Family Law

The Society for Children and Youth of BC

SOCIETY FOR children and youth OF BC

RC&Y Representative for Children & Youth

Family Law

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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), sḵwx̱wú7mesh (Squamish) and səl̓ilwətaʔɬ (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.

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

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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:) 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.

SOCIETY FOR children and youth OF BC

#102 - 1678 W. Broadway, Vancouver, B.C. V6J 1X6
Telephone: (778) 657-5544 | www.scyofbc.org
General inquiries: info@scyofbc.org
Child and Youth Legal Centre: cylc@scyofbc.org

Child Capacity and Participation in Family Law

Society for Children and Youth of BC
Suzette Narbonne

"There was never a moment in my life where my opinion was heard and valued by the system.

There were individuals that heard me, but not the system. I never felt heard by the system.

Youth Engagement

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A. Executive Summary

This paper is part of a series on the topic of child capacity in relation to child participation rights. Throughout this collection of papers, we focus on the following areas: a broader socio-legal discussion on child capacity; family law; child welfare and adoptions; mental health and involuntary civil detention; and decisions about health care.

The key findings of this paper are derived from a literature review, legal analysis, and youth engagement. The youth engagement included surveys, interviews, and listening circles with children and youth regarding their experiences of capacity in the context of family law. The Society for Children and Youth of BC want to acknowledge the thoughtful young people who spoke candidly about their lived experiences. Those voices are critical to the research and key findings.

Key Findings

1. All children have the legal right to be heard when decisions are being made about them in family law matters.
2. There is no universal test for capacity. All children should be presumed to have the capacity to express their views and preferences.
3. While a child's maturity may affect the weight to be attached to their views, a child's capacity should not be a barrier to their right to participate.
4. A child's best interests and participatory rights are inextricably linked.
5. There are numerous ways that a child may participate in family law cases.
6. Participation is a choice. Children should be informed of their options and permitted to choose if and how they would like to have their views shared.
7. Practitioners including lawyers, mental health professionals, mediators, voice of the child report writers and judges should have interdisciplinary training in listening to children and inclusion of the child's voice and views including training in listening to very young children.
8. There should be adequate funding for report writers and children's lawyers in order to ensure that all children have equal access to justice.

B. Background and purpose of report

The purpose of this paper is to discuss capacity and child participation rights in family law in British Columbia. Modes of participation are examined along with the legislative framework for those various ways that children may be included in family law decisions. As part of the research, capacity and participation rights in other Canadian and international jurisdictions are also examined.

This paper is part of a larger research project exploring the interplay between child capacity and child participation in legal and administrative proceedings in Canada with a focus on British Columbia. This research project considers the question of capacity in the context of the United Nations Convention on the Rights of the Child (UNCRC) (1989), to which Canada is a signatory, and was funded by the Office of the Representative for Children and Youth (RCY) of British Columbia.

C. Discussion

Child Rights and the Legal Framework

> The status of children has changed dramatically from the times when children were viewed as property…Today children are viewed as individuals, who as full rights bearers and members of a group made vulnerable by dependency, age, and need, merit society's full protection.
>
> (*Michel v. Graydon*, 2020, para. 77).

All children have rights, separate and distinct from those of the adults who are involved in their lives and care, including their parents. Their unique status as children, however, impedes their ability to seek information about or enforce their rights. In cases where an adult's interests conflict with those of the child, all too often a child's rights can be simply ignored. The greatest challenges are faced by the most vulnerable children (Martinson, 2016). There is a growing body of law and research that recognizes the importance of including children when decisions are being made about their present and future well-being. It is in this framework that a child's right to be heard and to be taken seriously takes on added importance.

> *"Multiple medical professionals and teachers knew something was wrong, but no one ever pulled the alarm."*
>
> Youth Engagement

Inherent in this framework of child participation is the notion of capacity. The dominant view of capacity is that it is evolving, context-dependent, and changes over time depending on a great variety of factors. Capacity is no one single thing, and requires

asking the question, "capacity to do what?" In the context of child participation, we may understand capacity to mean, for example, the capacity of a child to make and communicate a decision about a situation affecting that child. Capacity also refers to the child's legal capacity, or their ability as a legal actor to exercise a right and have that right respected.

The centrality of capacity to children's participation is rooted in the fact that our rights tradition requires that children possess certain capacities in order to exercise their right to be heard. If a child is deemed incapable, they are effectively prevented from having their voices heard. There are many prejudices operant among adult decision-makers that tend toward assuming children are incapable or incompetent, simply because they are children. These assumptions of lack of capacity mean that too often decisions are made about children, without children. This is contrary to the direction of children's rights in Canada and the spirit of the UNCRC, both of which provide that children have a right to be heard in matters affecting them, that there is a direct correlation between hearing from a child and that child's best interests, and that decisions about children must be made in their best interests.

United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (UNCRC) (1989) is the "most universally accepted human rights instrument in history" (*R v. Sharpe*, 2001, para. 177). It recognizes children as rights holders and focuses on their specific needs. A child's rights are inalienable and cannot be taken away from them. Canada played a leading role in its development and ratified the Convention in 1991.

The UNCRC applies to *all children of any age without discrimination* (Article 2). Importantly, the UNCRC (1989) does not require that a child have capacity or that they reach a certain age before they are permitted to exercise their rights. In fact, the UNCRC is explicit that a child need only to be "capable of forming his or her view" for them to be included in decisions about matters affecting them (Article 12).

Articles 5 and 12 of the UNCRC (1989) recognize that a child's capacity is not static; rather, as a child matures, so too will their capacity evolve. 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).

Article 12(1) asserts a child's right to express their views freely in "all matters affecting the child," with those views being given due weight. "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child" (Article 12(2)).

In a 2010 decision, Justice Martinson of the Yukon Supreme Court said:

> [13] There is no ambiguity in the language used. The Convention is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.
>
> [14] The legal rights to be heard are not isolated rights. A key premise of Article 12 is that hearing from children is an integral part of a determination of their best interests (*BJG v. DLG*, 2010).

UN General Comment No. 12 (2009) and the UNCRC (1989) provide that a child should be presumed to have the capacity to form their views and States parties must recognize the child's right to express those views—that it is not up to the child to first prove their capacity (General Comment 12, para. 20). In other words, a child presumptively has capacity.

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" (2009, para. 30). As we explain in the companion paper respecting capacity (see Bellano, 2024), it is enough that a young person is able to formulate a view in order to demonstrate that they have the right to express their view; that is, the child is not required to understand how or why they formed the view or the consequences of expressing the view or acting on it (Canadian Bar Association (CBA), 2023; Mol, 2019). Article 12 of the UNCRC (1989) likewise reflects an understanding of capacity as evolving; indeed, it provides that the child's views be "given due weight *in accordance with his or her age or maturity*" (emphasis added). Clearly, greater weight may be afforded to a child's views as the child ages and becomes more mature, as this implies a greater degree of understanding on the part of the child of the nature and consequences of their articulated view (Canadian Bar Association (CBA), 2023; UN General Comment No. 12, paras. 20-21). Notably, while a child's views may take on more weight as the child matures, the child's right to express their views is not dependent on the child having met any defined level of capacity.

