

Canadian Lawyers Abroad-Avocats
canadiens à l'étranger

2010-2011 Student Chapter Theme
Document



**Children's Rights:
Law vs. Practice**

"There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their

welfare is protected, that their lives are free from fear and want and that they grow up in peace.”

- Kofi Annan in the "Foreword" to [The State of the World's Children 2000](#)

CLA-ACE ANNUAL THEME: CHILDREN'S RIGHTS

In 1973, Hillary Rodham Clinton famously stated that “children’s rights’ is a slogan still in search of a definition.” Although to date, there is still no universal consensus about what rights children should possess, or about whether we should conceive of children as rights-bearers at all, the adoption of the *Convention on the Rights of the Child* (UNCRC) in 1989 certainly provided the world with some welcome guidance in this area.

The UNCRC outlines a comprehensive system of children’s rights and has been ratified by all of the UN member states except the United States and Somalia. It is also widely supported by children’s rights advocates. Although widespread ratification is an important accomplishment, in practice, most nations have failed to implement the majority of the UNCRC’s provisions. This has left children across the globe living in poverty without recourse, sold into the sex trade by desperate parents, or even facing torture or the death penalty at the hands of the state.

This document aims to provide a background for discussion in some of the key areas where the law intersects with children’s rights.

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I. EXPLORING THE IDEA OF CHILDREN'S RIGHTS

1) WHAT IS A RIGHTS-BASED APPROACH TO ADVANCING THE INTERESTS OF CHILDREN?

The prevailing model of advancing the interests of children is through a rights-based approach. Under a rights-based model, children are considered individuals with their own set of interests and opinions, rather than mere objects of concern that need to be protected. The rights-based model acknowledges the capacity of children to enjoy autonomy as they mature, while still accepting that, in some circumstances, the vulnerability of childhood requires that measures are taken on behalf of the child in order to protect his/her rights.

The rights-based model contrasts with the traditional welfare model, which has been criticized for its tendency to subsume children's interests within the interests of their parents. Under the rights-based model, due weight must be given to the child's opinions in accordance with his/her age and maturity. In practice, this might mean providing procedural safeguards to ensure that the child's voice is heard in the deportation proceedings of a parent, or during a divorce mediation. Under the rights-based model, it is essential that the child is acknowledged as an active player in defining his own rights and interests.

2) THE LEGAL FRAMEWORK OF A RIGHTS-BASED APPROACH

The UN Convention on the Rights of the Child ("UNCRC")

The United Nations UNCRC is the end result of ten years of drafting and consultations with experts and legislators from across the globe. It provides a comprehensive framework for the actualization of children's rights. Though some of its provisions are general and are meant to guide further action by domestic legislators, many of its articles were designed to be directly incorporated into domestic law. Generally, the UNCRC sets out four main principles: non-discrimination, upholding the best interest of the child, the right to life, survival and development, and participatory rights to ensure that the child's views are respected.

The Committee on the Rights of the Child

The Committee is an independent group of experts who monitor states' compliance with the UNCRC. State parties are required to submit reports to the Committee on the situation of children's rights in their country. The Committee then responds to the report, making recommendations for improvement.

3) THE CONVENTION ON THE RIGHTS OF THE CHILD IN PRACTICE

Although the UNCRC has obtained almost universal ratification, its implementation at the domestic level remains the exception rather than the norm. Without incorporation at the national level, its provisions are rarely directly enforceable by domestic courts. Therefore, if judges wish to use a substantive, rights-based approach to children's issues, they may have to embrace the values of the UNCRC while acting through domestic human rights legislation like the *Charter of Rights and Freedoms* or the British *Human Rights Act*.

Implementing a comprehensive children's rights model has proven to be a challenge in Canada. Despite the recommendations of the Standing Senate Committee on Human Rights and the UNCRC Committee, Canada remains one of the few developed countries without an independent Children's Commissioner to monitor the protection of children's rights.

