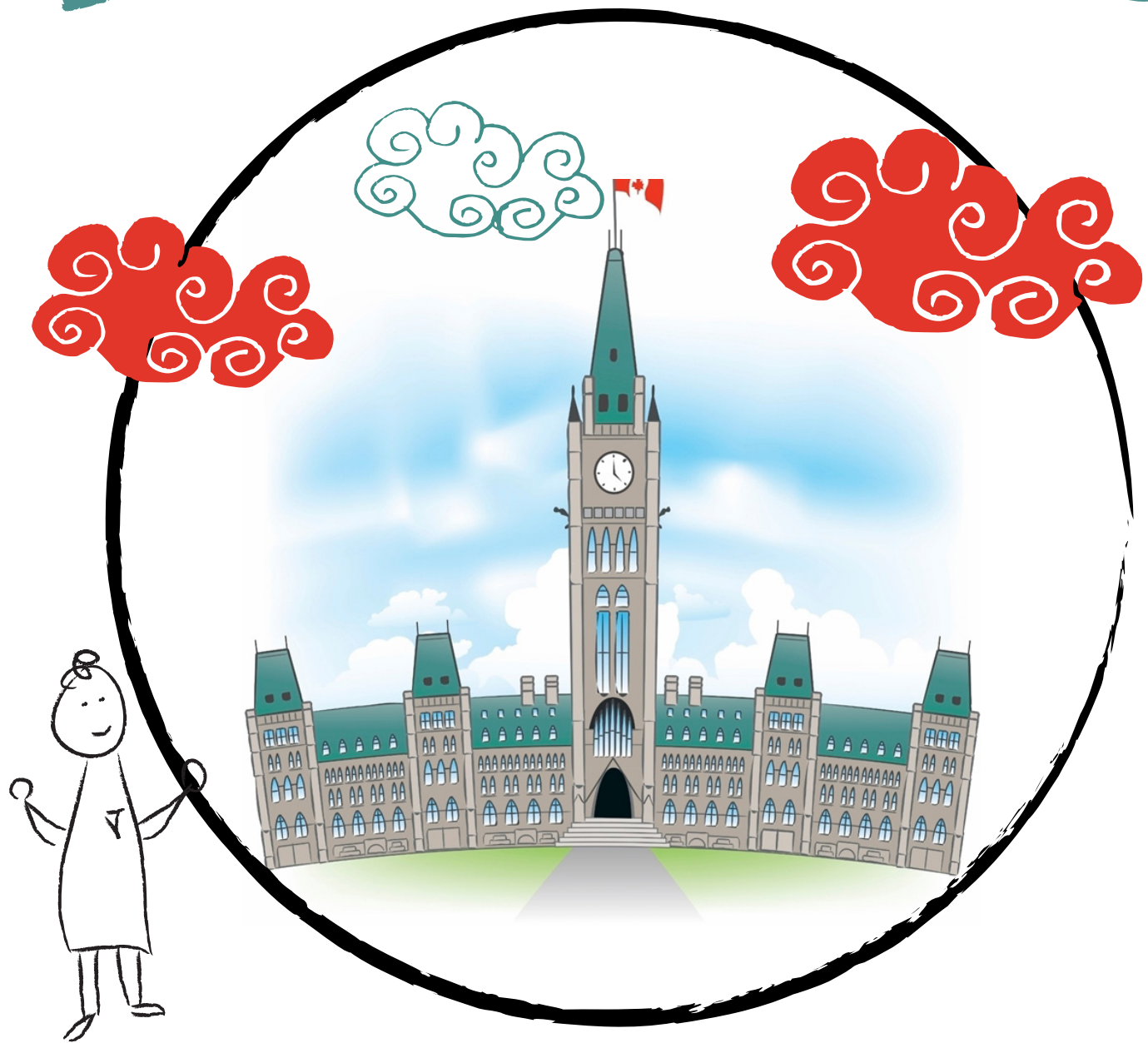


Children's Rights in the Canadian Legal System



SOCIETY FOR
children
and **youth**
OF BC

SOCIETY FOR CHILDREN AND YOUTH OF BC

The Society for Children and Youth of British Columbia (SCY) is a provincial advocacy organization dedicated to improving the well-being of children and youth through education, advocacy, and community engagement.

SCY provides a forum for multi-disciplinary exchange and action for organizations and individuals working with and for young people.

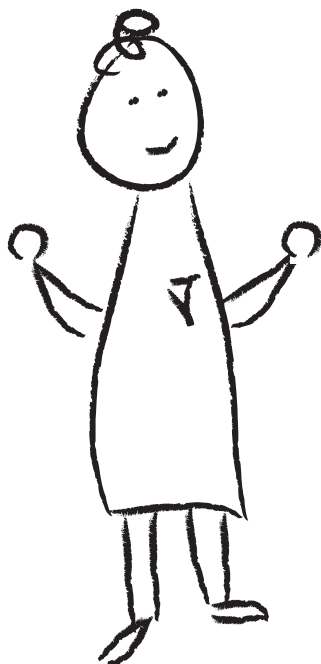
This paper is part of a project of the Child Rights Public Awareness Program of SCY.

For more information on SCY, or copies of this booklet, please contact:

Society for Children and Youth of BC

Email: info@scyofbc.org

www.scyofbc.org



SOCIETY FOR
children
and **youth**
OF BC

Children's Rights in the Canadian Legal System

AUTHOR
Jen Flood

PROJECT SUPERVISOR
Andrea Lemire

RESEARCH CONTRIBUTOR
Jean Feng

SUPERVISING LAWYER
Shakeela Begum

EDITING AND LAYOUT
Christina Thiele

SPECIAL THANKS

We are indebted to Pro Bono Students Canada through the University of British Columbia, Faculty of Law.



Pro Bono Students Canada ("PBSC") is a national pro bono student organization with a mandate to provide legal services without charge to organizations and individuals in need across Canada. In furtherance of its mandate, PBSC matches law student volunteers with

community organizations, firms, courts and tribunals under the supervision of qualified lawyers.

This program supported SCY and this publication by providing us with skilful and thoughtful student lawyers who researched and authored this report.