> The absence of a minimum threshold for 'capacity' minimizes barriers to young people's participation. Historically, tests of capacity have limited opportunities for young people to participate in decisions made about them. *The [UN]CRC is explicit that capacity is not to be a barrier to young people's participation and that the formation of a view in and of itself, without any requirement to 'have capacity' is sufficient to permit participation by young people in matters affecting them.*
>
> (Canadian Bar Association (CBA), 2023, emphasis added)

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Family Law

In British Columbia, the amended *Divorce Act* (2019) and the *Family Law Act* (2011) provide the statutory framework under which family law decisions are made. Both Acts mandate that decisions about children should only be made in their best interests. And both Acts require the court to consider a child's views in determining what is in their best interests. Under section 16(3) of the amended *Divorce Act*, the court "shall consider all factors related to the circumstances of the child, including: (e) *the child's views and preferences giving due weight to the child's age and maturity, unless they cannot be ascertained*" (emphasis added).

The language of s. 37 of the Family Law Act (2011) is similar: "37 (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following: … (b) *the child's views, unless it would be inappropriate to consider them*" (emphasis added).

Notably, neither statute suggests that a child's capacity should be determinative of whether a child is permitted to express their views, though it may be a factor in assessing the weight of their views.

This is not surprising. Children are the people most directly affected by the parenting decisions that their guardians and judges make about them. And they are the experts in their own lives. They know what their parents' strengths and weaknesses are—who can get them to appointments, who can get them to school or help them with homework, and what life is like in each home. As the Supreme Court of Canada said in *Young v. Young*, "Courts must always be mindful that not only the benefit but also the real cost and burden of all custody and access arrangements ultimately fall on the children themselves" (1993, para. 82).

> *"Most people think that it is just between the parents, but kids can clearly see what is going on. Kids can have the capacity and the control to know what they want. My dad has an addiction and sometimes I want to be around him and sometimes I don't, and I can decide for myself."*
>
> Youth Engagement

Under the previous *Divorce Act*, there was a presumption that it was in a child's best interests to maximize their contact with both parents. The amended Act reflects a better understanding that "the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted" (*Young v. Young*, 1993, para. 204). The Ontario Superior Court explained:

> A human rights-based approach to the new *Divorce Act* calls on courts to recognize, respect and reflect each child as an individual distinct from their parents, and to empower children to be actors in their own destiny. (*SS v. RS* 2021, para. 27).

Participation is a choice

> *"There is a social worker in my school and counsellor; when I have approached them they have little or barely any info about child lawyers and anything like that."*
>
> Youth Engagement

Children should be encouraged to participate in decisions that will affect them and should be provided with an environment that allows them to exercise their right to express their views. It is axiomatic that a child should know what their rights are so that they can decide if they wish to exercise those rights (Dundee, 2016); (General Comment No. 12, 2009). It is important, therefore, that children have access to the information they need to make an informed decision regarding their participation. Most children want to contribute their views and to have those views considered in decision-making. But no child should be obliged to participate (Birnbaum & Saini, 2012; General Comment No. 12, 2009).

> *"How can a minor be expected to consent when they are not informed? How can they make informed decisions? Parents do not have to live with it, yet they are the ones who make the decisions, they are deferred to."*
>
> Youth Engagement

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Barriers to participation

Most scholars agree that it is essential to include the child's views and preferences in family law proceedings when determining what is in their best interests (Jackson & Martinson, 2020). Notwithstanding, the legal system continues to erect roadblocks to a child's right to participate in matters that will uniquely impact, and often shape, their life in significant ways. Decisions about who they will live with, how much time they will spend with their guardians, their siblings and step-siblings, how decisions will be made for them, even whether they will move to another community, or another country, are often made with little or no input from the child. In practice, the realization of their rights is much more difficult for children than it is for adults. "Their rights can be overlooked or even undermined by adults" (Martinson & Tempesta, 2018, p.155).

A common justification for excluding a child from the process is the belief that they will be asked to decide between caregivers or placed into an adversarial role against a parent (*JESD. v. YEP*, 2018). In fact, children's lawyers, judges and assessors are trained to avoid asking children to choose between their parents, though some children will volunteer a preference for living with one parent. When children are asked why they should be included in decision-making, at the top of the list they put "to be listened to" and at the bottom "to get what I want" (Atwood, 2003, p. 658).

Birnbaum and Bala point to three assumptions based on paternalistic thinking, which operate to keep children out of family court process: "i) children are 'lacking the legal and psychological capacity to participate'; ii) parents know what is in the best interests of their children and because of that, children's views can adequately be represented by them; and iii) keeping them out of the process will shelter them from the 'turmoil of their parents' relationship breakdown'" (as cited in Martinson & Tempesta, 2018, p. 163).

Flawed Assumption #1: Children Lack the Psychological and Legal Capacity to Participate in Family Law Matters

> *"As a child making decisions about who you live with, who you feel safe with, you don't know a lot about technical things, you just know something is wrong, you just don't feel safe."*
>
> *"There were people that listened and then acted on it, it was so good. There were a lot of people who ignored the red flags."*
>
> Youth Engagement

Too often, a court's determination of if and how a child may participate in a family law decision that is being made about them focuses on unsupported and antiquated perceptions of a child's capacity. Age is often used as a measure of capacity. Capacity may be erroneously presumed not to be present in cases where there is a risk of parental influence (see *KSP v. JTP* (2023)). Children with intellectual disabilities may be improperly deemed incapable of participating, because of their disability.

Instead, a child should be presumed to have the capacity to form their own views and to express them in family law proceedings. They should not be required to prove capacity as a condition precedent to participation (General Comment No. 12, 2009; Henderson-Dekort et al., 2021; Tisdall, 2016). Indeed, the literature is replete with examples of very young children being supported in expressing their views and preferences. Children as young as three have had their views considered (Tisdall, 2016, p. 366). The fact that a child is very young or in a vulnerable position because of disability or other factors should not be used as a reason to decide that they are incapable of expressing their views. Instead, as per General Comment No. 14 (2013), reasonable accommodation and support should be provided to that child on an individualized basis that will assure a full participatory role to the child in the assessment of their best interests.

> *"Even my sister knows whether she can make decisions and she is nine. Kids should know what they need to know, but they shouldn't know what they do not need to know. They need to remain kids. Kids need to know what is going on in their lives, they have the right to know."*
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Henderson-Dekort et al. (2021) explain that assigning a fixed age to assume capacity or incapacity does not align with the modern research respecting children's "unique, diverse and evolving capacities" (p. 87). In their review of the research, they note that to deny a child their fundamental right to be heard based on a perceived arbitrary age or maturity level undermines the framework of the Convention. "In actuality, even extremely young children and those with intellectual disabilities benefit when granted autonomy with enhanced protections and support in decision-making" (Jackson & Martinson, 2020, p.2).