An additional problem in Canada is that there seems to be very little awareness of the UNCRC outside academic and advocacy circles. As the Standing Senate Committee on Human Rights noted in its 2007 report *Children: The Silenced Citizens*, even government officials who work in the area of children's law are unaware of the UNCRC framework. The Committee pointed out that one of the biggest problems for achieving substantive gains for children is that the rights guaranteed in the UNCRC "are not solidly embedded in Canadian law, policy or the national psyche."

4) KEY RIGHTS

The UNCRC provides a comprehensive framework for the promotion and protection of children's interests. It includes both substantive and participatory rights. The key provisions of the UNCRC are:

- ❖ Fundamental Freedoms (thought, conscience and religion, association, privacy)
- ❖ The right to a childhood (including a right to leisure and play free from economic exploitation)
- ❖ The right to be educated (including a free primary school education)
- ❖ The right to be healthy (including having clean water, nutritious food and medical care)
- ❖ The right to be treated fairly (freedom from discrimination)
- ❖ The right to be heard (participatory rights, including the right to have their views considered)
- ❖ Rights that protect children in special circumstances (including identity rights when parents are separated, and special rights in adoption proceedings or the immigration context)

****Please visit the UNICEF link below for a comprehensive summary of the rights in the UNCRC****

5) FURTHER INFORMATION

- **The [Convention of the Rights of the Child](#)**
- **[Summary of UNCRC by UNICEF](#)**
- **Canada's 2003 [Report on the Implementation of the Convention and the UN Committee's 2003 Recommendations to Canada](#)**
- **Proposed [Private Member's Bill to establish a Children's Commissioner in Canada](#)**

II. THE BEST INTEREST OF THE CHILD AND PARTICIPATORY RIGHTS

Ensuring that those in power take into consideration the best interest of the child (“BIC”) is the backbone of a rights-based approach. The best interest principle informs the interpretation of all the articles in the UNCRC, and should be a primary consideration in any area of the law that affects children. However, like the UNCRC generally, the BIC principle is easy to subscribe to in theory but difficult to firmly implement in practice. Often, the adversarial nature of the court or administrative processes that affect children (for example custody or access disputes) make it difficult for comprehensive and genuine consideration of the BIC to take place.

Convention on the Rights of the Child

ARTICLE 3(1) - “In all actions concerning children, whether undertaken by public or private special welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”

The flexibility of the BIC principle can lend itself to manipulation by those in power. Too often, decision-makers with ulterior motives will unilaterally impose what they think is in the best interests of the child without a genuine consideration of circumstance, or without taking the child’s voice into account. This problem becomes apparent if you consider that, at one time, the BIC was used to justify removing Aboriginal children from their homes and placing them in residential schools.

Acknowledging that children are individuals with their own thoughts and preferences is fundamental to the rights-based model of advancing children’s interests. This is why Articles 3 and 12 of the UNCRC must be implemented together. Mechanisms need to be put in place to ensure that the child’s views are heard and respected. Ideally, consultations should be ongoing. Although having a voice does not necessarily mean having the final say, it does mean that serious consideration should be given to the views of the child. Different countries across the world use different mechanisms to incorporate the child’s view into judicial and administrative proceedings. Some practices that have been used in the family law context include:

- (i) Hear the Child Interviews (started in Kelowna, BC) - health professionals and lawyers interview the child and take the information to the decision-maker
- (ii) Children and youth voices F-9 form in Scotland
- (iii) Clinical “assists” (Office of the Children’s Lawyer, Ontario) - provides lawyers that exclusively represent the child’s interest
- (iv) Child Inclusive Mediation (BC, USA, New Zealand and Australia)

Child participation also extends beyond individual circumstances. National and international conferences, like the World Congress Against Commercial Sexual Exploitation of Children, now often invite child and youth delegations to provide input on problems and policies affecting children.

1) BIC IN CANADA

In its 2003 Report, the UN Committee on the Rights of the Child called on Canada to analyze and improve the application of BIC in all areas of domestic law that affect the interests of children. The BIC is mentioned in specific laws in the family, immigration, and child welfare context, but Canada's lack of a coherent approach to children has led to confusing and conflicting judgments.