Copyright

© Society for Children and Youth of British Columbia, 2013

All rights reserved. No part of this document may be reproduced for commercial purposes without permission in writing from the publisher. Publication of parts or extracts of this document by not-for-profit agencies serving children and youth is encouraged, as long as appropriate acknowledgement is given.

SCOPE AND LIMITATIONS

This series gives a snapshot of how the United Nations Convention on the Rights of the Child (UNCRC) is being implemented in the Canadian legal system.

The need for this report was precipitated by an interest in members of SCY's Child Rights Network who wanted updated information on how the UNCRC is being implemented in Canada's legal system.

Our last review "The UN Convention on the Rights of the Child—Does Domestic Legislation Measure Up?" was conducted in 1998 which was a thorough look at domestic laws, giving an assessment based on a 4 star rating system for Canada's compliance in implementing the UNCRC.

The initial iterations for this project was to do a complete review of Canada's progress in implementing the UNCRC by examining case law that mentions the UNCRC. This would give us a picture of how the UNCRC is being utilized in practice.

After an initial search on the Westlaw Canada database using the key words "Convention on the Rights of the Child" 485 cases were found. In order to make the research meaningful, 30 cases were excluded because they had negative treatments, meaning the cases had been

overturned for various reasons and are not part of current case law.

There were about 50 cases that have more than one judgment in the database, meaning that these cases went through different procedures from lower courts to the higher courts. We included these cases as part of our initial review as they show an evolution of how cases were decided from previous proceedings.

In order to ensure the variety of the cases that most embody the UNCRC, we included cases that consider provisions of the Convention (for example, considering the best interests of the child) that have been considered or referred to.

The case summaries related to the areas of criminal penalty, evidence, custody and access, child protection, adoption, education, and immigration issues with different UNCRC rights and provisions have been considered or referred. We deemed a more narrow focus through a narrative approach to be more fruitful and informative rather than reviewing laws on a case-by-case basis.

Using the aforementioned methodology, select cases inform this series and are told through the lens of three key rights: every child's right to life, survival, and development.

ABOUT THIS SERIES

Part 1 An introduction to child rights and the Canadian legal system

Part 2 A child's right to life: an adequate standard of living and medical care

Part 3 A child's right to survival: protection from physical violence and protection from sexual exploitation and abuse

Part 4 A child's right to development: culture, identity, family connections, and education

page

1



ABOUT THIS SERIES

This four part series will focus on how the UNCRC has been used in legal cases, rather than on specific legal outcomes in each case. The cases come from various provinces and different levels of court. This series discusses several cases in which Canadian courts have considered children's rights related to the second guiding principle, found in Article 6 of the UNCRC.

ARTICLE 6 OF THE UNCRC PROVIDES THAT:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

While these rights may seem straightforward, it will become clear from the cases that they are often more nuanced and complex in practice. Children's rights can come into conflict with other rights and interests, and decision-makers must balance the competing factors. The rights guaranteed in the UNCRC are by no means absolute. For example, as we shall see, parental rights can outweigh a child's right to protection from harm in the context of corporal punishment. Another complication comes from the role of international treaties in Canadian decision-making.

page

2

CHILD RIGHTS IN PRACTICE

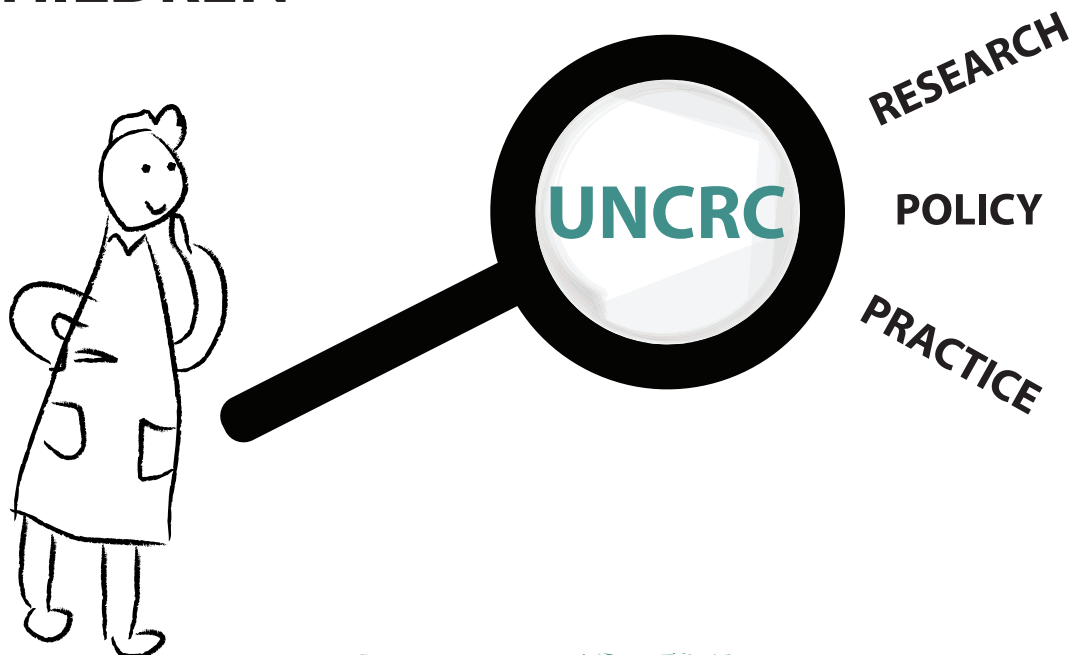
Despite its limitations, the UNCRC can be an effective advocacy tool in cases involving children. The BC Supreme Court has recently stated that “Canada has positive obligations to prevent violations of the UNCRC. These positive obligations are heightened with regard to the UNCRC as children are, of course, inherently less able to advocate on their own behalf”. Children cannot ensure that their rights are respected on their own, since children are often under the jurisdiction of parents and other caregivers and lack the resources

**IT IS UP TO
CHILDREN’S RIGHTS
ADVOCATES TO
MAKE ARGUMENTS
ON BEHALF OF
CHILDREN**

and access to the court system needed to make a complaint. Thus, it is up to children’s rights advocates to make arguments on behalf of children in order to enforce their rights recognized under the UNCRC.