Henderson-Dekort et al. (2012) also caution against the implementation of a specific capacity assessment. “To state that the capacity of a child will be considered when hearing their voices, with no universal way to gauge that child’s capacity level, presents tensions in actualising their voice” (Henderson-Dekort et al., 2021, p. 91). They advocate instead for an opportunity for each child to “display their capacity in order to have their participation meaningful” (p. 91). When a child’s developmental stage does not allow them to communicate directly, other communication methods need to be considered to include the child’s voice (Henderson-Dekort et al., 2021, p. 91).

> *“Things need to be explained in ways that kids can understand them.”*
>
> *“My four-year-old can make decisions, he is so smart, if you expect something from someone you have to teach them how, they have to be kept in the loop.”*
>
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According to Dundee, there is ongoing tension between the best interests principle, the child’s right to be heard, and their right to have their expressed views considered and taken seriously by decision makers. These are separate rights and although BC has incorporated the best interests principle into its family law legislation, it has “preferred to hear about children rather than from them until very lately” (2016, p. 9).

> *“Things only started to change when I could speak up without retribution. Things changed when I lived with my Mom and I was allowed to express myself without fear.”*
>
> Youth Engagement

The question should not be “does this child have the capacity to participate” and instead we should ask “how can we support this child to uphold their right to participate? What changes do our practices require?” The UN Committee on the Rights of the Child’s General Comment No. 12 urges decision makers to avoid tokenistic approaches which limit a child’s expression of their views or the weight that should be accorded to those views. For participation to be meaningful it must be seen as an ongoing process rather than a “one-off event” (2009, para. 133).

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Flawed Assumption #2: Parents know what is in the best interests of their children and because of that, children's views can adequately be represented by them

> *"Professionals repeatedly act in the best interest of what the parents want."*
>
> *"I would like to see an acknowledgment that the parents are sometimes the problem."*
>
> Youth Engagement

Judges decide only a "small fraction of all Canadian parenting disputes" (Bala, 2015, p. 430). There are many alternatives to litigation for parents who can work with each other—from meetings between parents and trusted advisors, to mediation to collaborative divorce processes. The reality is that most parents are in court precisely because they cannot agree as to what is in their child's best interests.

Instead of being in a child's best interests, "deferring to parents in these circumstances can, in fact, be harmful to children… It is difficult for parents, who each often have strongly held views, to objectively assess whether the child should participate, and if so, how, and what is, in fact, in their best interests overall. In these circumstances, children's interests can be overlooked or undermined" (Martinson & Tempesta, 2018, p. 165-166).

As Tisdall notes, studies reflect that a surprisingly large number of parents did not include their children in discussions over their future parenting regimes and "assumed that they would fall in with whatever arrangements were put in place for their future upbringing" (Tisdall 2016, p. 372, quoting Fortin, Hunt, & Scanlan, 2012, p. 4).

In a 1999 BC Supreme Court decision, the Court recognized that the best interests of children may not necessarily be the same as those of their parents or other interested guardians. "In addition, adults may disagree with children about what is in their best interests. The adults may therefore not present to the court all the evidence the court needs to make its decision about the best interests of the children" (*Dormer v. Thomas*, 1999, p.40). An evidence-gathering process that defers solely to the parents when questions about the child's views and preferences are being considered will deprive the child of their legal right to be heard and to be taken seriously. Inherent in a child's best interests is their right to be heard. A "rights-based approach is of particular importance in the discussion of children's rights because of children's often intense vulnerability, the frequent competition between children's rights and those of adults, and the resulting ease with which a more paternalistic and needs-based approach can be adopted" (Standing Senate Committee on Human Rights, 2007, p. 27).

Although children have the right to be heard when decisions are being made about them, the actualization of children's rights in the family court remains a significant challenge.

For example, while acknowledging that there is a call for more legal representation for children (General Comment No. 14, 2013), the BC Appeal court has interpreted the legal test for the appointment of a children's lawyer in s. 203 of the *Family Law Act* as "a deliberate choice to limit the circumstances in which a child has a right to counsel" (*JESD v. YEP*, 2018, para. 43). In that case the Court said, "It would be invidious, and contrary to [the child]'s interests, to place her in an adversarial role against her father or against experts who have been engaged by the court" (para. 55). This approach may well be reconsidered in future cases, in view of two later decisions. In *AB v. CD* (2020), the same Court supported the child's right to legal representation throughout contested, very high conflict, court proceedings which involved among other issues an allegation of family violence. In *Michel v. Graydon* (2020), the Supreme Court of Canada overturned a statutory interpretation decision of the BC Court of Appeal it considered did not support the rights of children. In that decision the Supreme Court said, "Courts are not to be discouraged from defending the rights of children when they have the opportunity to do so" and emphasized using a child rights approach to questions of statutory interpretation (para. 31).

The UN Committee concluded that a child will need appropriate legal representation when their best interests are to be formally assessed and determined by courts. "In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision" (General Comment No. 14, 2013, para. 96).

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Flawed Assumption #3: Children need to be sheltered from the turmoil of family breakdown by excluding them from the process

Judges and other justice system professionals have often been reluctant to include children in the legal process, believing that it is best to keep them out of the litigation. There are fears that it will cause them psychological harm, they will be forced to decide between parents, they will be caught in a loyalty trap, or they will be coerced into a position.

The notion that children will be protected from the turmoil of their parents' relationship breakdown by keeping them out of the process, in effect that participation equates with harm to the child, has been discounted in the literature throughout many countries. Tisdall (2016) explains that contrary to harming children, research supports the finding that "young people who were involved in making decisions about contact subsequently are more likely to have positive experiences of contact" (p. 372). Jackson and Martinson (2020) maintain that more harm is done by excluding children from the process:

> [T]here has been some disconnect between children's best interests and their right to be heard (Birnbaum, 2017; Dundee, 2016). This results from concerns about potential harm to children and/or conceptions that removing children from litigation is in their best interests (Dundee, 2016). However, research shows that greater harm is done from excluding children from family law proceedings, hindering their participation, and disempowering them (Bell, 2016; Birnbaum, 2017; Dundee, 2016) (pp. 2-3).

The English and Welsh Voice of the Child Dispute Resolution Advisory Group (2015) makes a strong case that concerns about possible distress are not a good reason to exclude children from the processes:

> Arguments that it might be distressing to the child do not normally constitute good reason to disenfranchise the child…Furthermore, high conflict disputes can be particularly stressful for children and being able to express their concerns and worries can be reassuring and supportive (p. 133).

High conflict separations are often very stressful for children, but seeking their participation in decision-making helps to empower them during a time of significant disruption in their lives. Children are aware that decisions are being made and excluding them from expressing their views only increases their distress.

Some of the participants in the youth listening circles highlighted cultural differences in the determination of how to include child participation in decision-making.

