

ACCESS TO JUSTICE FOR CHILDREN: CANADA

This report was produced by White & Case LLP in April 2014, but may have been subsequently edited by Child Rights International Network (CRIN). CRIN takes full responsibility for any errors or inaccuracies in the report.

I. **What is the legal status of the Convention on the Rights of the Child (CRC)?**

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

A treaty is not itself a source of domestic law in Canada¹ and it does not automatically have the force of law.² In order to have direct effect in Canadian law, all treaties require legislative implementation, which ranges from express implementation of entire treaties through primary legislation, to statutes or regulations discharging the state's treaty derived obligations, or relying on existing constitutional or legislative provisions to meet the treaties' requirements.³

Canada ratified the CRC on 13 December 1991.⁴ A number of federal and provincial laws, policies, and practices affecting children have advanced children's rights to protection, development, and participation in decisions affecting their lives. Such federal laws include the Criminal Code, the Youth Criminal Justice Act, etc.⁵

B. Does the CRC take precedence over national law?

The CRC does not take precedence over national law, although national law is interpreted where possible in a manner consistent with the CRC.⁶

C. Has the CRC been incorporated into national law?

The CRC has not been directly incorporated into national law to date.⁷

D. Can the CRC be directly enforced in the courts?

The CRC cannot be directly enforced in Canadian courts but is referred to and

¹ Comments on this report provided by the Office of the Provincial Advocate for Children and Youth of Ontario, October 2015.

² Gib van Ert, *Dubious Dualism: The Reception of International Law in Canada*, 44 VAL. U. L. REV. 927, 928 (2010). Available at <http://scholar.valpo.edu/vulr/vol44/iss3/9>.

³ *Id.*

⁴ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

⁵ See <http://www.loc.gov/law/help/child-rights/canada.php>.

⁶ See Gib van Ert, *supra* note 1, at 934.

⁷ United Nations Children's Fund (UNICEF), "Not There Yet: Canada's implementation of the general measures of the Convention on the Rights of the Child," 61, available at http://www.unicef-irc.org/publications/pdf/canada_nty.pdf.

guides the courts in the interpretation of domestic legislation.⁸

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

The CRC has been extensively cited in court decisions. Canadian courts have discussed the CRC in cases concerning deportation of a parent and the best interest of the child,⁹ corporal punishment,¹⁰ protection and wardship,¹¹ the refusal of life sustaining medical care¹² etc. While children were the focus of the litigation, it should be noted that it was adults rather than children who commenced the litigation. There are fewer cases of rights being advanced by the child. In those cases, the cases have been commenced by an adult acting as litigation guardian (see part II.B below).¹³

II. **What is the legal status of the child?**

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

In Canada, the rules of civil procedure are administered by each jurisdiction—both federal and provincial—and, thus, each has its own set of rules.¹⁴ Most provinces base their civil procedure rules on a mixture of English and American rules adapted to the needs of the province.¹⁵ The Ontario Rules of Civil Procedure have been largely adopted by Manitoba, PEI, and North West Territories. In comparison, Québec's private law follows the civil law tradition, and litigation rights are stipulated under the Civil Code.¹⁶

The following discussions will focus, where provincial laws are applicable, on the relevant laws and rules in Ontario and Québec, which are prominent examples in their respective legal traditions.

Children or their representatives are entitled to bring cases in courts to challenge violations of children's rights in accordance with relevant laws and regulations

⁸ *Id.*; see also *supra* note 1, at 934.

⁹ *Baker v. Canada*, [1997] 2 FC 127 Available at <http://canlii.ca/t/4nc1>.

¹⁰ *Canadian Foundation for Children, Youth and the Law v. Canada* [2004] 1 SCR 76; 2004 SCC 4., Available at www.crin.org/node/6970.

¹¹ *Syl Apps Secure Treatment Centre v. B.D.* [2007] 3 SCC 38. Available at <http://canlii.ca/t/1s7xl>.

¹² *A.C. v. Manitoba (Director of Child and Family Services)* [2009] SCC 30. Available at: www.crin.org/node/7144.

¹³ An example is *A.B. v. Bragg Communications*, 2012 SCC 46 where the CRC was used in support of the heightened vulnerability of young people to permit her to bring an action without disclosing her identity. The action was commenced by A.B. by her litigation guardian; in *R. v. D.B.*, [2008] 2 S.C.R. 3, it was a young person within the meaning of the Youth Criminal Justice Act, who raised the CRC in the context of calling for an interpretation that would support diminished culpability.

¹⁴ See <http://www.thecanadianencyclopedia.com/en/article/civil-procedure/>.

¹⁵ *Id.*

¹⁶ *Id.*

in various jurisdictions in Canada.¹⁷

In federal law any person who, on reasonable grounds, believes that a person has committed an indictable offence may submit that information to a justice. The justice may in turn refer the complaint to a provincial court judge or designated justice to consider whether to compel the accused to appear before the court.¹⁸ The Attorney General has the discretion to stay (end) such a prosecution.¹⁹ There is a similar procedure under the Ontario Provincial Offences Act.²⁰

Where a person is arrested or detained, he or she has the right to challenge the validity of detention by way of habeas corpus and to be released of the detention, when it is not lawful.²¹

The Canadian Human Rights Commission operates at the federal level and has a mandate that permits it to receive complaints, though complaints must be in relation to discrimination.²²

The Canadian Council for Child and Youth Advocates is an alliance of ten children's advocates across Canada with mandates that support the rights of children and youth.²³ The mandates of the ten advocates that operate at the provincial level vary, but Newfoundland and Labrador, Nova Scotia and Saskatchewan all have mechanisms that allow children to make complaints.²⁴

- B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

Ontario

The legal status of the child in Ontario depends on the nature of the proceeding before the court.

In civil litigation, the Rules of Civil Procedure of Ontario provides that, unless the court orders or a statute provides otherwise, a case shall be brought to the

¹⁷ See, e.g., Rule 7 of Rules of Civil Procedure of Ontario, RRO 1990, Reg 194, in force since January 1, 2013. Available at <http://canlii.ca/t/51xtl>; articles 155–66 of Civil Code of Québec, LRQ, c C-1991, in force since May 23, 2013. Available at <http://canlii.ca/t/52203>.

¹⁸ Criminal Code, Section s504 and 507.1.. Available at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/>.

¹⁹ Criminal Code, Section 579.

²⁰ Provincial Offences Act, Section 23(1) and 24(1). Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p33_e.htm#BK39.

²¹ Canadian Charter of Rights and Freedoms, Article 10(c).

²² Canadian Human Rights Act, Section 27(1). Available at: <http://laws-lois.justice.gc.ca/eng/acts/h-6/>.

²³ See <http://www.cccya.ca/content/index.asp>.