page

3



PART ONE

AN INTRODUCTION TO CHILD RIGHTS AND THE CANADIAN LEGAL SYSTEM

The United Nations Convention on the Rights of the Child (UNCRC) is an international treaty, which recognizes the rights of all children. It is the most widely ratified international human rights treaty, with 193 countries as parties, including all but 3 United Nations member states. The Convention sets out common standards for children living in all parts of the world. At the same time, it is intended to take into account “the different cultural, social, economic and political realities of individual States so that each State may seek its own means to implement the rights common to all.” Canada ratified the Convention in 1991.

page

4

Article 43(1) of the Convention establishes a Committee on the Rights of the Child, which examines the progress made by states in meeting their obligations in the Convention. All parties to the UNCRC are required to submit regular reports describing their implementation of the Convention. The Committee reviews the reports, addresses areas of concern, and makes recommendations to the state, called “Concluding Observations”, to better implement the convention. The Committee also publishes “General Comments” to clarify its interpretation of the UNCRC.

There are two “Optional Protocols” to the UNCRC in force, one restricting the involvement of children in armed conflict and one prohibiting the sale of children, child prostitution, and child pornography. Optional Protocols are separate treaties that add to the main treaty, and must be signed and ratified separately by states that choose to do so. Both optional protocols have over 150 parties, including Canada. A third Optional Protocol was opened for signature in 2012, which will allow children to submit complaints about violations of their rights directly to the Committee on the Rights of the Child. This third Protocol will not come into force until at least 10 states have ratified it, which has yet to happen. Canada has not signed this Protocol.

GUIDING PRINCIPLES

There are four general principles, also called “guiding principles”, enshrined in the Convention, which are “meant to help with the interpretation of the Convention as a whole and thereby guide national programmes of implementation.”

The guiding principles appear in Articles 2, 3, 6, and 12:

- (1) The principle of non-discrimination (Article 2);
- (2) The rights to life, survival, and development (Article 6);
- (3) The best interests of the child principle (Article 3); and
- (4) The views of the child principle (Article 12).

A COURT SHOULD PREFER INTERPRETATIONS THAT REFLECT THE PRINCIPLES IN THE CONVENTION

“Development” is interpreted broadly, including not only physical health, but also mental, emotional, cognitive, social and cultural development. Many of the specific UNCRC rights promote children’s life, survival, and development. These

include the rights to an adequate standard of living; medical care; protection from violence and sexual exploitation; culture, identity, and family connections; and education.

Although the guiding principles are general and apply to the interpretation of the entire Convention, we identify several specific rights that are particularly relevant to a child’s life, survival, and development. For each right, we look at court cases in which that right came into play, and discuss what impact the UNCRC had on the court’s decision.

page

5

APPLYING INTERNATIONAL LAW IN CANADA

In Canada, the law varies from province to province, and lower court decisions can always be overruled. It is important not to assume that any law or decision discussed in this article applies in your province or territory, or to your situation. For assistance with a specific legal issue, please contact a lawyer.

Since Canada has ratified the UNCRC, it is required under international law to make its domestic law consistent with the convention, providing children in Canada with the rights set out in the UNCRC. Ratified Conventions do not become a part of Canadian domestic law until the government (both federal and provincial, depending on the issue) enacts legislation (law) “implementing” the convention. If the rights are not implemented in domestic law, individuals cannot go to court to have those rights enforced. Implementation has not been done explicitly, as the government of Canada has taken the position that even though the exact wording of Canadian law is not the same as the wording of the Convention, the law already complies with the standards set out in the Convention.

Additionally, some Canadian legislation has been enacted or amended specifically to make it comply with the Convention. Even though the Convention is not fully implemented in law, the Supreme Court of Canada has decided that the “values and principles” in the Convention are still important to decision-making about children. When a court is interpreting domestic legislation, it should prefer interpretations that reflect the values and principles in the Convention where possible, because the government is presumed to have respected the values and principles of international law when it made the law.

THE CHARTER OF RIGHTS AND FREEDOMS

The Canadian Charter of Rights and Freedoms is one of the key mechanisms to protect human rights in Canada, and many of the cases discussed in this article deal with the Charter. It guarantees certain rights for everyone in the country, including children. It provides children with some of the same rights as those recognized in the UNCRC, but it is much less comprehensive.

Because the Charter is part of the Canadian Constitution, the government cannot enact legislation that does not comply with the Charter. A person who believes that legislation violates their Charter rights can challenge that law in court. If the court decides that the government has violated a Charter right, it must then decide whether the breach is justified under section one of the Charter, which states that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” If the breach is not justified, then the law is unconstitutional. The court will either “strike down” the legislation, declaring it to be of no force or effect, or give the government a period of time to change it so that it does not violate the right.

Remember, you can only go to a Canadian court for violations of domestic law. You cannot go to court to complain that your rights under un-implemented international law have been violated. Since the role of the Canadian courts is to apply Canadian domestic law, cases are never solely concerned with the UNCRC. There is always domestic legislation at issue, and the parties may argue that it should be interpreted in accordance with the UNCRC. Often, though not always, cases in which the UNCRC is relevant involve allegations that a child’s Charter rights have also been violated.

page

7

PART TWO

ADEQUATE STANDARD OF LIVING

Article 27 of the *United Nations Convention on the Rights of the Child* (UNCRC) states that every child has the right to a standard of living adequate for physical, mental, spiritual, moral, and social development. Parents have the primary responsibility to provide the conditions of living necessary for the child's development, within their financial ability.

OUR SOCIETY HAS GIVEN THE POWER AND DUTY TO REAR CHILDREN PRIMARILY TO THE PARENTS

The government's role is to take measures to assist parents and provide material assistance and support programs, particularly with regard to nutrition, clothing, and housing. Article 18 recognizes that both parents are responsible for the child, and that parents have the primary responsibility for the upbringing and development of the child.

Article 3.2 is also relevant, requiring the state to take legislative and administrative measures to ensure the child such protection and care as is necessary for their well-being, taking into account the rights and duties of parents.