> *"Our [Indigenous] system is so inclusive of children, the circle model of bringing all people into a circle together, it is so different from government."*
>
> Youth Engagement

In *B.J.G. v. D.L.G.* (2010), the Yukon court explained that rather than harming children, encouraging their participation is critical to their well-being:

> Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the [family law] dispute, can lead to better decisions for children that have a greater chance of working successfully. They have important information to offer about such things as schedules, including time spent with each parent, that work for them, extra-curricular activities and lessons, vacations, schools, and exchanges between their two homes and how these work best. They can also speak about what their life is like from their point of view, including the impact of the separation on them as well as the impact of the conduct of their parents.
>
> Receiving children's input early in the process, and throughout as appropriate, can reduce conflict by focusing or refocusing matters on the children and what is important to them. It can reduce the intensity and duration of the conflict and enhance conciliation between parents so that they can communicate more effectively for the benefit of their child. When children are actively involved in problem solving and given recognition that their ideas are important and are being heard, they are empowered and their confidence and self-esteem grow. They feel that they have been treated with dignity. In addition, children's participation in the decision-making process correlates positively with their ability to adapt to a newly reconfigured family (paras. 21-22).

Many of the participants in the youth interviews spoke about the impact of being excluded from the process.

> *"When my parents broke up, I had no idea why, I still don't know why. The lack of transparency can do such harm. Not acknowledging the elephant in the room can do such harm."*
>
> *"Court started when I was a few months old. I was always being thrown around, from house to house or city to city. I never felt like I could make decisions, I felt like everything was decided for me."*
>
> Youth Engagement

By contrast, the young people who had been included in the decision-making process reported how valuable that experience was for them.

> *"My parents split up when I was 15, and I was also given a choice to either live with my mom or dad. And yes, it was a much bigger decision than just who I was going to live with. It ultimately came down to me wanting to stay with my 6-month-old sister. I felt so heard and grateful in being included in that decision."*
>
> Youth Engagement

Overall, research shows that children want to be included in decision-making about issues that are important to their lives and cases confirm that judicial decision-making is strengthened by having these insights (see for example, *WCX v. CMC*, 2023; *Tseng v. West*, 2019; *TC v. SC*, 2020; *M v. M*, 2015).

Other barriers: Allegations of parental alienation

Alienating behaviour is described as conduct by a parent that undermines the child's perceptions of their relationship with the other parent. "Resist-refuse contact is the newer and preferable term for cases that have been referred to as parental alienation cases" (Martinson, 2023, p. 1). It is not uncommon in high conflict family law cases for a parent to allege that the other parent is brainwashing the child into refusing contact with a parent and that, accordingly, the child should either not be heard or should have their views given little to no weight (Bala, 2015). Martinson cautions that numerous child rights are at stake in these cases including their participation rights, rights to privacy, and "the right to be protected from violence of all kinds while in the care of parents, legal guardians or any other person who has care of the child" (p. 2).

In *MF v. JL* (2002), the Quebec Court of Appeal found that even in cases of parental alienation, a child who is able to express their wishes and to instruct counsel is entitled to have their wishes put before the court and advocated for. This ruling is supported throughout most of the literature respecting child participation in family law. Jackson and Martinson say that there is a risk of serious harm caused by marginalizing or even silencing a child's views particularly in the face of arguments that a child is being manipulated by the other parent. Accordingly, a child's right to participate and be heard is even more important in cases involving allegations of parental alienation (Jackson & Martinson, 2020).

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A child may resist contact with a parent for a variety of reasons including the child's own negative experiences with that parent. It is important therefore to understand all of the reasons for the child's rejection of a parent (Bala, 2015; Bala & Birnbaum, 2018; Fidler & Bala, 2010).

One young person who was interviewed for this research paper spoke about how she was shuttled back and forth between her parents for many years. Her complaints about family violence at the hands of her father were attributed to parental alienation and given no weight. The young person told the interviewer that in the fifth grade she was taken from her class and made to meet with a professional who did not identify himself or explain why he was at her school. He asked her a series of questions about her father but offered her no follow-up support. She later learned that the professional was a social worker, employed by the government. He reported what she had said to her father, and this resulted in her father's abuse escalating.

The literature consistently reflects that it is the fact of the conflict that is harmful—not the child's expression of their views. Hearing from children in the decision-making process protects their rights and improves their outcomes (Bala, 2015; Bessner, 2002).

Modes of participation: How to include children in family law decisions

In a 2021 decision (*DM v. CR*), the British Columbia Provincial Court ordered that an eight-year-old child be permitted to participate in a family law case where decisions were being made about her. In that case, the court said:

> A child has the right to choose whether or not to participate. To exercise that right, the child must have information and advice about the choices and their potential consequences. That [K.M.R] is a young child is not determinative. There should be no age limits, and capacity must be assessed on a case-by-case basis: N.J.K. v. R.W.F., 2011 BCSC 1666 at paragraph 202. I have considered General Comment 12 as persuasive in informing the interpretation of the Convention.
>
> There is a direct link between determining a child's best interests, as set out in Article 3, and hearing the child's views and taking them seriously. Canadian case law confirms that considering children's views is both beneficial to children generally and doing so can reach more effective decisions: Medjuck v. Medjuck, 2019 ONSC 3254 at paragraph 30 (para. 17).

In British Columbia, children can participate in family law matters in several ways.

1. Out of Court Settlement Discussions

Some common ways that a parent will include the child's perspective in out of court settlement discussions are:

a) *Mediation*: In British Columbia, the Family Justice Counsellors offer free *Children in Mediation* services that will include the child's views and preferences in any mediation discussions with the parents. The parties can also choose to retain a private mediator who will include the child in the mediation process. In Ontario, the Ontario Association for Family Mediation (OAFM) requires its accredited mediators to adhere to specific standards including standards for including the child in mediation (OAFM, 2023).

The Ontario experience shows that there is a range of ways to have child-inclusive mediation. In British Columbia, Mediate BC provides a list of Registered Roster Mediators who must meet stringent standards and adhere to Mediate BC's standard of conduct in order to be included on their roster. Their Child Protection Mediation Program Policy and Procedure Manual includes best practices for fostering meaningful participation of children in mediation. All new child protection mediators with Mediate BC receive foundational training on how to best include children in the mediation process.

b) *Views of the Child Reports*: Commonly referred to as VOC's (Views of the Child) or HTC's (Hear the Child), these reports can be requested by a guardian of the child. The report writer is retained to meet with the child and provide the parties with a written report of the child's views. The Hear the Child Society, for example, has a roster of trained, vetted report writers who will meet with the child in confidence and, with the child's permission, provide a written report of the child's views and perspectives to the parents (2023). All parties must consent to the process and the child must agree to engage with the report writer. The Hear the Child Society requires that report writers give the child the opportunity to review the report and to make any changes that they want prior to the report being released. The cost of these reports varies depending on the fees the report writer charges.

c) *Expert Reports*: Parents can arrange (and pay for) an evaluative report from a professional that includes an assessment of the child's views and includes recommendations for resolution. The cost of an expert report is prohibitive for some families.

d) *Retaining a lawyer for the child*: The Child and Youth Legal Centre under the umbrella of the Society for Children and Youth of BC (SCY) provides free lawyers for children if the parties all consent to the child being represented by counsel in negotiations. In order to be represented by a lawyer in these out of court settlement discussions, children must want to have a lawyer and to participate in the process. The communications between the child and the lawyer are privileged and will not be shared without the express permission of the child. The lawyer will also advocate on behalf of the child with the parents. Alternatively, parties may retain a private lawyer to represent their child's interests in settlement negotiations.