²⁴ See Canadian Council of Child and Youth Advocates: Members for more information. Available at: <http://www.cccya.ca/content/members/index.asp>.

court on behalf of a child by a “litigation guardian.”²⁵ Any person who is not under disability may act without being appointed by the court, as litigation guardian for a plaintiff or applicant who is under disability.²⁶ A minor is considered to be under a disability for the purposes of the relevant civil procedure rules.²⁷ The requesting person must first file an affidavit in which the requesting person must consent to act as litigation guardian, set out his or her relationship with the child, show that he or she has no conflict of interest with the child in the case, and acknowledge that he or she has been informed of his or her liability to personally pay any costs awarded against him or her or the child.²⁸ If there is no other proper person willing and able to act as litigation guardian for a child, the court will appoint a litigation guardian to represent the child.²⁹ Litigation guardians may be changed by court order, and the appointment of a litigation guardian may be discontinued when the child reaches the age of 18.³⁰

According to the Office of the Provincial Advocate for Children and Youth of Ontario, the requirement of a litigation guardian can present a barrier to children who experience a violation of their rights at the hands of their parent or guardian as they may not be able to secure a litigation guardian to advance their rights through the courts. Litigation guardians are personally liable for the costs ordered in a proceeding and this naturally can impede a person’s willingness to act.³¹

In the unusual event that a child is able to commence a proceeding without a litigation guardian, the court must appoint the Office of the Children’s Lawyer to represent the minor litigant unless there is some other person willing and able to act as litigation guardian.³²

Children subject to criminal proceedings are parties to the litigation and have the right to participate. In contrast, a child whose parents have separated and commenced proceedings relating to custody and access is not a party to those proceedings. Once over the age of 12, if the child is the subject of a child protection proceeding, he or she is entitled to receive notice and be present in court for the hearing of the matter unless the court orders otherwise.³³ A child over the age of 12 and subject to an order for supervision or wardship may apply to the court for a review of his or her status and if the child makes such an application will be considered a party.

Québec

²⁵ Rules of Civil Procedure of Ontario, Section 7.01.

²⁶ Rules of Civil Procedure of Ontario, Rule 7.02.

²⁷ Rules of Civil Procedure of Ontario, Rule 103(1).

²⁸ Rules of Civil Procedure of Ontario, Rule 7.02.

²⁹ Rules of Civil Procedure of Ontario, Rule 7.04.

³⁰ Rules of Civil Procedure of Ontario, Rule 7.06.

³¹ Rules of Civil Procedure of Ontario, Rule 7.02(2)(h).

³² Rules of Civil Procedure of Ontario, Rule 7.04(1).

³³ Child and Family Services Act of Ontario, RSO 1990, c C.11, Section 39(4).

The Civil Code of Québec provides that, in judicial matters, a child shall be represented by his or her “tutor,” i.e., guardian. An action on behalf of a child is brought in the name of the tutor.³⁴ In a case brought by the tutor on behalf of the child, it is mandatory for the tutor to be represented by an attorney.³⁵ Tutorship ends when the child attains full age (18), obtains full emancipation, or dies.³⁶

But, with the authorisation of the court, a child may alone institute an action relating to his or her status, to the exercise of parental authority, or to an act that he or she may perform alone,³⁷ e.g., those within the limits imposed by his age and power of discernment.³⁸

In all cases where the interest of the child is opposed to the interest of his or her legal representative, the court has an obligation to appoint a tutor or “curator *ad hoc*” to ensure proper representation of the child.³⁹ Whenever a minor has any interest to discuss judicially with his or her tutor, a tutor *ad hoc* is appointed to him or her.⁴⁰

C. In the case of infants and young children, how would cases typically be brought?

In the case of infants and young children, the child's tutor or legal guardian would typically initiate a lawsuit on behalf of the child in the manner described above.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

In Canada, legal aid is usually available to persons whose income or whose core family's income is below a certain threshold.⁴¹ For example, Ontario maintains a legal aid program which provides certificates for legal aid services for low-income Ontarians but the tariff of that program does not provide for legal aid certificates for civil litigation matters (the tariff primarily provides for legal aid for criminal, mental health, immigration and child welfare matters).

Ontario

The Office of the Children's Lawyer is a law office in the Ministry of the Attorney General that delivers programmes in the administration of justice on

³⁴ Civil Code of Québec, Article 159.

³⁵ Article 61 of the Rules of Civil Procedure of Québec (“**Rules of Civil Procedure of Québec**”), RSQ, c C-25, in force since December 1, 2012. Available at <http://canlii.ca/t/51xjt>.

³⁶ Civil Code of Québec, Article 255.

³⁷ Civil Code of Québec, Article 159.

³⁸ Civil Code of Québec, Article 157.

³⁹ Rules of Civil Procedure of Québec, Rule 394.2; see also Civil Code of Québec, Article 251.

⁴⁰ Civil Code of Québec, Article 191.

⁴¹ See, e.g., http://www.csj.qc.ca/SiteComm/W2007English/Main_En_v3.asp.

behalf of children under the age of 18 with respect to their personal and property rights.⁴² Lawyers within the office represent children in various areas of law, including child custody and access disputes, child protection proceedings, estate matters, and civil litigation.⁴³ Clinical investigators prepare reports for the court in custody or access proceedings and may assist lawyers who are representing children in such matters.⁴⁴

While a judge may ask for the Office of the Children’s Lawyer to represent a child or the child’s interests, the Office is not obliged to accept the appointment.⁴⁵ In contrast, a judge may order that a child receive representation at any stage of the proceedings in a child protection proceeding commenced under the Child and Family Services Act of Ontario (CFSA).⁴⁶ In child protection proceedings, where the best interests of the child are to be at the heart, the child may receive legal representation pursuant to that statute.⁴⁷ The CFSA provides that the court shall order legal representation for the child if the court determines that legal representation is desirable to protect the child’s interests, including situations where the parents or other person in charge of the child fails to adequately care for or protect the child.⁴⁸

Québec

Pursuant to the Youth Protection Rights of Québec, the tribunal shall hear from persons concerned and the advocates representing them.⁴⁹ If the child has no advocate, the tribunal shall appoint one to him or her *ex officio*.⁵⁰ Where the tribunal establishes that the interests of the child are opposed to those of his or her parents, it must see that an advocate is specifically assigned to counsel and represent the child and that the advocate does not act, at the same time, as counsel or attorney for the parents.⁵¹

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

No other such conditions or limits could be identified.

III. How can children’s rights violations be challenged before national courts?

⁴² See <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *C.M.G. v. D.W.S.*, 2015 ONSC 2201 (CanLii), Courts of Justice Act, Section 89(3.1).

⁴⁶ Child and Family Services Act of Ontario, RSO 1990, c C.11, Section 38.

⁴⁷ Child and Family Services Act of Ontario, RSO 1990, c C.11, Section 39(1).

⁴⁸ Child and Family Services Act of Ontario, RSO 1990, c C.11, Section 37(2).

⁴⁹ Sections 81 and 84 of the Youth Protection Act of Québec (“**Youth Protection Act of Québec**”). Available at <http://canlii.org/en/qc/laws/stat/rsq-c-p-34.1/latest/rsq-c-p-34.1.html>.

⁵⁰ *Id.*

⁵¹ Youth Protection Act of Québec, Section 80.

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Children and their representatives may initiate legal proceedings in civil courts to challenge violations of their rights under domestic law, following the rules of civil procedure in each province. Civil actions typically request compensation in the form of money damages but may also seek an injunction ordering a party to carry out or cease a particular action.