One case that demonstrates this right is *R v RD*. In this case, a father told his 16-year-old son that he was no longer allowed to live in the house. The father did not provide the son with money or any alternative living arrangements, though he was sometimes invited in for meals. The son ended up homeless and living on the street. One day, the son climbed through the window of the house and took some food, and after a neighbour called the police, he was charged with breaking and entering plus theft.



The judge noted that our society has given the power and duty to rear children primarily to the parents. He referred to the UNCRC to support the general idea that the primary responsibility for the child's care lies with the parents (Articles 18 and 27), and that the government's role is to ensure that the minimum requirements are met (Article 3.2).

In order to determine what exactly this duty means, the judge considered several statutes in criminal law and child protection law that impose liability on parents, and found that the father had a legal duty to provide, at minimum, food and shelter for the child.

The parental duty did not disappear when the father kicked his son out of the home. If the father wanted to change the situation, he needed to make alternative arrangements for the child's basic needs. Therefore, the child had a right to enter the home and take food, so he could not be found guilty of breaking and entering or theft.

page

9

MEDICAL CARE

Article 24 gives children the right to the highest attainable standard of health and access to health care services. The state must take a number of measures to implement this right, including measures to diminish infant and child mortality; to combat disease and malnutrition; to ensure appropriate pre-natal and post-natal health care for mothers; and to develop preventive health care, among other provisions.

The right to health care was an issue in *Struweg v Struweg*, a child abduction case. In this case a married couple with one child lived

in Pennsylvania, though they were citizens of South Africa and their child was a citizen of Canada. The mother took the child on vacation to visit her brother in Saskatchewan. Once she arrived in Canada, she decided she wanted to end the marriage and did not plan to return to the US. The father brought an application for the child to be returned to the Pennsylvania under the *Hague Convention on the Civil Aspects of International Child Abduction*, an international convention implemented in Saskatchewan, which requires member states to secure the prompt return of children wrongfully removed or retained from another state.

page

10

ARTICLE 24 GIVES CHILDREN THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH AND ACCESS TO HEALTH CARE SERVICES

Under the Hague Convention, the child does not have to be returned if there is a grave risk that the child would suffer physical or psychological harm or would be placed in an intolerable situation. The mother raised a number of arguments for her child to stay in Canada based on the child's rights under the UNCRC.

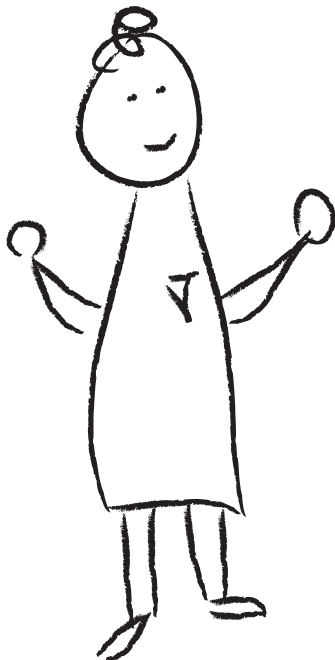
Since the mother was not a citizen of the US, she would not be able to work and would not qualify for social assistance if she returned there, and she therefore would have no means to support herself and the child. Among other things, she argued that her child would not have medical coverage in the US and would therefore be denied the highest attainable standard of health, which is the child's right under Article 24. As a Canadian citizen, the child did have medical coverage in Canada.

The mother was not successful; the Court ordered the child to be returned to Pennsylvania. The judge ruled that merely claiming that a child will have a higher standard of education, health or social services than what is available in another jurisdiction is not a sufficient reason to keep the child in Canada and grant the mother custody.

However, the Court did attach conditions to the order so that the child's needs would be met. The father had to agree to an interim order for the financial support of the mother and child, specifically dealing with medical insurance coverage. The fact that this condition was attached suggests that the judge took into account the child's right to medical care in making the decision.

page

11



PART 3

A CHILD'S RIGHT TO SURVIVAL: PROTECTION FROM PHYSICAL VIOLENCE AND PROTECTION FROM SEXUAL EXPLOITATION AND ABUSE

Children have a right to protection from all forms of physical and mental violence under Article 19 of the UNCRC. In addition, Article 37(a) provides that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”

page

12

It is a crime in Canada to assault a person. However, section 43 of the Criminal Code provides an exception to the crime of assault for parents and teachers who use corporal punishment against children:

Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

In 2004, the Canadian Foundation for Children, Youth, and the Law challenged this provision of the Criminal Code, arguing that it violated children's Charter rights.

The Foundation argued that this provision violates children's Charter rights: the right to security of the person (section 7), the right not to be subjected to any cruel and unusual treatment or punishment (section 12), and the right to equal protection and equal benefit of the law without discrimination based on age (section 15).



THE SUPREME COURT AND “USING FORCE” ON A CHILD



The majority of the Supreme Court of Canada rejected that argument and upheld section 43. The decision did, however, place a number of limitations on when using force against a child cannot be considered “reasonable in the circumstances”.

Based on the wording of the provision, social consensus, and expert evidence, the majority decided that it is always unreasonable to use force:

- (1) that is motivated by anger or frustration rather than corrective purposes
- (2) that results in harm or the prospect of bodily harm
- (3) against children under two years of age or children who are incapable of learning from the correction because of a disability
- (4) against teenagers
- (5) using any objects, such as a belt
- (6) using slaps or blows to the head

In addition, the majority decided that although it is acceptable for parents to use corporal punishment, it is not acceptable for teachers, though it may be reasonable for teachers to use force if necessary to remove a child from a room.

The majority referred to Article 19(1) of the UNCRC, which requires the state to protect children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation” and Article 37(a) which requires the

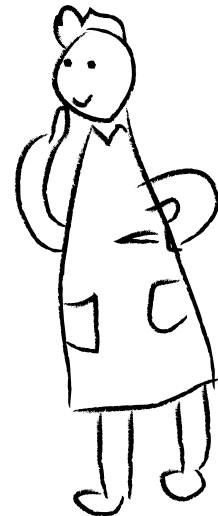
page

13

state to ensure that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. Based on these rights, the majority concluded that what is reasonable will seek to avoid harm and will never include cruel, inhuman, or degrading treatment.

However, the majority also referred to Article 5, which requires the state to “respect the responsibilities, rights and duties of parents . . . 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”.