> *"For us, what was most effective was having a lawyer, the same lawyer, over the years to advocate for us."*
>
> Youth Engagement

2. Cases That are Before the Court

If a matter is in the courts, there are several ways that the child's views and preferences can inform the decision-making process. Most commonly this is done through Views of the Child Reports, expert reports prepared by professionals, judicial interviews, and through legal representation. Less often, children will write letters, provide affidavits or, rarely, testify. Courts have significant discretion in determining if and how a child will participate and, if they do participate, how much weight will be given to the child's evidence. These various options for hearing from the child are not mutually exclusive and a judge may choose one, several, or none of the options for the child to be heard (*DS v. TN*, 2023, para 3). This broad discretion, however, can be dependent on what the government will pay for, or what the parents can afford. When the parents lack resources to pay for a report or to retain a lawyer for the child, and a lawyer is not otherwise available, often nothing is done to ensure that the child is meaningfully heard in a timely way.

When determining the reliability or accuracy of the child's hearsay evidence, a judge will weigh and assess the children's evidence in whatever forms it is submitted: see *Sahi v. Sahi* (2023), paragraphs 249 and 250, where the child's evidence was considered in the context of the other evidence in the trial, the child's views expressed in a s. 211 report, and their representation through counsel.

Legislative framework for hearing children in family law cases in British Columbia

The amended *Divorce Act* (2019) links the determination of a child's best interests to their right to be heard, however, the Act does not provide any specific mechanism for hearing a child. In BC, the *Family Law Act* (2011) provides a wide array of options to the Court and to the parties to meet the s.37 mandate of including the child's evidence or views in any best interest assessment.

Section 201(1) of the *Family Law Act* (2011) provides that a child has the capacity to "make, conduct or defend a proceeding under this Act without a litigation guardian" if the child is at least 16 years old, a spouse, or a parent. A court may, however, appoint a litigation guardian for that child or can allow a child who is not described in subsection (1) the same right to make, conduct or defend a proceeding under the Family Law Act without a litigation guardian.

In practice, it is uncommon to see a child participate under this section, save where they themselves are a parent or spouse.

Section 202 of the *Family Law Act* (2011) gives the Court broad discretion as to how it will receive the child's evidence including through the admission of hearsay evidence. This section is most often relied on for a Views of the Child or Hear the Child report. Such reports generally involve two meetings with the child. At the first meeting, the interviewer will meet alone with the child and make a record of what the child has

shared. The second meeting allows the child and the interviewer to review that record for accuracy. The interviewer will then report in writing on the child's demeanour and what the child said but will not provide an assessment or any recommendations. The child is sometimes, but not always, given the opportunity to decide when the report should be released. Many interviewers do not feel equipped to meet with younger children.

Judicial Interviews

> *"When I got to speak to the judge I felt that my opinion was most valued. We had talked to so many people, MCFD was crap, but with the judge I felt the most seen and the most heard."*
>
> Youth Engagement

Another way to include the child's views under section 202 (*Family Law Act*, 2011) is through a judicial interview. There are no specific guidelines regarding how a judicial interview should be conducted in British Columbia and practices vary widely (see for example, *M v. M*, 2015, paras. 44-49). Some judges will allow the child's counsel or a support person to join them in the interview. The interview will sometimes, but not always, be recorded. If it is recorded, a transcript may be provided to the parties or the Court may instead seal the recording and provide a written or verbal synopsis of the information gleaned from that interview. While a judge may decide to conduct multiple interviews with a child, the more common practice is to have a single interview. A judicial survey of Arizona judges revealed a "wide diversity in philosophy" with some judges prioritizing procedural fairness while for others the "paramount goal was to facilitate the child's meaningful and confidential participation in the litigation process" (Atwood, 2003, pp. 630-631).

Historically many judges were opposed to judicial meetings with children, however, of late there has been an increase in judicial interviewing of children who are involved in family law disputes (Bertrand et al., 2012).

In *LCT v. RK* (2016) the BC Supreme Court noted:

> I do not know the children. I have never met them. Yet I am being asked to make an order that will have a significant impact on them, regardless of what the order might be, and that is based on conflicting positions and affidavits on what the parties say is happening with the children.
>
> There are benefits to me interviewing the children in private. Some of those benefits are:
> (1) The children will be able to express their respective views to the person who is responsible for making the decision that will affect them.
> (2) It will facilitate a better decision that will be in the children's best interests.
> (3) The children will benefit from expressing their views in private and in confidence.

(4) It will ensure their wishes are correctly interpreted and not through the sanitization or buffer of their parents and others.
(5) It would likely put their apparent distress, meltdowns and acting out into context.
(6) Their views, expressed in private, may play a significant role in my determination of whether or not a stay should be granted (paras. 15-16).

The timing of the judicial interview is significant to how the children's evidence is weighed. Judicial interviews tend to be at the end of the evidentiary portion of the trial so that the children's evidence can be placed in a proper context (*SK v. DG*, 2022).

Research from other jurisdictions reveals that many children really appreciate the opportunity to meet the judge and directly express their views to the court. Judges generally find it helpful to meet children. The practice of judicial interviewing of children is very common in Quebec and is becoming more common in other parts of Canada. Judges require education and protocols to carry out this important role in a child-focused fashion (Bala et al., 2013; Bala & Birnbaum, 2018).

Child Hearsay

Section 202 of the *Family Law Act* (2011) also allows the court to admit the hearsay evidence as to the child's views. This provision is important if the evidence is provided by a neutral party, but hearsay from parents in a high conflict case will generally be given little weight. Indeed, having parents interview their children and report their views is generally discouraged. The inability to truly weigh the hearsay evidence of the parents in these circumstances can render the child's views meaningless, effectively depriving the child of the right to be heard and to be taken seriously.

In the case of *Goldsmith v. Holden* (2020), the BC Supreme Court relied on s.202 to appoint counsel for the children. Children's letters and evidence of other third parties such as teachers, coaches, and counsellors respecting the child's views are also sometimes admitted into evidence through this section.

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Appointing a lawyer for the child

Section 203 of the *Family Law Act* (2011) permits the court to appoint a lawyer to represent the interest of a child if the court is satisfied that:

> (a) The degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and
>
> (b) It is necessary to protect the best interests of the child.

As many commentators have noted, this test creates a high bar to the appointment of counsel for the child under this section. With our growing understanding of the negative impacts of high conflict disputes on the child, a test that requires matters to have evolved to such an extreme is not in a child's best interests.

During the youth interviews conducted by the Society for Children and Youth of BC ("SCY"), one young person said that her first experience of feeling heard was when she was represented by a lawyer. While her views had previously been provided to the court through other mechanisms during the life of the family court case, what stood out for her was how different her experience was with counsel. She felt that unlike previous interviews with legal professionals, her lawyer was interested in her position, and what she wanted, not what her parents wanted. Other interviewees expressed this same sentiment.