A party adversely affected by a decision of an executive government department (also called an “administrative decision maker” or “ADM”) may file a petition for judicial review of such a decision. A judicial review allows for the court to consider the entire decision-making process, including the process and the findings of fact and law. The power of judicial review is found either in the enabling statute or by virtue of the common law.⁵²

The criminal law of Canada is under the exclusive legislative jurisdiction of the federal government. Most criminal laws have been codified in the Criminal Code of Canada and the Controlled Drugs and Substances Act and Youth Criminal Justice Act. If the violation amounts to a crime, apart from public prosecution, there are both federal and provincial offences which can be privately prosecuted. Section 504 of the Criminal Code provides that anyone who has reasonable grounds to believe that an indictable offence has been committed may inform a justice.⁵³ A citizen or organisation approaches a justice of the peace to present evidence on each element of the alleged offence. The justice then sets up a hearing with a Judge to determine whether there is evidence on each element of the offence, and if approved, and if the Crown does not intervene and terminate the charge (called “staying the charge”), then it is allowed to proceed to and go through court via the criminal procedure.

Any person who alleges that his or her rights under the Canadian Charter of Rights and Freedoms have been infringed may apply to a court to obtain remedies.⁵⁴

Individuals or groups of individuals, including children, and NGOs may submit petitions to the Inter-American Commission on Human Rights (IACHR),⁵⁵ on

⁵² Many provinces such as British Columbia, Ontario, and Prince Edward Island, as well as the federal government, have codified the common-law power. All federal ADMs are reviewable under the Federal Court Act RSC 1985, C. F-7, available at <http://canlii.ca/t/5211v>.

⁵³ Available at <http://canlii.ca/t/5248p>.

⁵⁴ Canadian Charter of Rights and Freedoms, Section 24(1).

⁵⁵ The Inter-American Commission on Human Rights is one of two bodies within the Organisation of American States (OAS) for the promotion and protection of human rights. The other human rights body is the Inter-American Court of Human Rights. The Commission benefits from a “dual role” as its mandate is found in both the Charter of the Organisation of American States, and in the American Convention on Human Rights (ACHR). As an OAS Charter organ, the IACHR performs functions in relation to all OAS Member States. As an organ of the Convention, its functions are applicable only to States that have ratified the ACHR:

their behalf or on behalf of third persons, regarding alleged violations of the American Declaration of the Rights and Duties of Man⁵⁶ and other Inter-American human rights instruments⁵⁷. A petition can only be lodged after domestic remedies have been exhausted, and normally must be filed within six months after the final judgment.⁵⁸ The petition must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, the name(s) of the victim(s) if possible, and whether the petitioner wishes to remain anonymous and the respective reasons.⁵⁹ The victim may designate a lawyer or other person to represent him/her before the IACHR, but this is not compulsory.⁶⁰ When a petition is declared admissible, the IACHR attempts to reach a “Friendly Settlement” between the parties concerned. If this is not possible, the IACHR will reach a decision on the merits, which consists of non-binding recommendations to the violating State, aimed at ending the human rights violations, making reparations, and/or making changes to the law.

However, according to the Office of the Provincial Advocate for Children and Youth of Ontario, recourse to international tribunals such as the Inter-American Commission on Human Rights remains essentially out of reach to Canadian children and youth.

B. What powers would courts have to review these violations, and what remedies could they offer?

Civil courts have the power to award money damages or to issue an injunction. In civil proceedings, it is possible to apply to the court for a preliminary injunction pending the proceedings to ensure that no further action is taken on the matter in dispute as the case progresses.⁶¹ In judicial review proceedings, courts ensure that administrative decision makers observe the limits on the authority and could grant declaration and equitable injunction remedies.⁶²

Any person who alleges that his or her rights under the Canadian Charter of Rights and Freedoms have been infringed may apply to a court to obtain remedies.⁶³ Where a law is inconstant with the rights provisions under the Charter, the court can rule that the relevant provisions of primary legislation are

Charter of the Organisation of American States, Chapter XV, available at: http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm; American Convention on Human Rights, ‘Pact of San Jose, Costa Rica’, Chapter VII, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

⁵⁶ Available at: <https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

⁵⁷ Statute of the Inter-American Commission on Human Rights, Section IV, available at: <http://www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp>.

⁵⁸ Rules of Procedure of the Inter-American Commission on Human Rights, Articles 31-32, available at: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

⁵⁹ *Ibid.*, Article 28.

⁶⁰ *Ibid.*, Article 23.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Canadian Charter of Rights and Freedoms, Section 24(1).

void or inoperative.⁶⁴

In cases involving rights under the Canadian Charter of Rights and Freedoms, the Parliament or legislature of a province can expressly declare that a law applies even if it violates a number of provisions of the Charter.⁶⁵ In such circumstances, the Court would have to apply the law even if it violated the rights provision, though the law would have to be re-enacted after five years to remain in force.⁶⁶

In judicial review proceedings, the courts can make a range of orders, namely certiorari (if successful this results in an order quashing the relevant decision) prohibiting orders, mandamus (an order requiring a party to take a particular action), make a declaration as to the legal position between two parties and exercise Habeas Corpus to ensure the legality of detention.

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Canada operates on the open court principle such that there is a presumption that courts will be open and accessible. However, there are strict limits on what may be reported about child welfare proceedings. For example, in Ontario, Section 45(8) of the CFSA contains a prohibition on the publication of the identity of a child who is the subject of a proceeding under the CFSA. Hearings may be held in private where necessary to protect the interests of any child.⁶⁷ Courts may also give other orders for the protection of parties and deponents.⁶⁸

In civil litigation matters where a victim is seeking redress from a court for damages, the presumption is an open court. The courts have been willing to depart from this principle in favour of non-publication of identity. In *Bragg Communications*, the court considered a request for non-publication of the identity of a victim of cyberbullying. The Supreme Court of Canada allowed the plaintiff to legally pursue her cyberbully anonymously. In permitting a departure from the open court principle, the court relied upon the inherent vulnerability of young people and found that the need to protect young victims outweighs the minimal harm caused by departing from the open court principle.⁶⁹

While the open court principle applies generally to administrative tribunals, some tribunals will not identify young people.

⁶⁴ See, e.g. *Ford v. Québec (Attorney General)* [1988] CanLii 19 (SCC); 54 DLR (4th) 577; 36 CRR 1; 10 CHRR 5559. Available at: <http://www.canlii.org/en/ca/scc/doc/1988/1988canlii19/1988canlii19.html>.

⁶⁵ Canadian Charter of Rights and Freedoms, Section 33(1). Rights contained within sections 2 or 7 to 15 can be subject to such “notwithstanding” clauses.

⁶⁶ Canadian Charter of Rights and Freedoms, Section 33(3) and (4).

⁶⁷ Child and Family Services Act of Ontario, RSO 1990, c C.11, Section 45(4). Available at <http://canlii.ca/t/ldxd#sec45subsec4>.

⁶⁸ Child and Family Services Act of Ontario, RSO 1990, c C.11, Section 45(7).

⁶⁹ *Bragg Communications*, para. 29.