This illustrates how some provisions of the Convention can be used to support a decision that seems to be contrary to children’s right to protection from harm. The majority also remarked that the Convention does not explicitly ban all corporal punishment, and that the Human Rights Committee of the United Nations took the view that corporal punishment in schools engages Article 37’s prohibition of degrading treatment or punishment, but has not expressed a similar view of corporal punishment by parents.



DISSENTING VOICES

Justice Arbour wrote a dissenting opinion in which she took the view that section 43 is unconstitutional because it violates children's right to security of the person. Justice Arbour also referred to the Convention in support of her position. The Committee on the Rights of the Child has commented on a provision in the UK similar to section 43 of the Criminal Code, stating:

The imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner. Thus, the ... legislative and other measures relating to the physical integrity of children do not appear to be compatible with the provisions and principles of the Convention.

Justice Arbour noted that the Committee has not recommended clarifying these laws, but abolishing them entirely:

[P]enal legislation allowing corporal punishment of children by parents, in schools and in institutions where children may be placed [should be considered for review]. In this regard ... physical punishment of children in families [should] be prohibited. In connection with the child's right to physical integrity ... and in the light of the best interests of the child, ... the possibility of introducing new legislation and follow-up mechanisms to prevent violence within the family [should be considered], and ... educational campaigns [should] be launched with a view to changing attitudes in society on the use of physical punishment in the family and fostering the acceptance of its legal prohibition.

page

15

REPEAL SECTION 43?

In addition, the Committee has expressed “deep concern” that Canada had taken “no action to remove section 43 of the Criminal Code” and recommended the adoption of “legislation to remove the existing authorization of the use of ‘reasonable force’ in disciplining children and explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed.” In light of these statements, Justice Arbour was of the opinion that striking down section 43 was necessary in order to comply with Canada’s international obligations.

The majority and minority opinions in this case illustrate how the different judges can rely on the Convention to support completely opposite opinions. Since the rights in the Convention are quite broad, their meaning is not always clear-cut. Advocates on both sides of an issue can therefore make arguments based on how the Convention supports their position.

Since this case, the Committee has continued to urge Canada to repeal section 43 and to “explicitly prohibit all forms of violence against all age groups of children, however light, within the family, in schools and in other institutions where children may be placed.” There have been attempts to have section 43 repealed not only through the court system but also through the political process. Several private members bills have been introduced in the House of Commons over the years, but they have never passed into law. Many children’s rights groups continue to advocate for the repeal of section 43.

OMAR KHADR AND THE UNCRC

Another aspect of the right to protection from violence was dealt with in *Canada (Prime Minister) v Khadr*. Omar Khadr, a Canadian citizen, was arrested in Afghanistan in 2002 at the age of 15. He was accused of throwing a grenade that killed a US soldier, and was imprisoned at the US detention camp, Guantanamo Bay, awaiting trial. He was given no special treatment as a minor, and did not have the opportunity to speak to a lawyer until 2004. He was subjected to sleep deprivation techniques and isolation designed to induce him to talk, which Canadian officials became aware of and were implicated in. Canadian officials visited him, not to provide assistance, but to interrogate him a number of times in 2003-2004, and shared the information gained through these interrogations with US officials. Officials began checking on him with concern for his treatment and welfare beginning in 2005. The Canadian government did not attempt to have him returned to Canada.

Khadr argued that his section 7 Charter rights to life, liberty, and security of the person were infringed by the government's refusal to seek his repatriation to Canada. In determining whether his Charter rights were infringed, the Federal Court discussed Canada's obligations under the UNCRC at length, including the obligation to protect children from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19) and not to subject them to torture or other cruel, inhuman or degrading treatment or punishment (Article 37(a)). Although the government raised some concerns about his treatment, it condoned the sleep deprivation techniques by interviewing him while knowing that these techniques were being used.

page

17

The Court also referred to the Optional Protocol on the Involvement of Children in Armed Conflict, which recognizes that children are inherently vulnerable to recruitment into armed conflict before they can apply mature judgment to the choices they face. The Court concluded that Canada had a duty to protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms, such as those in the UNCRC. This decision was upheld by the Supreme Court of Canada in 2010, which declared that his rights were violated but left it up to the government to decide on the appropriate course of action. Omar Khadr was repatriated to Canada in 2012.

SEXUAL EXPLOITATION AND ABUSE

Children have the right to protection from all forms of sexual abuse and sexual exploitation under Article 34 of the UNCRC. In particular, the state must take all appropriate measures to prevent the coercion of a child to engage in unlawful sexual activity, the exploitative use of children in prostitution, and the exploitative use of children in pornographic performances and materials.

An important aspect of protecting children from abuse is providing them with appropriate safeguards when they have to deal with the court system. In *R v LDO*, the Supreme Court of Canada considered the constitutionality of one such safeguard. Section 715.1 of the Criminal Code allows children's testimony to be videotaped and played for the court, so that children do not have to testify in person.

A man accused of sexual assault argued that section 715.1 violated his Charter rights to life, liberty, and security of the person (section

7) and to be presumed innocent until proven guilty according to law in a fair and public hearing (section 11(d)). The majority of the Court upheld the section because it “not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.”

One of the accused’s arguments was based on the fact that children up to 18 years are allowed to use this safeguard. He argued that the age limit of 18 years is arbitrary. The majority rejected this argument, and Justice L’Heureux Dubé explained in her concurring opinion that: Whether the complainant is a young child or an adult woman, all victims of sexual abuse who are required to relive, through detailed testimony, the horrendous events through which they have suffered, experience doubly what is already significant pain. . . . Section 715.1 is a legislative attempt to partly shield the most vulnerable of those witnesses, children and young women. . . . A young woman of 15, 16 or 17 years of age will, in most instances, be in a situation of power imbalance vis-à-vis the perpetrator, as a result of both her sex and her age. As well, there will be many instances where the accused is in a position of trust and this may often result in additional emotional turmoil and confusion.

Justice L’Heureux-Dubé referred to the UNCRC in support of her decision. The Convention applies to all children under 18 (Article 1), and Article 34 therefore protects all children under 18. The age of majority in all Canadian provinces is at least 18. Interpreting section 715.1 consistently with the Convention, she concluded that it is legitimate, and not arbitrary, to draw the line at age 18.