> *"The biggest issue was no one would listen to me. No one. My lawyer was instrumental in me being able to have autonomy. Once she became involved, the judge listened to me."*
>
> Youth Engagement

Some legal scholars argue that legal representation for children is the most effective way to provide meaningful access to justice for children in court proceedings (Martinson 2023; Tempesta, 2019). Martinson asserts that "in the absence of [independent legal representation] in court proceedings, only lip service is paid to the legal principle of treating children as full rights bearers" (2023, p. 2). She explains that "lingering paternalistic thinking" may inappropriately silence the child and open up the risk of biased assessments of family violence which minimize the child's voice, discriminatory and controversial forced reunification programs, and the "[d]iscriminatory use of police enforcement clauses which, in effect, cause children to be "arrested" by the police" (p. 2).

Martinson says that legal representation for children is one of the eight safeguards and guarantees mandated by the UN Committee on the Rights of the Child that is necessary to advance and protect a child's rights in court proceedings and that legal representation "is particularly important" as it ensures that the other seven safeguards are followed (2023, p. 12). Those seven safeguards are:

1. Prioritizing processes, avoiding unnecessary delay (time perception);
2. Obtaining children's views;
3. Establishing relevant facts;
4. Using qualified professionals;
5. Using appropriate judicial "legal reasoning" in decision, which apply child rights principles, including giving due weight to children's views; explain conclusions different from children's views; and are provided without delay;
6. Providing mechanisms to revise or review decisions; and
7. Requiring governments to assess the impact of all laws and policies, including budget decisions, on children's well-being (Martinson, 2023, pp. 11-12).

In British Columbia, the Code of Professional Conduct of BC says, "When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship" (Law Society of BC, 2013, s.3.2-9). Notwithstanding, the legal profession has often taken a narrow approach to the capacity of children to instruct counsel and there continues to be a general lack of awareness that children have these rights or that lawyers are available to fulfill this specific mandate. Herein is the risk to children: that very few of them will be able to obtain independent legal representation in a confidential, privileged legal setting. Bessner (2002) explains that instead, if the legal system presumes that children have the same capacity to instruct counsel as do adults and a simple test of capacity is endorsed, more children will be able to have their views and preferences advocated for in family law.

In British Columbia, the Society for Children and Youth of BC provides free legal advice and representation to young people in court proceedings through the Child and Youth Legal Centre (CYLC). A child may also retain a private lawyer if the parties are able to pay for private representation for the child. In either case, the court must appoint counsel for the child. A CYLC lawyer for the child will review pleadings and meet with the client several times before sharing their views. They will assist the child in understanding the decisions that are being made and the value in their voice. Children are told that they do not need to decide anything, but that their views are important to the determination of their best interests. Counsel acts on the instructions of the child only and not those of the parents. Meetings between the child and their lawyer are in a confidential setting. Unlike the other ways of including the child's voice, counsel for the child has an ongoing relationship with their client and will advocate for their position with the decision makers. While the child is not generally made a party to the legal proceedings, counsel for the child can participate in all stages of the legal proceedings. In having their own counsel, there is the added benefit – to the child – of having an independent person explaining the nature of the legal proceedings, helping to shield them from conflict, and keeping the court apprised on evidence that is current as to the child's evolving circumstances, views and opinions (see for example, *EL v. ML*, 2018; *Goldsmith v. Holden*, 2020 para. 23).

In *S.K. v D.G.* (2022) the Alberta Court of Queen's Bench found:

> A child's lawyer has the benefit of establishing a privileged, confidential, open, independent, and honest relationship with the child. Particularly in proceedings that stretch out over years, are complex and multi-factorial, the child's lawyer can remain engaged in the ever-changing situation and properly advance the child's wishes. They are also trained to tease apart any concerns of alienation, coaching, and properly guide the child to understand the full picture and consequences of the child's wishes (para. 175).

> *"The only thing that I would recommend would be that everyone have access to [a lawyer]. I need everyone to have these services. Most people think that it is just between the parents, but kids can clearly see what is going on. Kids can have the capacity and the control to know what they want."*
>
> — Youth Engagement

Professional Assessments

Section 211 of the *Family Law Act* (2011) allows the court to appoint a person to assess, among other things, the views of a child in relation to a family law dispute. The person appointed must be a family justice counsellor, a social worker, or another person approved by the court. An expert report can cost in the tens of thousands of dollars and is thus inaccessible for many families. A report of a Family Justice Counsellor, while free, often can take a significant time to be completed. Family Justice Counsellors do not opine as to the best outcome for the child.

Courts should be mindful of the danger in placing too much reliance on the opinion of the expert as to what is in a child's best interests. That ultimate determination is for the court to make.

> "There are no check-ins that happened with the family so someone who writes a report won't even know if the decision that they made impacted the family in a good way or helped the family in the way that they were intending."

> "I would love it if the courts would stop treating the testimony of psychologists as experts. Psychologists are not experts. They are the number one group that provided the evidence to allow me to stay in an abusive situation."
>
> — Youth Engagement

By design, s. 211 reports are primarily a parenting assessment tool. An interview with the child is often carried out at each parent's home. There is no requirement that the young person is given an opportunity to review the information that is attributed to them prior to the report being released. Given the delays inherent in the court system, these reports are often dated by the time the matter reaches trial.

With these myriad options for hearing from the child, it is unsurprising that there is "considerable controversy" about the best way to include the child's views in family law cases (Bertrand et al., 2012, p. 19). Not every family can afford the cost of a report from an expert. There can be significant delays in the case depending on the choice for how the child will be heard. The one constant throughout the scholarship is that hearing from the child, regardless of their capacity, provides evidence that is an integral part of that child's best interests.

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How are Children Heard in Other Jurisdictions?

> "It is generally accepted, and also mandated by international human rights law, that children should be able to express their views in family law proceedings" (Mol, 2021, p. 337).

If and how a child may be heard, however, and what the criteria are for the inclusion of that child's voice, depend entirely on where the child lives. Two similar 12-year-olds living in different countries, or different provinces in Canada, may face entirely different barriers to their ability to be heard in their family law case.

Canada

In Canada, every family court is required to consider the views and preferences of children when decisions are made about their best interests, regardless of where the children live. Birnbaum and Bala noted, however:

> [W]hile the requirements of Article 12 of the UN Convention on the Rights of the Child (UNCRC) are in theory being met by legislation, in practice the extent of children's participation varies greatly across the country, not only because of differences in legislation, government funding and support for services, but also as a result of differences in attitudes of the family justice professionals who remain the gatekeepers to children's participation (2021, p. 123).

Whether the child is being heard through a meeting with the judge, or indirectly by a written report or even through the representation of counsel, each province has different funding schemes and approaches.