The problem is compounded by the division of powers in Canada. For example, the federal government is responsible for youth justice, but the provincial governments are responsible for delivering programs for youths involved with the justice system. A promising step was made in 2009 when Parliament adopted "**Jordan's Principle**" in the implementation of services for Aboriginal children.

Convention on the Rights of the Child
[ARTICLE 12 (1) - "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"]

Jordan's Story

Jordan's principle was named in memory of Jordan River Anderson, a five year-old First Nations boy who had a rare muscular disorder that required constant medical treatment. After spending two years at a hospital in Winnipeg, Jordan's doctors decided that he was stable enough to return to his family. However, the federal and provincial government could not agree about who should pay for his homecare, and Jordan unnecessarily remained in the hospital for another two years while they bickered over the jurisdictional issue. Jordan died in 2005, without ever being able to return to his family and home.

Jordan's principle provides that when a child is suffering because of a jurisdictional issue, the federal government must provide the service to that child without delay, and afterwards worry about arguing their jurisdictional dispute with the province. Although a parliamentary resolution is a good start to ensuring situations like Jordan's do not occur again, steps still need to be taken to ensure Jordan's principle is actually put into practice across the country.

2) BIC AND THE VULNERABLE

Certain vulnerable groups of children were named for further attention in the 2003 UN Committee review of Canada's implementation of the UNCRC. Action to ensure that the BIC principle is applied to these groups should be of top priority:

- (i) Children living in poverty
- (ii) Children with special needs
- (iii) Aboriginal children
- (iv) Children in the Youth Criminal Justice System
- (v) Children in refugee families

Children in these vulnerable groups have unique needs. Taking into consideration the best interests of Aboriginal children, for example, requires respecting their cultural and collective rights that are fundamental to their identity

Fast Facts

- In Canada, 1 in 10 Aboriginal children end up in state care, in comparison to 1 in 200 non-Aboriginal children
- In the immigration and refugee context, children are often rejected because a DNA test demonstrates they are not biologically the child of their parents. Rejecting a child or their family because a lack of biological parenthood (especially for refugees who cannot afford to undergo formal adoption processes to adopt these children) is not in the best interest of the child.
- According to Statistics Canada, the rate of child poverty has remained at 12% for the last two decades

STEPS TO INCORPORATE THE BIC PRINCIPLE INTO THE LAW:

- **Replace adversarial processes with collaborative processes**
- **Establish a federal Children’s Commissioner that can investigate when the interests of children are being ignored**
- **Ensure that in cases where parents have lawyers, children have their own lawyer to defend their individual interests**
- **Mandatory requirements to consider the views of children should be incorporated into the legislation and legal processes that affect children**
- **Provide mechanisms to ensure Jordan’s principle is implemented for all Aboriginal children, and children generally who are falling between the cracks because of inter-departmental or jurisdictional disputes**
- **Look beyond the courtroom and consider BIC when engaging in policy formation, preventative action and public education (a model program of this nature is the common framework for children adopted by British Columbia, entitled “*Strong, Safe and Supported*”, which is based on the UNCRC and will be used to assess and integrate the work of all government departments in relation to children)**

3) FURTHER INFORMATION

- **UNHCR Guidelines on BIC**
- **Conference Report from “Best Interest of the Child: Meaning and Application in Canada”** (held February 27-28, 2009). Hosted by UNICEF-Canada, International Bureau for Children’s Rights, Justice for Children and Youth, Canadian Coalition for the Rights of Children, David Asper Center for Constitutional Rights at the University of Toronto.
- **BIC and Aboriginal children:** Tae Mee Park, “In the Best Interests of the Aboriginal Child” (2003) 16 *Windsor Review of Legal and Social Issues* 45.
- **BIC in the immigration context:** Qingwen Xu, “In the ‘best interest’ of immigrant and refugee children: Deliberating their unique circumstances” (2004) 84 *Child Welfare* 747.
- **Joint Declaration for Support of Jordan’s Principle**

III. PROTECTION OF CHILDREN FROM TRAFFICKING AND SEXUAL EXPLOITATION

The trafficking of children for sexual exploitation is an international problem. Although the actual exploitation most often takes place in developing countries, offenders from all across the globe form a part of the sex tourism industry.