In Ontario criminal courts, the Youth Criminal Justice Act makes it an offence to publish the identity of a young person within the meaning of the Act or the identity of a victim under the age of 18 with few exceptions.⁷⁰ Section 110 of the Act prohibits the publication of the name of a young person or information related to the young person if it would identify the young person within the meaning of the Act.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

The Federal Court of Canada permits class action lawsuits.⁷¹ Provincial laws also allow class actions.⁷² All provinces permit plaintiff classes and some permit defendant classes. Out of all the provinces in Canada, Québec was the first province to enact class proceedings legislation in 1978.⁷³

In Québec, several civil claims can be joined in the same case and two or more persons can join their suits where they are based on the same points of law and fact.⁷⁴ Similar procedures are available in Ontario, where two or more persons can join proceedings where they are making a claim arising out of the same occurrence, a common question of law or fact arises or where joining proceedings may “promote the convenient administration of justice.”⁷⁵

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

In general, a person or organisation must be directly affected by a matter to bring legal proceedings. However, an NGO may file challenges on behalf of a child if it becomes a guardian or tutor of such child, subject to applicable restrictions in each province. As above, NGOs may bring judicial review proceedings in their own name where they are adversely affected.

In addition, any person or organisation may apply for permission to provide evidence for or participate in civil proceedings. For example, Ontario’s Rules of Civil Procedure provides that the court may, on motion by a party, order production for inspection of a document that is in the possession, control, or

⁷⁰ Youth Criminal Justice Act, Sections 110-111.

⁷¹ See Federal Courts Rules, SOR/98-106, in force since Mar 1, 2013 (“**Federal Court Rules**”). Available at <http://canlii.ca/t/51zx1>.

⁷² E.g. Class Proceedings Act 1992 (Ontario) and An Act Respecting the Class Action, SQ 1978 c. 8, now Book IX of the Code of Civil Procedure, RSQ C-25 (Québec).

⁷³ Catherine Piché, “Québec: The Canadian Jurisdiction of Choice for Class Actions?” Class Action Reports, Volume 26, Number 5, September - October 2005. Available at: http://www.fasken.com/files/Publication/452daf80-cc91-4d53-ab43-0fbc536955b1/Presentation/PublicationAttachment/0c216ea1-90c1-4fea-a56f-32ca137c08a8/Québec_THE_CANADIAN_JURISDICTION_OF_CHOICE_FOR_CLASS_ACTIONS.pdf.

⁷⁴ Civil Code, Sections 66 and 67.

⁷⁵ Court of Justice Act, RRO 1990 Regulation 194, Rules of Civil Procedure, Sections 5.01 and 5.02.

power of a person not a party, and that is not privileged where the court is satisfied of the following: (a) The document is relevant to a material issue in the action; and (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.⁷⁶

IV. **Practical considerations.** Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. **Venue.** In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Ontario

In Ontario, there are four courts that potentially can address the rights of children: the Federal Court, the Superior Court of Justice, the Ontario Court of Justice and the Small Claims Court.

The Federal Court has jurisdiction over matters within federal jurisdiction. For example, it would consider children's rights in an application for judicial review from a decision of a federal immigration and refugee tribunal.

The Superior Court of Justice is established pursuant to Ontario's Courts of Justice Act and has the jurisdiction historically exercised by courts of common law and equity in England and Ontario.⁷⁷ The Divisional Court is a branch of the Superior Court of Justice and it functions as a court hearing appeals from interlocutory and some final orders of the Superior Court and judicial reviews of administrative actions.⁷⁸ The Civil Procedure Rules provide guidance on how judicial review proceedings are initiated,⁷⁹ as does the Judicial Review Procedure Act.⁸⁰

The Ontario Court of Justice has criminal jurisdiction in matters where the Parliament of Canada confers a duty or power to a provincial court judge, is a youth court under the Youth Criminal Justice Act and has jurisdiction over provincial offences under the Provincial Offences Act.⁸¹ Children accused of committing an offence will be tried in a Youth Justice Court.⁸² However, a child over age fourteen may be both tried and sentenced as an adult if the offence is sufficiently serious.⁸³ Where children and youth are concerned, the Ontario

⁷⁶ Rules of Civil Procedure of Ontario, Rule 30.10.

⁷⁷ Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, Section 11(2).

⁷⁸ Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, Section 19.

⁷⁹ Rules of Civil Procedure of Ontario, Rule 68.

⁸⁰ Judicial Review Procedure Act of Ontario. Available at:

<http://www.canlii.org/en/on/laws/stat/rso-1990-c-j1/latest/>.

⁸¹ Provincial Offences Act, R.S.O. 1990, c. P.33, as amended.

⁸² Youth Criminal Justice Act. Available at:

<http://www.canlii.org/en/ca/laws/stat/sc-2002-c-1/latest/sc-2002-c-1.html>.

⁸³ See, e.g., Youth Criminal Justice Act § 38.

Court of Justice has jurisdiction in family law and child welfare arising from the duties assigned to it through the Children's Law Reform Act, the Family Law Act and the CFSA.⁸⁴ The Ontario Court of Justice is the court whose work, with the exception of civil litigation, most directly affects the lives of children and youth.

The Small Claims Court has jurisdiction for claims where the action does not exceed the prescribed amount (currently \$25,000).⁸⁵ Where a party is claiming an amount in excess of \$25,000, the claim will be filed in the Superior Court of Justice.⁸⁶ The Civil Procedure Rules provide extensive guidance on how to initiate civil proceedings.⁸⁷

Private criminal prosecutions are governed by the Provincial Offences Act, which allows any individual to "lay information" under oath before a Justice of the Peace.⁸⁸ The matter will then be referred to either a provincial court judge or a Justice of the Peace to determine whether an arrest warrant should be issued.

Québec

The Youth Division of the Court of Québec ("**Youth Division**") hears all cases involving minors, such as applications under the Youth Protection Act concerning the security or development of a child under eighteen years of age.⁸⁹ It also hears adoption cases.⁹⁰

In criminal matters, the Youth Division applies the Youth Criminal Justice Act.⁹¹ It hears first instance cases in which individuals between the ages of twelve and eighteen are accused of offences under the Criminal Code, including murder, and other federal statutes.⁹²

In penal matters, the Youth Division applies the Code of Penal Procedure and hears cases involving individuals between the ages of fourteen and eighteen who are accused of offences under Québec statutes and municipal by-laws.⁹³

In civil matters, the Superior Court generally hears cases in first instance where the amount at issue is at least \$70,000.⁹⁴

⁸⁴ Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, Section 38.

⁸⁵ Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, Section 23, O.Reg. 626/00, section 1.

⁸⁶ Rules of Civil Procedure of Ontario, Rule 1.02(1).

⁸⁷ See http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm.

⁸⁸ Section 23(1) of the Provincial Offences Act of Ontario: "Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information." Available at: <http://www.canlii.org/en/on/laws/stat/rso-1990-c-p33/latest/>.

⁸⁹ See <http://www.justice.gouv.qc.ca/english/tribunaux/Québec/ch-jeun-a.htm>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See <http://www.justice.gouv.qc.ca/english/tribunaux/Québec/ch-jeun-a.htm>.