A child's capacity to be heard is seldom discussed in case law; the reality is that the younger the child, the less likely that counsel will be appointed to represent their interests. In most provinces, if an order is made allowing the child to be represented by counsel, the child's capacity to instruct a lawyer will then be assessed by the individual lawyer. There are no clear guidelines for lawyers regarding how to assess a child's capacity.

In some provinces, a government lawyer may be appointed to represent the child, however "resource restraints result in many parenting cases being resolved without a lawyer for a child, even if requested by the court" (Birnbaum & Bala, 2021, p. 125). Ontario, Northwest Territories and PEI have robust government funded child representation programs. Legal Aid Alberta has a requirement that the cost of counsel for the child must be repaid to legal aid by the parents. In Quebec, counsel must represent the child on a solicitor/client model. Other provinces do not have specific rules as to the mode of representation. In British Columbia, free child representation is provided by the Society for Children and Youth of BC— a not-for-profit, nongovernmental organization, or by private bar lawyers who charge a fee for their services.

With respect to other modes of child participation, the legislation in Quebec "establishes a presumption that judges will hear directly from children", and it is common for judges to meet with children, starting around the age of 7 (Bala & Birnbaum, 2021, p. 38).

Throughout the rest of the country, there are no requirements that judges in family cases must meet directly with children. The result is a lack of consistency, not only from jurisdiction to jurisdiction but even from judge to judge, with some judges regularly interviewing children while other judges either refusing to meet with children or rarely doing so (Bala & Birnbaum, 2021, p. 38).

Birnbaum and Bala found that the use of independent parenting assessments depends on where the child lives. These assessments, which will generally include a meeting with the child, are expensive and many parents cannot afford them. In BC, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Nova Scotia, "there are limited government-funded programmes to prepare these assessment reports" (Birnbaum & Bala, 2021, p. 125). In some parts of the country these assessments are either unavailable or available for only a "very small portion of cases" (e.g. Yukon, Nunavut, Northwest Territories, New Brunswick, Newfoundland and Labrador) (Birnbaum & Bala, 2021, p. 125). There do not appear to be any criteria respecting the capacity of the child to participate in a report, however, the reality is that younger children are less likely to have their views considered as part of a parenting assessment.

Bala and Birnbaum (2021) concluded that "In too many places in Canada there are insufficient resources to allow for meaningful involvement by children" (p. 42). They recommend "more training and education for judges, lawyers and other professionals about how to involve children in the family dispute resolution process" (p. 42).

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International

Mol compared the role of the child in family law proceedings in 17 different countries throughout the world (Mol, 2021). She found that practices and determinations of capacity vary widely depending on where the child lives.

Judicial Interviews

In China, for example, a "strict age limit" of eight years and older is mandated for a child to participate in a judicial interview, while in Israel, "children from the age of six ought to be invited to participate but younger children may also participate if they wish to and have an older sibling who is participating" (Mol, 2021, p. 338). Some countries require the child to be at least 12 years old before they can speak with the judge, others consider whether the child is "sufficiently mature". In many cases, the assessment of capacity falls upon the judge.

Written Reports

Indirect participation through a written report is used to hear the child in nine of the seventeen jurisdictions that Mol compared. In some jurisdictions, the written report should only express the child's views while "in most jurisdictions the aim of reporting on the views of the child is combined with observations or recommendations regarding the welfare of the child" (Mol, 2021, p. 346).

Child Representation

Mol (2021) notes that direct participation with the assistance of counsel or another representative also, depends on which country the child lives in. In some countries, the representative must be a lawyer while in others the child may be represented by a layperson or even a psychologist (p. 343). The mode of representation varies from jurisdiction to jurisdiction. In South Africa, for example, the representative "must present and argue the child's wishes, through use of their legal knowledge and expertise" (p. 342). In China, the child is represented by an agent "ad litem" who advocates for what they believe to be in the child's best interests. In New Zealand, "the lawyer for the child represents the welfare of the child as well as ascertaining and communicating the child's views, but when these clash it is possible for a second lawyer to be appointed so that both perspectives are represented" (p. 342).
The costs of children's counsel are most often borne by the state; however, some governments require the parties to contribute to the cost of counsel. In China, the parents are required to pay the cost of an agent ad litem for their child (Mol, 2021, p. 344).

Whether a child will be permitted to participate directly often depends on a combination of age and maturity requirements. Some jurisdictions include other requirements like the existence of a conflict or the consent of the parents. There is a variety of language used to determine whether a child is sufficiently mature to participate:

(i) sufficient age and maturity (Denmark, Scotland, South Africa);
(ii) capacity to express views (South Africa);
(iii) capacity to instruct a representative (South Africa);

(iv) being capable of understanding the meaning and legal consequences of litigation (Croatia);
(v) having sufficient understanding (England and Wales, Scotland, South Africa).

Depending on where the child lives, there may be presumptions of capacity based on the child's age, while younger children will have to satisfy additional maturity requirements. Some jurisdictions apply strict age limits. New Zealand dispensed with age and maturity requirements in 2005 (Mol, 2021). Instead, any child in New Zealand must be given "reasonable opportunities to express their views on matters affecting them" (Mol, 2021, pp. 352-353). Indirect participation is less likely to include specific capacity criteria.

Consistent through the literature is the concern that a child's right to be heard requires much more than just legislative rules.

> "It is striking that it is not uncommon for participation rights and opportunities to be legally regulated, but for the actual use of them to be limited. Child participation in practice requires more than laws and regulations: it requires, amongst other things, funding, adequate information provided to the child, a shared will by the authorities involved, and the training of judges and others in hearing children" (Mol, 2021, p. 357).

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D. Conclusion and Summary of key findings

There is a growing body of evidence that demonstrates that children and their families benefit from including the child's views when decisions are being made in family law cases. Yet all too often, claims of incapacity or perceived harm prevent a child from being heard in the decision-making process. Throughout the course of this research project, some key findings emerged from the literature as well as the youth engagement.

1. All children have the legal right to be heard when decisions are being made about them in family law matters.

2. There is no universal test for capacity. All children should be presumed to have the capacity to express their views and preferences.

3. While a child's maturity may affect the weight to be attached to their views, a child's capacity should not be a barrier to their right to participate.