CHILD PORNOGRAPHY

Another issue related to protecting children from sexual exploitation is pornography. It is a crime in Canada to possess child pornography. The Supreme Court of Canada considered the constitutionality of the definition of child pornography, which includes “any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act”. In *R v Sharpe*, a man accused of possessing child pornography argued that this prohibition violates his Charter right to freedom of expression (section 2(b)). He accepted that criminalizing child pornography is justified in order to prevent harm to children, but argued that prohibiting written material goes too far.

The majority of the Court agreed that this prohibition violates freedom of expression, but held that the infringement is justified under section 1 of the Charter. The Court considered evidence that shows connections between child pornography and harm to children:

- (1) child pornography promotes cognitive distortions;
- (2) it fuels fantasies that incite offenders to offend;
- (3) it is used for grooming and seducing victims; and
- (4) children are abused in the production of child pornography involving real children.

Justice L’Heureux-Dubé wrote a concurring opinion in which she referred to the UNCRC in support of her opinion that prohibiting child pornography, including written material, is justified. She stated that the Convention affirms the importance of protecting children from harm, and that Canada’s ratification of the Convention “demonstrates this country’s strong commitment to protecting children’s rights.” The Convention (and the Optional Protocol on the

Sale of Children, Child Prostitution and Child Pornography) explicitly recognizes the harms of child pornography. Thus, the UNCRC provides a very strong basis for the government to justify bans on child pornography.

In general, Canadian criminal law only applies to offences committed within Canada. However, there are some exceptions in which citizens and permanent residents of Canada can be charged for acts committed outside the country. One such exception is found in the Criminal Code section 7(4.1), which deals with sexual offences against children. In *R v Klassen*, a man charged with sexual abuse of children in Colombia, Cambodia, and the Philippines challenged this provision, arguing that Canada does not have the authority to pass laws that apply outside the country.

The British Columbia Supreme Court rejected this argument, and held that Canada does have the authority to prosecute its citizens and permanent residents for acts that they commit elsewhere. The Court referred to the UNCRC to support the view that there is international consensus on the need to protect children from sexual abuse, and noted that when the Parliament of Canada enacted section 7(4.1), Canada's obligations under the Convention were cited as one of the reasons for the provision, which illustrates that the government does take the Convention into account when it enacts legislation dealing with children.

Furthermore, Canada signed and ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which specifically requires the state to pass criminal laws against the sale of children, child prostitution, and child pornography, whether the offences are committed by nationals within the country or not.

Section 810.1 of the Criminal Code provides another tool that can be used to deal with offenders who have committed sexual offences against children, whether in Canada or elsewhere. This provision allows for a person to be arrested and to have probation-like conditions imposed if he has committed a sexual offence against a child under 16, and if there are reasonable grounds to fear that he will commit another sexual offence. Recently, a BC man was arrested when he arrived in Canada after spending 5 years in a Thai prison for sexually abusing children in Thailand. He was placed on conditions for 18 months, including surrendering his passport, staying away from places where children under 16 would congregate, not having access to the Internet, frequently checking in with a probation officer, and attending a treatment center.

In 2011, the British Columbia Supreme Court was called upon to decide whether the criminal law against polygamy is constitutional. As part of the analysis, the Court considered whether the UNCRC, as well as three other international treaties, requires Canada to take all available measures to end polygamy. Since there is no specific mention of “polygamy” in the Convention, the Court considered other provisions that may be implicated in the practice of polygamy, including articles 19 and 34 (protection from violence and sexual exploitation).

The Court noted the observations of Committee on the Rights of the Child. Article 24(3) requires the state to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children,” and the Committee has commented on the importance of preventing teen pregnancy, which is an issue related to polygamy. The Committee has identified polygamy as a discriminatory tradition and has encouraged states to

discourage polygamy “by applying legal and administrative measures and conducting awareness-raising campaigns on its adverse effects on children.”

The Court decided that although the criminalization of polygamy infringes the religious rights of certain groups, it is justified because evidence showed endemic concrete harm to women, children, society and the institution of monogamous marriage. The Court identified the following harms to children: higher infant mortality, emotional, behavioural, and psychological problems, and lower educational achievement, which are “likely the result of higher levels of conflict, emotional stress and tension in polygamous families.” They also face an enhanced risk of psychological and physical abuse and neglect. Additionally, children in polygamous communities are exposed to harmful gender stereotypes. Girls are less likely to be educated, face higher rates of teen pregnancy, and some become victims of child trafficking, which involves moving the young girls across the border to the US for the purpose of marriage. Harms to women include higher rates of domestic violence and sexual abuse, higher rates of mental health issues, shorter lifespans, less autonomy, and worse economic situation.

page

23

PART 4

A CHILD'S RIGHT TO DEVELOPMENT: CULTURE, IDENTITY, FAMILY CONNECTIONS, & EDUCATION

page

24

There are three closely related articles that provide children with the rights to culture, identity, and family connections: Articles 8, 9, and 30.

Article 8 of the UNCRC provides that children have the right to preserve their identity, including nationality, name, and family relations without unlawful interference.

Article 9 requires the state to ensure that a child is not separated from his or her parents against their will, except when such separation is necessary for the best interests of the child.

Under **Article 30**, indigenous children have the right to enjoy their own culture, to profess and practice their own religion, or to use their own language.

In *Baker*, the Supreme Court of Canada was asked to determine the role of children's interests in decisions about whether to admit a person to Canada based on humanitarian and compassionate grounds. Ms. Baker was a citizen of Jamaica who overstayed her

worker's visa and lived in Canada illegally as a domestic worker for 11 years. She had four Canadian-born children. When she was diagnosed with a mental illness, she applied for welfare, and was ordered deported. Ordinarily, people must apply for permanent residence status from outside Canada, but Ms. Baker applied for an exemption based on humanitarian and compassionate grounds because she was the sole caregiver of two of her children, and because of her illness. She argued that she and the children would suffer emotional hardship if she were deported, and that she would not receive treatment in Jamaica, which could worsen her mental illness. Article 9 of the UNCRC was relevant in this case because if Ms. Baker were deported, she would be separated from her children.

page

25

“CANADA CAN'T AFFORD THIS TYPE OF GENEROSITY”

Ms. Baker's application to stay in Canada to apply for permanent residence was denied. When she requested reasons for the decision, she was provided with informal notes taken by an Immigration Official. The portion of the notes dealing with humanitarian and compassionate considerations read as follows:

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.