Decisions by courts or bodies in Québec, except Court of Appeals decisions, are subject to the superintending and reforming power of the Superior Court, with some exceptions.⁹⁵

As is the case for the Court of Appeal, the Superior Court is competent to hear appeals of decisions under the Criminal Code made by a judge of the Youth Division.⁹⁶

- B. **Legal aid / Court costs.** Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

Ontario

Child complainants or their representatives may qualify for free or subsidised legal aid.⁹⁷ Legal Aid Ontario publishes a guideline chart to identify whether a potential claimant would be eligible for assistance based on his or her financial situation.⁹⁸

In addition to the financial circumstances of the complainant, other factors to be considered in deciding whether legal aid is granted include whether the matter is an area of law and a type of proceeding for which Legal Aid Ontario typically provides legal aid services.⁹⁹ Such proceedings include family law, immigration and youth criminal justice.

The Small Claims Court, the Superior Court of Justice, the Superior Court of Justice (Divisional Court), and the Court of Appeals charge various fees, in respect of civil, criminal, and family matters, among others.¹⁰⁰ Most fees¹⁰¹ can be waived where certain criteria are met¹⁰² including where the majority of the complainant's household's income is made up of income assistance.

Québec

⁹⁵ See <http://www.justice.gouv.qc.ca/english/tribunaux/super-a.htm>.

⁹⁶ See <http://www.justice.gouv.qc.ca/english/publications/generale/systeme-a.htm#appel>.

⁹⁷ Legal Aid Services Act of Ontario. Available at <http://www.canlii.org/en/on/laws/stat/so-1998-c-26/latest/so-1998-c-26.html>.

⁹⁸ <http://www.legalaid.on.ca/en/getting/eligibility.asp>.

⁹⁹ Section 16 of the Legal Aid Services Act of Ontario. Available at <http://www.canlii.org/en/on/laws/stat/so-1998-c-26/latest/so-1998-c-26.html>.

¹⁰⁰ Regulation 293/92 – *Superior Court of Justice and Court of Appeal – Fees*. Available at <http://www.canlii.org/en/on/laws/regu/o-reg-293-92/latest/o-reg-293-92.html>

¹⁰¹ Regulation 2/05 – *Fee Waiver* – para. 3. Available at <http://www.canlii.org/en/on/laws/regu/o-reg-2-05/latest/o-reg-2-05.html>.

¹⁰² Section 4 of the Administration of Justice Act, available at <http://www.canlii.org/en/on/laws/stat/rso-1990-c-a6/latest/rso-1990-c-a6.html>.

Minors under eighteen years of age who need legal representation may be eligible for legal aid. Legal aid will always be provided in cases relating to family law, tutorship, court exercises of powers under the Youth Protection Act, and minors facing proceedings before a court under the Youth Criminal Justice Act.¹⁰³

No regulations require the case to present an important legal question or demonstrate a likelihood of success, but there are certain requirements that must be met before legal aid will be provided, such as a requirement that the applicant be receiving social assistance or social solidarity benefits under a last resort financial assistance programme.¹⁰⁴

The Court may decide the costs of the appeal and the costs before the tribunal.¹⁰⁵

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practicing lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Ontario

Justice for Children and Youth is a legal clinic funded by Legal Aid Ontario that provides legal services for young people under the age of 18 and homeless young people under the age of 25.¹⁰⁶ There are other legal clinics funded by Legal Aid Ontario but none focus solely on the legal rights of young people.

Pro bono legal services may also be available from the following organisations:

- Pro Bono Law Ontario,¹⁰⁷ which identifies priority children who face barriers to their health, wellbeing, and educational progress and who might benefit from the assistance of a lawyer;
- South Asian Legal Clinic of Ontario;¹⁰⁸
- Visual Artist Legal Clinic of Ontario;¹⁰⁹
- Lawyers for Aboriginal Artists;¹¹⁰
- Pro-Bono Students Canada;¹¹¹ and
- Law Help Ontario.¹¹²

¹⁰³ See http://www.csj.qc.ca/SiteComm/W2007English/Main_En_v3.asp.

¹⁰⁴ For more information, see <http://www4.gouv.qc.ca/en/Portail/Citoyens/Evenements/separation-divorce/Pages/aide-juridique.aspx>.

¹⁰⁵ Youth Protection Act, Section 113.

¹⁰⁶ <http://jfcy.org/en/about-us/>.

¹⁰⁷ <http://www.pblo.org/get-legal-help/>

¹⁰⁸ <http://www.salc.on.ca/>.

¹⁰⁹ <http://www.carfaontario.ca/>.

¹¹⁰ <http://www.aboriginallegal.ca/>.

¹¹¹ http://www.law.uwo.ca/clinics_and_centres/pro_bono_students_canada/index.html.

¹¹² <http://www.lawhelpontario.org/about/>

There are also certain children's or other human rights organisations:

- Kids Help Phone,¹¹³
- Ontario Association of Children's Aid Societies;¹¹⁴ and
- The Social Justice Committee.¹¹⁵

Provided certain conditions are met,¹¹⁶ contingency fee arrangements are permitted for civil matters.¹¹⁷ Such arrangements provide that the remuneration (in whole or in part) of the legal advisor is dependent upon success in the civil proceedings, and is payable as a percentage of the amount of any damages won or any settlement reached. However, contingency fee arrangements are not permitted for criminal or family matters¹¹⁸ and it is not permissible for a solicitor, who is representing a plaintiff, to recover more in fees under a contingency fee agreement than his or her client recovers by way of damages or settlement.¹¹⁹

Further, any contingency fee must exclude the costs and disbursements of the legal advisor.¹²⁰ The result of this is that the client is typically responsible for paying these costs (in addition to the contingency fee) to the extent that such costs are not recoverable from the opposing party on the conventional basis. In Ontario, the loser generally pays the winner's costs¹²¹ and no "success fee" is payable by the client to the successful legal advisor as in some other common law jurisdictions.

It is permissible for the contingency fee to cover the whole remuneration of the representative (essentially a "No Win-No Fee" arrangement).

Québec

Pro Bono Québec initiates, coordinates, and promotes free or low-cost professional legal services to the benefit of the population of limited means in Québec.¹²² However, if the applicant is eligible for Legal Aid, the applicant is

¹¹³ <http://kidshelpphone.ca/teens/home/splash.aspx>.

¹¹⁴ <http://www.oacas.org/>.

¹¹⁵ <http://www.sjc-cjs.org/>.

¹¹⁶ Regulation 195/04 – *Contingency Fee Arrangements* – para. 3. Available at: <https://www.canlii.org/en/on/laws/regu/o-reg-195-04/latest/o-reg-195-04.html>.

¹¹⁷ Section 28.1 of the Solicitors Act, available at <http://www.canlii.org/en/on/laws/stat/rso-1990-c-s15/latest/rso-1990-c-s15.html> and Regulation 195/04 – *Contingency Fee Arrangements*. Available at <https://www.canlii.org/en/on/laws/regu/o-reg-195-04/latest/o-reg-195-04.html>.

¹¹⁸ Section 28.1(3) of the Solicitors Act. Available at <http://www.canlii.org/en/on/laws/stat/rso-1990-c-s15/latest/rso-1990-c-s15.html>.