The victims of this industry are often stigmatized (particularly in developed countries), but they rarely willingly become involved in the exploitation. Many are lured away from their homes by a supposed "boyfriend," while others are kidnapped, sold by their families, or drugged into submission. The growing accessibility of sex tourism and child pornography means that the annual number of children lured into this industry is on the rise. The growing development of the Internet has made it increasingly difficult for law enforcement and policymakers to address this expanding industry.

1) FAST FACTS

- It is estimated that 1.2 million children are trafficked each year
- In Canada, between 10-15% of people involved in street prostitution are under 18
- The US is one of the world's largest child pornography producers, distributors, and consumers. Between 1996 and 2002 there was a 1997% increase in the number of child pornography cases opened by the FBI.
- Mexico's social service agency reports that there are more than 16,000 children engaged in prostitution, with tourist destinations being among those areas with the highest number.
- Sex trafficking is becoming an increasingly international phenomenon. According to the Thai Ministry of Social Development and Human Security, children are being trafficked abroad to places like Japan or Australia through Malaysia or Hong Kong. There has also been an increase in the number of foreign children trafficked into Thailand for sexual exploitation, including children from Cambodia, China, Lao PDR, Myanmar, and Vietnam
- In 2006, Thailand was placed 5th on the list of "Top Five Hosts" of child abuse websites by the Internet Watch Foundation. Based on reports of abuse by web users, almost 5,000 websites (3.6 per cent) can be traced back to Thailand.

2) CASE STUDY – ECPAT IN THAILAND

ECPAT is an international network of organizations focussed on preventing the commercial sexual exploitation of children. ECPAT works at multiple levels and in a variety of contexts to share information, educate, and advocate. They are actively involved in coordinating the efforts of local NGOs and organizing relevant teaching and fundraising initiatives. They also assess individual countries on the efforts they

make to protect children from sexual exploitation. The ECPAT Foundation (Thailand) has encountered thousands of children affected by this industry. The excerpt from their report below provides but one example of how children are forced to become sex workers:

“In 2005, hill tribe families in different villages in Laos were approached by a group of Lao males who were led by a man named Aunwieng, who promised to find their daughters good jobs in Thailand. The girls’ parents received an advance on their daughters’ salary of around 20,000 Thai Baht (US\$600) for each girl. The girls were trafficked by boat and entered Thailand illegally. Once they arrived in Thailand, they were passed on to a female Laotian trafficker who forced them into sex work. Initially, they worked at a karaoke bar in Pharn for a few weeks before being trafficked again to another province in Thailand... The victims were eventually rescued by Thai Immigration Police and handed over to a Thai NGO. Although the girls’ statements were taken, the case managed to get ‘lost’ for three years... It is estimated that around 8 to 10 girls are trafficked each month by this particular trafficking gang...” **From ECPAT’s “Stop Sex Trafficking of Children and Young People” (linked below)**

3) FURTHER INFORMATION

- **ECPAT “Stop Sex Trafficking of Children and Young People” [Factsheet](#)**
- **ECPAT [Reports by Country](#)**
- **[UNICEF](#) on protecting children from violence, exploitation and abuse**

IV. CHILDREN'S RIGHTS IN THE CRIMINAL JUSTICE CONTEXT

1) FAST FACTS

- According to Physicians for Human Rights, children who are detained or incarcerated in adult facilities are twice as likely to be beaten by staff, 50% more likely to be attacked with a weapon and 8 times more likely to commit suicide than children in juvenile facilities
- Since 1992, most states have lowered or eliminated the age at which a child can be tried as an adult and the criteria for transfer to the adult system has expanded to include non-violent and first-time offenders
- Despite the UNCRC's prohibition on sentencing those under 18 to death, in the last year execution of juvenile offenders has occurred in Iran, Nigeria, Pakistan, Saudi Arabia, the US and Yemen
- In the U.S., more than 70 people remain on death row for crimes they committed when they were under 18
- There is scientific support to hold children less culpable than adults for their actions - see the studies of Dr. Jay Giedd (Chief of Brain Imaging in the Child Psychiatry Branch at the National Institute of Mental Health) and Dr. Deborah Yurgelun-Todd (Harvard Medical School)
- In the last twenty years in the US, more than 1600 children under the age of 13 were sentenced in adult courts and many of these children only committed property-related crimes