The Supreme Court of Canada determined that this decision was unreasonable, in part because it was completely dismissive of the children's interests.

The Court stated:

Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations ... may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

This was a very important decision on the role of international law in making such decisions. The Court held that although the UNCRC is not implemented in domestic law, the values and principles of international human rights law play an important role in interpreting domestic law.

The principles of the Convention "place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights." Although this does not give the children the right to a particular outcome (i.e. it does not mean that a mother with Canadian children will never be deported), the decision-maker must "consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them." Therefore, the decision was overturned and returned for consideration by a different Immigration Officer.

CHILDREN'S RIGHTS ARE CENTRAL HUMANITARIAN & COMPASSIONATE VALUES IN CANADIAN SOCIETY

ARTICLE 8 AND ANONYMOUS DONOR INSEMINATION

In *Pratten v British Columbia (Attorney General)*, a woman unsuccessfully argued that she had the right to information about her biological origins, based on the UNCRC. She was conceived by donor insemination from an anonymous donor, and the records with information about her biological father were destroyed. She tried to establish that she had the right to this information under section 7 of the Charter, and relied on Article 8 of the UNCRC to support this claim. However, the Court determined that Article 8 does not give children the right to know their biological origins. To support this interpretation, the Court considered both the history of Article 8 and the observations of the Committee on the Rights of the Child.

page

27

The Court noted that Article 8 was introduced into the UNCRC when Argentina proposed it to deal with children who had been abducted from their parents and later renamed and registered as the children of the abductors. In the Committee's concluding observations on the UK, it was concerned that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilization did not have the right to know the identity of their biological parents recommended that the government take steps "to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible" in light of the rights in Articles 3 and 7.

Since the Committee did not mention Article 8, the Court concluded that Article 8 was not intended to deal with this situation. Although the Committee did recommend that states allow all children this information, the Court took the view that the language of this recommendation “does not reflect the view that access to information regarding biological origin is guaranteed by the Convention”, and concluded that the right to know one’s past is not of such fundamental importance to amount to a constitutional right.

ARTICLE 30 AND THE “60s SCOOP”

Turning to Article 30 (the right to culture, religion, and language for indigenous children), there is a long history in Canada of Aboriginal children being removed from their homes and communities and placed with non-Aboriginal families. This was often due to systemic disadvantage faced by indigenous communities and “the colonialistic assumption that native people were culturally inferior and unable to adequately provide for the needs of the children” (“The 60s scoop”, Origins Canada, online: <http://www.originscanada.org/the-stolen-generation/>) The highest number of adoptions of Aboriginal children took place in the 1960s, known as the “60s Scoop” because children were scooped from their homes without the consent of the families and bands. Today, there is still a disproportionate number of adoptions of Aboriginal children. Thus, it remains a contentious and challenging issue for decision-makers.

For children, positive self-image is partly based on a positive view of one’s culture. This is especially important in communities that have experienced systematic racism, such as indigenous communities in Canada. Preserving the culture and aboriginal identity of children

is a very important consideration for decision-makers, and this is often recognized in Canadian legislation. However, even when courts have taken this consideration into account, there have been many cases in which courts have decided that a bonding relationship between the child and adoptive parents is more important than maintaining Aboriginal heritage, and children have often been placed with non-aboriginal families. This is an area in which making an argument based on the UNCRC might help to reinforce arguments about the importance of culture, identity, and family connections.

In *Re TR*, the Saskatchewan Court of Queen's Bench considered a policy that required the First Nations Band to consent before an Aboriginal child of that Band was placed for adoption. Five Aboriginal children had been in foster care for a long period of time and their Band refused to consent to any adoption to non-Aboriginal families. The Court decided that this policy violates the children's Charter rights to liberty and security of the person, and equality, because there was a potential for harm to the children if they had to stay in foster care, and they were denied a stable, permanent home.

page

29

THE HIGHEST NUMBER OF ADOPTIONS OF ABORIGINAL CHILDREN TOOK PLACE IN THE 1960S, KNOWN AS THE “60S SCOOP”

The Court referred to Article 30 and stated that culture is an important factor in determining children's best interests. However, the Court noted that it is possible for children to be placed with non-aboriginal families but still maintain a connection to their community. The Adoption Act in Saskatchewan allows for agreements to be made for facilitating communication and maintaining relationships with other members of the community, even if the adoptive family is non-aboriginal. “Adoption and culture are not mutually exclusive concepts”.

Another case, *S (J) v Nunavut (Minister of Health and Social Services)*, dealt with the rights under Article 30 of a young Inuk (singular of Inuit) whose parents died. He had no one to care for him, so he became a permanent ward of the Director of Child and Family Services at the age of 7. He lived in a series of foster homes, and at times was imprisoned for property offenses. Under the Child and Family Services Act (Nunavut), a child is no longer a ward of the Director when she or he turns 16 unless the Director chooses to make a special application. The services provided for children aged 16 - 18 were much more limited than for children under 16, with assistance from the Director becoming optional. When the child in this case turned 16, he was in prison. The Director did not apply to extend the wardship, so when the child was released from prison he did not have anywhere to go, and it was difficult to find affordable housing in the Iqaluit community. The child was homeless and was eventually transported to live with an extended family member in Montreal – a significant departure from his home, language, and culture.

As discussed above, the rights in the UNCRC apply to all children under the age of 18. Although the Court recognized that it may be appropriate for the type of services to change as a child gets older, it determined that the Child and Family Services Act violated the equality rights of children aged 16 - 18 under the Charter. In making this decision, the Court considered the rights of children under the UNCRC, recognizing that youth are disadvantaged and vulnerable, and discussed Article 30 for youth in Iqaluit in particular:

Youth should receive special attention, guidance and support, basic rights and freedoms, respect for language and culture, and a base standard of living. Further, in assessing the minimum requirements for service to those between the ages of 16 and 18, cultural, language and community of the individual are important considerations.