¹¹⁹ Regulation 195/04 – *Contingency Fee Arrangements* – para. 7. Available at <https://www.canlii.org/en/on/laws/regu/o-reg-195-04/latest/o-reg-195-04.html>.

¹²⁰ Regulation 195/04 – *Contingency Fee Arrangements* – para. 6. Available at <https://www.canlii.org/en/on/laws/regu/o-reg-195-04/latest/o-reg-195-04.html>.

¹²¹ Rules of Civil Procedure of Ontario, Rule 57.01.

¹²² See <http://Québec.cioc.ca/record/QBC3047?Ln=en-CA>.

not eligible for Pro Bono Québec services.¹²³

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

Ontario

The “basic” limitation period is two years from the earlier of the date on which the essential elements of the case are known to the defendant and the date on which such elements are discoverable.¹²⁴ However, this period does not commence for a minor until a litigation guardian has been appointed.¹²⁵

The ultimate limitation period is 15 years from the date on which the act or omission took place, regardless of whether the essential elements were known or were discoverable during the 15 year period.¹²⁶

However, such limitation periods do not apply where the complainant is a minor who is not represented by a litigation guardian¹²⁷ or with respect to assault or sexual assault where the claim is incapable of being commenced due to the physical, mental, or psychological condition of the complainant.¹²⁸

Québec

The prescription period in which one may file a claim varies from 1 to 10 years depending on the nature of the claim.¹²⁹

Prescription does not run against a minor with respect to remedies they may have against their representative or against the person entrusted with their custody, or with respect to remedies they may have against any person for bodily injury resulting from an act which could constitute a criminal offence.¹³⁰

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

Ontario

The kinds of evidence admissible in civil proceedings include documents,

¹²³ *Id.*

¹²⁴ Section 4 and Section 5 of the Limitation Act. Available at <http://canlii.ca/en/on/laws/stat/so-2002-c-24-sch-b/latest/so-2002-c-24-sch-b.html>.

¹²⁵ Limitation Act, Section 6.

¹²⁶ Limitation Act, Section 15.

¹²⁷ Limitation Act, Section 15(4)(b).

¹²⁸ Limitation Act, Section 10.

¹²⁹ Civil Code of Québec, Articles 2875-2933.

¹³⁰ Civil Code of Québec, Articles 2905.

photograph, film, witness testimony, and physical evidence.¹³¹ The Rules of Civil Procedure also provide for the testimony of expert witnesses and such experts may provide opinion evidence.¹³²

Children may give evidence or testify before the court in Ontario.¹³³ Under the Canada Evidence Act, a child under 14 years of age is presumed to have the capacity to testify¹³⁴ and a child's evidence will be admitted where the child is able to understand and respond to questions.¹³⁵ However, where a child is under 14 years of age and the child's ability to testify is challenged, the court will conduct an inquiry to establish whether the person is able to understand and respond to questions.¹³⁶

Where a child is over 14 years of age and his or her capacity to testify is challenged, the court will conduct an inquiry to establish whether the child understands the nature of the oath (which witnesses over 14 must provide) and is able to communicate the evidence of his or her testimony.¹³⁷ If the child is unable to understand the oath but is able to communicate evidence, the child may testify on the promise of telling the truth.¹³⁸ A child who neither understands the oath nor is able to communicate the evidence may not testify at court.¹³⁹

The Criminal Code contains extensive protections for children who provide evidence in court,¹⁴⁰ including allowing testimony to be given behind a screen,¹⁴¹ a support person to be present with the child witness¹⁴² and testimony to be given by video link.¹⁴³ Subject to certain narrow exceptions, the name or other identifying information of an accused under 18 years of age may not be published.¹⁴⁴

With respect to civil proceedings, a Children's Lawyer may be appointed where a party is a minor¹⁴⁵ and, in instances where proceedings for the approval of

¹³¹ Rules of Civil Procedure of Ontario, Rule 30.01 and Rule 30.09.

¹³² Rules of Civil Procedure of Ontario, Rule 4.1.01.

¹³³ See, e.g., Section 486(1) of the Criminal Code 1985. Available at: <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>.

¹³⁴ Section 16.1(1) of the Canada Evidence Act. Available at: <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/>. The Canadian Evidence Act only applies to court proceedings under federal law. With respect to matters under provincial law, each province has its own evidence rules for matters under provincial law.

¹³⁵ Section 16.1(3) of the Canada Evidence Act.

¹³⁶ Section 16.1(5) of the Canada Evidence Act.

¹³⁷ Section 16(1) of the Canada Evidence Act.

¹³⁸ Section 16(3) of the Canada Evidence Act.

¹³⁹ Section 16(4) of the Canada Evidence Act.

¹⁴⁰ See, e.g., Section 486.1 of the Criminal Code.

¹⁴¹ Section 486.1 of the Criminal Code.

¹⁴² Section 486.2 of the Criminal Code.

¹⁴³ Section 715.1 of the Criminal Code.

¹⁴⁴ Section 110 of the Youth Criminal Justice Act.

¹⁴⁵ Rules of Civil Procedure of Ontario, Rule 7.04.

disposition of a minor's property takes place, an affidavit in support of such disposition is needed and (where the minor is over 16 years of age) the minor's consent is also needed.¹⁴⁶

Québec

The above evidentiary rules provided under the Canada Evidence Act also apply to federal law proceedings in Québec. The rules governing how evidence is presented are largely the same in all provinces because Québec has adopted the English model, which is based on adversarial procedure. In all provinces, witnesses must in principle be heard before an open court, where they are first questioned by the lawyer of the party who has called them and then cross-examined by the lawyer of the opposing party.¹⁴⁷

The distinction between the law of evidence in Québec and in the common-law provinces lies in the provisions governing the admissibility of evidence. In the latter, the basic principle is still the rule of relevancy, from which flows the principle of the freedom of means of obtaining evidence. Under Québec law, however, evidence concerning contracts must be presented in writing, not orally, although oral testimony may be permitted in a limited number of cases, e.g., commercial transactions. Another unique feature of Québec law is called "authentic writing," writing drawn up by a public officer; e.g., a notary public.¹⁴⁸

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

Ontario

Accurate, recent statistics in relation to the average duration of a civil dispute were unavailable. However, there is much anecdotal evidence that suggests that civil disputes in Ontario are typically lengthy and expensive.¹⁴⁹ Canada as a whole ranks ninth out of sixteen North American and West European nations in relation to access to civil justice.¹⁵⁰

Nonetheless, in 2010, the Simplified Procedure was made mandatory for civil claims of \$100,000 or less.¹⁵¹ The procedure is designed to speed up the length of any civil disputes, by setting time limits by which certain steps must be completed (e.g. within 180 days after the first statement of defense is filed, the plaintiff to any claim must serve notice of readiness for pre-trial conference on

¹⁴⁶ Rules of Civil Procedure of Ontario, Rule 67.

¹⁴⁷ See <http://www.thecanadianencyclopedia.com/articles/law-of-evidence>.