2) CASE STUDY - THE STORY OF ANTONIO NUNEZ

Antonio is serving a sentence for life in prison in California without the possibility of parole for his involvement in an incident that occurred when he was fourteen and where no one was injured. He received this severe sentence despite the fact that he had only a very minimal past criminal record and there was evidence that he had a traumatic family history. Antonio had been a previous victim of street violence (he was shot multiple times) and had witnessed the murder of his 14-year old brother a year before. Prior to the incident that led to his arrest, he had tried to flee the violence of his neighbourhood, but a probation officer had threatened his mother to secure his return to the community.

At age 14, after going to a party where he had consumed alcohol, Antonio got into a car with two men twice his age. One of the men later claimed to be a kidnap victim. When the car was pursued by police and after shots had been exchanged between the two vehicles, Antonio, along with the 27 year old driver, was charged with aggravated kidnapping and attempted murder of a police officer. Antonio will spend the rest of his life behind bars, with no chance of parole or rehabilitation.

Convention on the Rights of the Child

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. **Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;**

3) FINDING THE RIGHT BALANCE - CANADA'S YOUTH CRIMINAL JUSTICE ACT ("YCJA")

According to the Department of Justice, by the early 2000s, Canada had one of the lowest rates of youth diversion from the criminal justice system and one of the highest rates of youth custody in the developed world. The enactment of the YCJA in 2003 has resulted in a significant drop in the number of youth charged by police and an increase in diversion from the criminal justice system. It has also introduced a sentencing scheme more in tune with the unique circumstances of young people. For example, the YCJA excludes deterrence as a purpose of sentencing in youth court, which a number of judges have cited as a reason to impose non-custodial sentence on a young person. Indeed, s.39 of the YCJA's four criteria for imposing custodial sentences upon young people is very restrictive.

Convention on the Rights of the Child

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Generally, the YCJA has been celebrated as respecting the balance between the rights and responsibilities of young people and the need to provide them with some protective measures given the unique circumstances of their age. However, there is still concern about the continued high rates of pre-trial detention and the large regional variation in the use of youth courts. Additionally, in March of this year, the federal government introduced amendments to the YCJA that are aimed at reducing the barriers to imposing custodial sentences upon youth. The amendments also seek to reintroduce deterrence and denunciation as principles in youth sentencing. These changes seem to conflict with the spirit of the UNCRC which states that "detention should be used as a last resort and for as short a time as possible."

4) FURTHER INFORMATION

- **Canadian Children's Rights Council - [links on youth criminal justice in Canada](#)**
- **Child Welfare League of Canada - on [Youth Justice](#)**
- **[Submissions](#) on Bill C-4 by the Canadian Coalition for the Rights of Children**
- **Nicholas Bala, Peter Carrington and Julian V. Roberts, "Evaluating the *Youth Criminal Justice Act* after Five Years: A Qualified Success"**
- **Special Project [Report: From Time out to Hard Time: Children in the Youth Criminal Justice System](#) - University of Texas at Austin**
- **[Defence for Children International](#)**
- **Federal Government on [YCJA Amendments](#)**

V. ACTIVITIES FOR STUDENT CHAPTERS

At the end of October, Presidents of the CLA-ACE Student Chapters will attend a leadership and training workshop in Ottawa on children's rights and the UNCRC. This workshop will be focussed on building their knowledge about children's rights and to provide them with concrete ideas as to how to raise awareness about these rights at their schools.