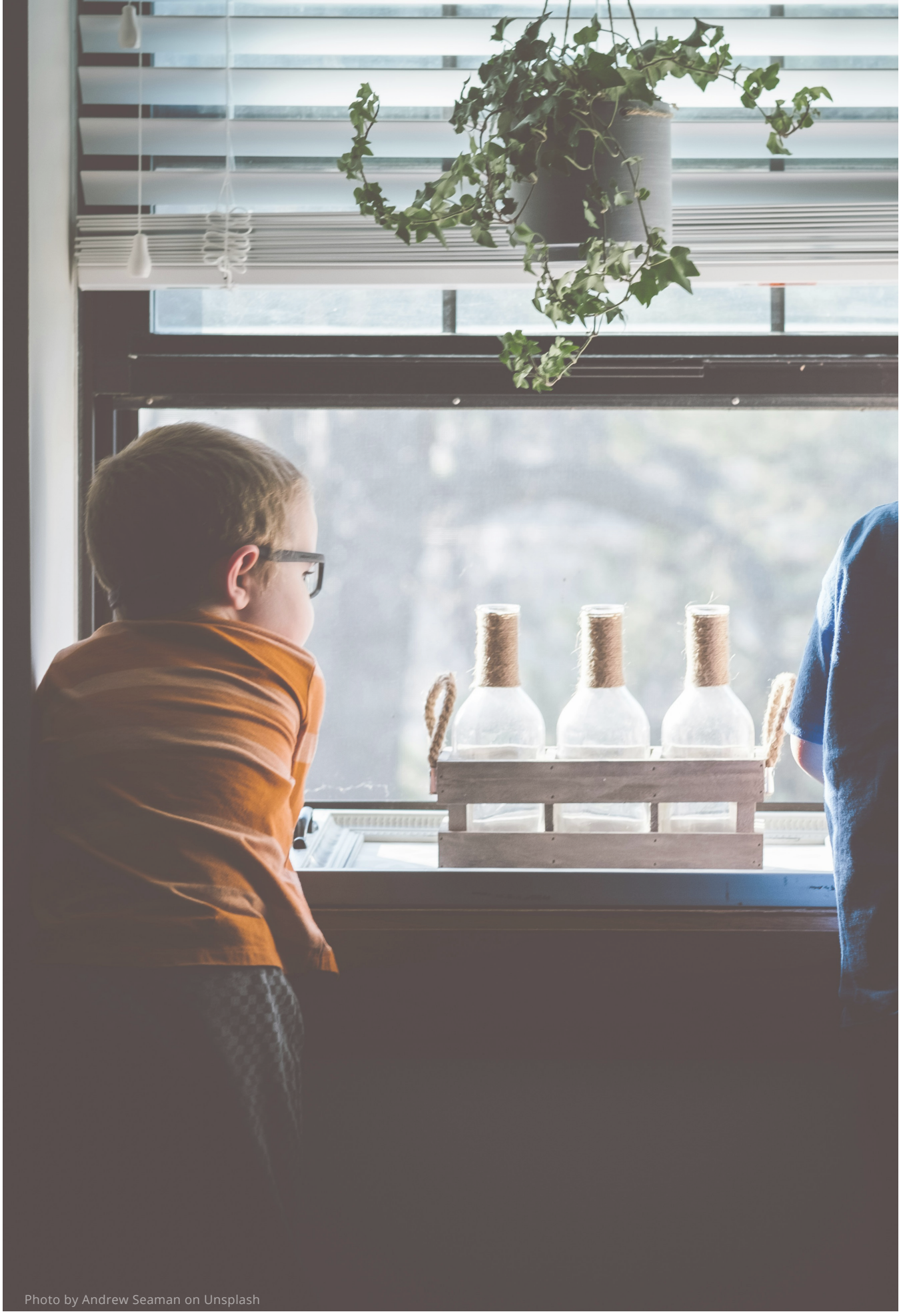
4. A child's best interests and participatory rights are inextricably linked.

5. There are numerous ways that a child may participate in family law cases.

6. Participation is a choice. Children should be informed of their options and permitted to choose if and how they would like to have their views shared.

7. Practitioners including lawyers, mental health professionals, mediators, voice of the child report writers and judges should have interdisciplinary training in listening to children and inclusion of the child's voice and views including training in listening to very young children.

8. There should be adequate funding for report writers and children's lawyers in order to ensure that all children have equal access to justice.



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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	Experience of being "heard"	• Through having a **lawyer / dedicated neutral third-party representative** • **Dedicated and consistent support person** needed especially in situations where capacity is diminished due to situational circumstances • Opportunity **to be heard directly by key decision-makers** (e.g. judges) • **Non-judgemental** listening (e.g. even if professional didn't agree) • Being heard as not just 'listening' but being reflected in **action taken** based on what is expressed by young person • **Individual dependent** – system as a whole never created space to be truly heard
2	Need for legislated services for all children	• Opportunity to have a legal representative **should be built into framework** of legal system • Inclusive legislation for young people to have lawyers in **the solicitor-client model** • Advocates should be available for **all young people** (including toddlers)
3	Need for transparency	• Young people have **a right to know** what is happening • Young people **less likely to tell the truth and access help** due to lack of transparency
4	Ageism and systemic oppression	• Young person's opinion **given more weight when able to communicate** in a certain way (as perceived by adults and associated with older ages) • **Young people marginalized in different ways** are assumed to have "less" (perceived) capacity and as a result are less likely to be heard • Young people **pressured to 'act a certain way' (to be valued) while balancing not acting 'too mature'** (perceived as having been manipulated)
5	Lack of consistency	• **Participation shifted** depending on presiding judge (participation fluctuated as a result of constantly changing judges) • Call for **"one judge per case"** • Experience in family law system **highly varied and contingent upon individual** professionals involved • Lack of continuity resulting from **funneling young people through stages and cutting off relationships with one practitioner** in order to move to another
6	Privacy and access to information	• Information shared with a professional by a young person **should not be shared with parent** that child does not feel safe with • **Weaponization of medical records** to take away child-focused support

7	Mandated practices that diminish capacity	• **No reunification counselling or police enforcement** clause • **Re-evaluate designation of some professionals as experts** (e.g. testimonies of psychologists)
8	Need for training of legal professionals	• **Training of judges** to be comfortable with engaging young people and how to do so appropriately • **Training of judges** regarding different family models, trauma-informed practices • Professionals need to **learn intersectionality of law** with other systems • Professionals need to **use tools and practices that are appropriate** for different ages and developmental stages • Need to change framing to **every child and every person has capacity** (work from this assumption)
9	Awareness of rights and supports available for young people	• Lawyers available for **children should be common knowledge** (e.g. in schools, among social workers, on reserves)
10	Need for holistic approach	• **Lack of communication and relations between different professionals** in family law system (or between professionals and young children)
11	Need for funding and resources for child-specific services	• **More funding** needed for young people to access services for them (especially on reserves and in territories)
12	Disenfranchisement resulting from protectionist practices	• **Abolish belief** that young people need to be **'protected' from truth** • Normalize that often consequences of decisions concerning young children impact them the most and this should **automatically rationalize** involving them in decisions • Recognize **that choices of young people may fluctuate** but those choices can be made by them • **Need to abandon belief that children need to have relationship with both parents** and the gender stereotypes embedded within that belief (e.g. father's have rights to their children, mothers are natural caregivers) • **Perpetuates or results in more harm to young person** (e.g. young people not being informed that confidential information they share will be made available to parents) • Results in feeling more **vulnerable and isolated** • **Parental alienation** - Accusation became barrier to exercising capacity
13	Lack of feedback loop structure	• **Reports written by practitioners do not change or update over time** (can be poorly worded or specific to the situation at the time of writing) • **Lack of follow-up / continuity of reports** (written as a one-time process) • **Lack of opportunity to provide feedback** to report writers • Current system does not allow for the recognition that young people, their interests, and their family situations **change over time**