¹⁴⁸ *Id.*

¹⁴⁹ See

<http://www.theglobeandmail.com/news/national/ontario-courts-only-open-to-the-rich-judge-warns/article12942343/> or <http://www.ontariolegal.com/litigation-procedure.html>.

¹⁵⁰ World Justice Project Rule of Law Index: <http://worldjusticeproject.org/rule-of-law-index-data>.

¹⁵¹ http://www.pallettvalo.com/newsletters/new_rules_of_civil_procedure.html.

other parties to the case).¹⁵²

Criminal cases typically reach resolution in 94 days in Ontario.¹⁵³

Québec

Accurate, recent statistics in relation to the average duration of a civil dispute were unavailable. A judge may, upon such conditions as he considers just, extend any time limit which is not preemptory or relieve a party from the consequences of his failure to respect such time limit.¹⁵⁴

Actions and applications that are to be contested orally must be heard or scheduled for proof and hearing and, in the latter case, referred by order to the clerk for scheduling of the hearing, and those that are to be contested in writing inscribed for proof and hearing, within a preemptory time limit of 180 days after service of the motion.¹⁵⁵ In family matters, however, the preemptory time limit is one year.¹⁵⁶

The court may extend the preemptory time limits, if warranted by the complexity of the matter or special circumstances, upon a request submitted at the time of presentation of the motion to institute proceedings. If, on the day the motion to institute proceedings is presented, the parties are unable to assess the time needed to allow the scheduling of the hearing or the inscription of the case, they may request an extension on the same grounds at any time before the expiry of the preemptory time limit.¹⁵⁷

The court may also relieve a party from the consequences of failure to act within the time limit upon proof that it was in fact impossible for the party to act within the time limit.¹⁵⁸

G. Appeal. What are the possibilities for appealing a decision to a higher court?

Ontario

Appeals from convictions for summary offences are heard in the Superior Court of Justice,¹⁵⁹ whereas appeals from convictions for indictable offences are heard in the Court of Appeal for Ontario.¹⁶⁰ Decisions from the Court of Appeal for Ontario may in turn be appealed to the Supreme Court of Canada.¹⁶¹

¹⁵² Rules of Civil Procedure of Ontario, Rule 76.09(1).

¹⁵³ See <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11804-eng.pdf>.

¹⁵⁴ Code of Civil Procedure, CQLR c C-25, s 9 .

¹⁵⁵ Code of Civil Procedure, CQLR c C-25, s 110.1

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Criminal Code, Section 812(1).

¹⁶⁰ Criminal Code, Section 673 and Section 675.

¹⁶¹ Criminal Code, Section 691(1).

A child convicted of an offence has a right to appeal under the Youth Criminal Justice Act 2002.¹⁶²

As to appeals in civil proceedings, the appeal of any decision of the Small Claims Court may be heard in the Divisional Court, provided that the amount in dispute is at least \$2,500.¹⁶³ Appeals from an order of the Divisional Court may be made to the Court of Appeal, provided the appeal is not based solely on a question of fact and provided that leave of appeal is granted.¹⁶⁴

It is possible to appeal to the Supreme Court of Canada if leave to appeal is granted. Leave to appeal will be granted if the Supreme Court finds that the case raises an issue of public importance and/or raises an issue of such a nature or significance that it should be decided by the Supreme Court.¹⁶⁵

Appeals must generally be made within 30 days of the granting of the order which is being appealed.¹⁶⁶ Appellate courts typically have the same powers as those of lower courts, including the power to make any order or decision that ought to or could have been made by the lower court, order a new trial, or make any other order that is “considered just”.¹⁶⁷

Québec

In civil matters, the Court hears appeals from final judgments of the Superior Court and the Court of Québec where the amount in dispute is \$50,000 or more.¹⁶⁸ The Court of Appeal also hears other appeals, specifically in matters of adoption, divorce, and the protective supervision of persons of full age.¹⁶⁹ Other final judgments of the Superior Court and the Court of Québec may be appealed if leave to do so is granted by a judge of the Court of Appeal.¹⁷⁰ In criminal matters, the Court of Appeal hears appeals from verdicts of guilt or acquittal and sentencing appeals.¹⁷¹

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

¹⁶² Youth Criminal Justice Act, Section 37.

¹⁶³ Regulation 626/00 – *Small Claims Court Jurisdiction and Appeal Limit*. Available at: <http://www.canlii.org/en/on/laws/regu/o-reg-626-00/latest/o-reg-626-00.html>.

¹⁶⁴ Section 6 of the Courts of Justice Act of Ontario. Available at: <http://www.canlii.org/en/on/laws/stat/rso-1990-c-c43/latest/>.

¹⁶⁵ Supreme Court Act, Section 40(1).

¹⁶⁶ Rules of Civil Procedure of Ontario, Rule 61.04(1).

¹⁶⁷ Rules of Civil Procedure of Ontario, Rule 134.1.

¹⁶⁸ See <http://www.justice.gouv.qc.ca/english/tribunaux/appel-a.htm>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

As most provinces (except for Québec) have their origins in British common law, precedent plays an important role in the Canadian legal system. Lower courts must follow the judgments of higher courts and a negative decision of a court (particularly a higher court) could be felt for some years.

There are examples of unpopular human rights laws in Canada which have been overturned by legislative means, following negative press attention as a result of some high-profile decisions.¹⁷² However, no evidence was found that Ontario's human rights laws (such as the Ontario Human Rights Code) were under serious threat of repeal.

The Supreme Court has final jurisdiction in criminal, civil and constitutional matters.¹⁷³ The Supreme Court may interpret the Canadian constitution, determine the constitutionality of a law and interpret federal or provincial laws.¹⁷⁴

The Supreme Court hears matters of national interest. No lower court can render a judgment that goes against a Supreme Court decision, including courts of Québec.¹⁷⁵

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

As to judgments obtained against the government, legislation has been enacted which makes it explicit that the government is subject to all liabilities in tort to which it would be subject if it were a person of full age and capacity.¹⁷⁶

It should be noted that injunctions cannot be obtained against the government.¹⁷⁷ However, in lieu of an injunction the court may make an order “declaratory of the rights of the parties”¹⁷⁸ and it has been noted that the government will be very unlikely to disobey such an order.¹⁷⁹

Further, the Crown is immune from execution on a judgment, as seizing Crown property could cause disruption to public service.¹⁸⁰ However, where money is awarded in judgment, the Minister of Finance is obliged to pay money awarded

¹⁷² See <http://ipa.org.au/sectors/freedom-of-speech/publication/2192/victories-for-free-speech>.

¹⁷³ Supreme Court Act, RSC 1985, c S-26, s 36. Available at <http://canlii.ca/t/5266h#sec36>. See also <http://www.scc-csc.gc.ca/court-court/role-eng.aspx>.

¹⁷⁴ See Supreme Court Act, RSC 1985, c S-26, s 53. Available at <http://canlii.ca/t/5266h#sec53>.

¹⁷⁵ See <http://www.justice.gouv.qc.ca/english/publications/generale/systeme-a.htm#jeunesse>.