The Court decided that since there were no legal parents, the Director was required to provide the necessities of life between the ages of 16 - 18 so that the child could stay in Iqaluit. This decision is similar to the case discussed above on the right to an adequate standard of living, but with a particular focus on the importance of a child's culture.

TAKING CANADA TO COURT

A case dealing with the rights of Aboriginal children in Canada is currently underway at the Canadian Human Rights Tribunal. In 2007, the Caring Society and the Assembly of First Nations filed a human rights complaint against the Federal government, alleging that Canada has discriminated against Aboriginal children through a longstanding pattern of providing less government funding for child and family services to First Nations children on reserves than is provided to non-Aboriginal children. A disproportionate number of Aboriginal children end up in the child welfare system due in part to the lack of adequate support services for Aboriginal families.

The hearing began in February 2013 and will continue for several months. This will be an interesting case to watch to see what role, if any, the UNCRC plays in the decision.



page

31

EDUCATION

Children have a right to education under Article 28 of the Convention. Article 29 sets a number of requirements for children's education. For example, it must be directed to the development of the child's personality, talents, and mental and physical abilities to their fullest potential.

In *Thiara v Canada (Citizenship and Immigration)*, a woman was being deported from Canada back to India. She had been established in Canada for several years and had three Canadian-born children. She wanted to remain in Canada to parent her children, so she made an application on humanitarian and compassionate grounds so that she would not have to return to India before applying for a visa to come back to Canada. In her application, she relied on the Articles 28 and 29 of the UNCRC, and a number of other human rights treaties, arguing that deporting her would violate her children's rights because her daughters would not have the opportunity to get an education in India. She also argued that their right to health care in Article 24, discussed above in Section IV, would be violated because they would not enjoy the highest attainable standard of health in India.

Although the immigration officer concluded that it would be in the children's best interests to allow their mother to stay in Canada, her application was denied because of other factors such as the mother's history of misrepresentations to immigration officials. The mother appealed, alleging that the officer did not interpret this provision in a way that complies with the children's rights in the UNCRC and other treaties. The officer did not specifically mention any of the human rights treaties in the decision. The Federal Court judge upheld the officer's decision, reiterating that the best interests of the children is

not the only factor and that although the officer did not specifically cite the treaties, she did address the substance of the treaties in her reasons. The Federal Court of Appeal agreed.

UNCRC, EDUCATION, PLUS RELIGION

In *ASK v MABK*, a child custody case, the children's right to an education came into consideration. The parents separated, and the children resided primarily with the mother. The mother had become very involved in a religious group, which severely limited any interactions with the outside world. The children could not use a computer or television and could only socialize with other members of the religious group. They could only listen to music and read books approved by the religion. The mother homeschooled the children, but removed any materials on history and science that were unacceptable to the religion. For these reasons, the father sought sole custody of the children.

In making a decision about the children's custody, the judge referred to several articles of the UNCRC, including Article 29 on the right to education. The homeschooling program followed by the mother did not meet the requirements of the Department of Education. The Court concluded that the children's right to be fully educated was being compromised, and that the father would provide the type of environment and parenting that would allow them to reach their full potential in accordance with Article 29. The Court therefore awarded sole custody of the children to the father and determined that the children should be enrolled in a public school.

page

33

CONCLUSION

Although the rights in the UNCRC are stated strongly and comprehensively, as we have seen, Canadian courts pay more attention to the Canadian law, considering children's rights in international law to be of secondary importance. Nevertheless, some arguments based on the UNCRC have been persuasive and have assisted the courts in securing positive outcomes for children.

Advocates for children should consider making arguments based on children's rights under the UNCRC. There are a broad range of rights that protect a child's right to life, survival, and development, and these rights can be related to a variety of situations. For example, although there is no specific provision in the Convention prohibiting polygamy, as discussed above, the government referred to various rights in the UNCRC that deal with protecting children from harm to bolster its argument that criminalizing polygamy is justified in order to protect children.

In addition, domestic law can be challenged directly or through the political system, as in the fight to strike down section 43 of the Criminal Code. Domestic policy and practice can also be challenged as not upholding children's rights, as in the court case by the First Nations Caring Society.

Court decisions become case law, and act as "precedents" for future cases, which means that lower courts must follow the decisions of higher courts. Although some of the cases discussed in this article have been quite dismissive of children's rights, others have affirmed the importance of children's rights under international law in decision-making about children. Those cases can be used to further defend children's rights.

RELATED PUBLICATIONS BY SCY INCLUDE:

- Realizing Rights, Responding to Needs: Youth with Disabilities in Conflict with the Law in British Columbia (2010)
- Aboriginal Child Friendly Communities Toolkit: Inclusion of the Early Years (2010)
- Making Space for Children: Rethinking and Re-creating Children's Play Environments (1999, 2010)
- Making Your Community More Child and Youth Friendly Toolkit: Getting Started and Planning for Action (2010, 2013: www.childfriendlycommunities.ca)
- Making Your Community More Child and Youth Friendly: Focusing on the Early Years (2010)
- Beyond Article 23—Rights of Children with Disabilities under the Convention on the Rights of the Child (2004)
- The Convention on the Rights of the Child and Public Policy—Perspectives on the Rights of Children with Disabilities in British Columbia (2003)
- Compliance of Canada's Youth Criminal Justice Act with the UN Convention on the Rights of the Child (2002)
- Compliance of BC's Secure Care Act with the UN Convention on the Rights of the Child (2001)
- The UN Convention on the Rights of the Child— 1. Guidelines for Policy Development; 2. A Model for Assessing Policy Compliance; 3. Supplement (2001)
- The UN Convention on the Rights of the Child—A Model for Assessing Legislative Compliance (2001)
- The UN Convention on the Rights of the Child—Does Domestic Legislation Measure Up? Research Review (1998)

For further information about the Society, or copies of this document or other SCY publications, please contact:

Society for Children and Youth of British Columbia
E-mail: info@scyofbc.org / Web: www.scyofbc.org

page

35