Between November and March 2011, Student Chapters will be engaged in raising awareness about children's rights and the UNCRC. As part of their activities on the theme, all Student Chapters **are required to:**

- i) Host at least one event about children's rights (see ideas below) that will be publicized at the school and open to all students; **and**
- ii) Write one article about children's rights and the UNCRC for publication in their law school or university newspaper or website.

SUGGESTIONS FOR ACTIVITIES

- ❖ **Organize a Professor or Expert Debate** on the UNCRC and what is in the best interest of the child in the criminal justice context - are alternatives to the formal justice system a good idea? Are transfers to adult courts in the best interest of the child? **Use the following webcasts as a launching point:**
 - [CNN](#) - Children in Jail in the Philippines
 - Indonesian Juveniles in adult jails ([YouTube](#))
 - The experience of a 17 year old in an adult American prison ([Youtube](#))
- ❖ **Pick a theme relevant to the UNCRC and children's rights and host a film festival.** Consider any of these award-winning documentaries:
 - **REDLIGHT (2010)** - Narrated by Lucy Liu, REDLIGHT is a powerful and moving documentary about children emerging from lives in which they were trafficked into prostitution. Filmed over a four-year period using footage smuggled out of brothels, REDLIGHT focuses on the personal stories of young Cambodian victims and features two remarkable Nobel Peace Prize nominees, Mu Sochua and Somaly Mam. View the REDLIGHT trailer [here](#).
 - **Returned: Child Soldiers of Nepal's Maoist Army (2010)** - Former child soldiers describe their recruitment and involvement with the Maoist People's Liberation Army. The girls' stories show how voluntarily joining the violent Maoist struggle became the only option to escape the gender discrimination and sexual violence of traditional Hindu culture in Nepal. With the Maoists now in control of the government, these children have been discarded and forced to return home to their traditional families that have disowned them. For many of the children, the return home will be even more difficult than the experience of war.
 - **Soldier Child (1998)** - This documentary is about a religious fanatic in Northern Uganda who abducts and then forces children to

become child soldiers. Since 1990, Joseph Kony has kidnapped more than 12,000 children and forced them to commit unspeakable atrocities against their families and communities. The film is about the efforts of the Ugandan people to rehabilitate these children back into society.

- **Kassim the Dream (2009)** - This documentary is about the life of World Champion Boxer, Kassim "The Dream" Ouma – who was born in Uganda and kidnapped by a rebel army at age 6.

- ❖ **Invite a panel of local practitioners who work in the area of child services, immigration or health care to speak at your school.** Have them discuss what they think could be done to ensure that the best interest of the child is considered in the proceedings they are involved with on a day to day basis. Then **write an article about it** for your school's newspaper.

- ❖ **Invite a past CLA intern (for example, someone who interned at ECPAT) to speak to your Chapter about their experiences,** particularly about the practical impediments to the success of children's rights initiatives

- ❖ **Ask the professors who teach family law at your school to discuss children's rights issues in their classes** (perhaps they would be open to letting you arrange a guest speaker, or leading a discussion on the subject)

- ❖ **Host a "lunch and learn" or informal pub night to discuss children's rights issues - suggestions for discussion topics:** Aboriginal child poverty, parental alienation, or child identity rights in Canada

- ❖ **Search out existing campaigns that can be promoted within your school:** For example, Beyond Borders and the Body Shop are currently campaigning to stop sex trafficking of children and young people in Canada. Contact your local Body Shop to see how you can promote the campaign within your school.

- ❖ **Spread the word:** Partner with undergrad clubs or other faculties to implement campaigns, promote events and help fundraise, increasing the reach of CLA-ACE initiatives.

- ❖ **Concert Fundraiser:** Hold a concert at a local venue with bands looking to promote themselves. Charge cover at the door and ask the bartender to make a specialty drink for the night from which CLA can collect the proceeds.

- ❖ **Silent Auction:** Include a silent auction at any event. Ask local businesses to donate items and gift certificates for students to bid on. Also ask upper year students to donate a few hours of tutoring time for first years to bid on.