¹⁷⁶ Section 5 of the Proceedings Against the Crown Act of Ontario. Available at: <http://www.canlii.org/en/on/laws/stat/rso-1990-c-c43/latest/>. See also Crown Liability and Proceedings Act, RSC 1985, c C-50, s 3 available at: <http://canlii.ca/t/522ft#sec3>.

¹⁷⁷ Section 14 of the Proceedings Against the Crown Act of Ontario. See also Section 22(1) of Crown Liability and Proceedings Act, RSC 1985.

¹⁷⁸ *Id.*

¹⁷⁹ Patrick J. Monahan, *Constitutional Law*, 3rd ed. (Toronto: Irwin Law, 2006) at 151.

¹⁸⁰ Section 21 of the Proceedings Against the Crown Act of Ontario.

in judgment against the government out of the Consolidated Revenue Fund.¹⁸¹

A successful party in a civil matter has various means of enforcing a judgment which is obtained against the other party¹⁸² and may also obtain a certain amount of the costs of enforcement against the other party.¹⁸³

V. Additional factors. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

Ontario

In Ontario, reference is made to the CRC only in the Provincial Advocate for Children and Youth Act, 2007. Section 2(3) of the statute provides that, in interpreting and applying the Act, regard shall be had to the principles expressed in the CRC. No other provincial statute mandates compliance with the CRC although the common law functions such that the principle of conformity applies. The Advocate's Office, in submissions on legislative reform, has called upon the Ontario Government to amend the CFSA to provide that services shall be provided and delivered in a manner that accords with the CRC.¹⁸⁴

In Ontario, in addition to federal, superior and provincial courts, there are many administrative boards and tribunals that adjudicate on the rights of children and youth.

These include the Custody Review Board, the Child and Family Services Review Board (CFSRB), the Human Rights Tribunal of Ontario, and the Immigration and Refugee Board. The CFSRB hears, among other things, complaints about services received from a children's aid society, emergency secure placement, foster care and residential placement. The tribunal presumes capacity and the ability to retain and instruct counsel.¹⁸⁵

According to the Office of the Provincial Advocate for Children and Youth of Ontario, the framework for legal challenges by children continues to present systemic barriers for them as they seek access to justice. There is a legislative gap between what is promised by policy and the reality that children face in accessing their rights. Children continue to struggle to be part of the decision-making processes that affect them. Children and young people seldom bring direct challenges to legislation. Two of the key aspects to challenging legislation or an infringement of rights, is knowledge of that right and having the power or confidence to challenge authority when that right is infringed. Both present

¹⁸¹ Section 22 of the Proceedings Against the Crown Act of Ontario.

¹⁸² Rules of Civil Procedure of Ontario, Rule 60.

¹⁸³ Rules of Civil Procedure of Ontario, Rule 60.19.

¹⁸⁴ Submissions of the Provincial Advocate for Children and Youth on the Review of the CFSA, page 6, http://provincialadvocate.on.ca/documents/en/OPACY_CFSA_Review_Submission2014.pdf.

¹⁸⁵ Rules of Procedure of the Child and Family Services Review Board, Rule A10.2m, <http://www.sjto.gov.on.ca/documents/cfsrb/CFSRB%20Rules%20of%20Procedure.pdf?e821aa>.

challenges for young people where their rights are not robustly endorsed by adults in positions of authority.¹⁸⁶

According to the Office of the Provincial Advocate for Children and Youth of Ontario, while in Ontario children in certain circumstances have access to the services of the Advocate's Office, children must be within its mandate.¹⁸⁷ As a result, there are limits to the jurisdiction of the Advocate's Office. Until the recent passage of amendments to the Provincial Advocate for Children and Youth Act, 2007 (not yet proclaimed into force), the Advocate's Office was not permitted to investigate those complaints and had no power to compel information that would allow it to do so. Recent amendments will permit the Advocate's Office to conduct investigations in some circumstances (i.e. for children in residential child welfare care). However, other children and youth in care as a result of the Youth Criminal Justice Act will not have the benefit of the Advocate's Office's new investigation powers as those have been withheld in the amendments.

Legal Aid Ontario controls the budgets of the legal aid clinics in Ontario. In July 2013, Legal Aid Ontario announced a 1.6% cutback in the funding granted to various legal aid clinics and this cutback was retroactive to April 2013.¹⁸⁸ This cutback broke an agreement Legal Aid Ontario had made in 2011 which stipulated that legal aid funding would not be cut until April 2014 at the earliest¹⁸⁹ and this surprise reduction alarmed many legal aid clinics. Cuts to immigration matters have generated particular concern.¹⁹⁰

There are fears in Ontario that the high demand for legal aid is putting undue strain upon Ontario's legal aid clinics.¹⁹¹ A further concern is that the eligibility criteria for certain types of legal aid funding is too stringent; in family law, for instance, there is a perception that it is difficult to obtain legal aid unless the matter involves domestic violence or contested child custody.¹⁹²

While there is a right to translation if a person does not speak one of Canada's two

¹⁸⁶ Information provided by the Office of the Provincial Advocate for Children and Youth of Ontario, October 2015.

¹⁸⁷ The children and youth who fall within the mandate of the Advocate's Office include those who are seeking or receiving services from the children's services sector in areas such as child welfare, youth justice, children's mental health, developmental services and children's treatment services. The jurisdiction of the Advocate's Office also includes students of the provincial and demonstration schools (i.e. schools for children who are hearing impaired, visually impaired or are exceptional pupils with learning disabilities requiring special education programs), youth in court holding cells or being transported to and from court holding cells, First Nations children and youth, and children and youth with special needs.

¹⁸⁸ See

http://www.thestar.com/opinion/commentary/2013/07/15/legal_aid_clinics_fight_to_save_their_budgets_goar.html

¹⁸⁹ See <http://blackburnnews.com/windsor/windsor-news/2013/07/23/cuts-worrying-windsor-legal-aid/>

¹⁹⁰ See

http://www.thestar.com/news/immigration/2013/04/04/legal_aid_ontario_cutbacks_could_leave_desperate_refugees_without_lawyers_at_hearings.html

¹⁹¹ See http://www.thestar.com/opinion/commentary/2013/07/03/legal_aid_ontario_overwhelmed_goar.html

¹⁹² See <http://www.communitylegalclinic.com/Getting-Legal-Assistance/Family-law/Introduction.html>

official languages, there is no right to an interpreter for children who are the subject of the proceeding. This leaves the children dependent upon the adults engaged in the proceeding to convey the information from the court to them in terms that they will understand and to fulfill their right to participate in matters that affect them.¹⁹³

Québec

The Québec courts render decisions only in the language in which they were heard.¹⁹⁴ This means if a decision was heard in English, the court only produces the decision in English, and vice versa, unless one of the parties orders a translation.¹⁹⁵ Even when a decision is rendered in English, sometimes attorneys interchangeably use English and French, which can create some difficulties with searching for or reading a case.¹⁹⁶

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This report is provided for educational and informational purposes only and should not be construed as legal advice.

¹⁹³ *Wilson on Children and the Law*, pages 6-9.

¹⁹⁴ See

http://www.courthouselibrary.ca/training/stream/13-05-27/Québec_Legislation_and_Case_Law_Free_Sources_and_Demystification.aspx

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*