

CHILD PROTECTION LAW IN BRITISH COLUMBIA:  
A RIGHTS-BASED ANALYSIS

by

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THESIS SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF SOCIAL WORK

THE UNIVERSITY OF NORTHERN BRITISH COLUMBIA  
March 2004

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*Your file    Votre référence*

*ISBN: 0-494-04664-3*

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*ISBN: 0-494-04664-3*

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## Abstract

This thesis examines the current British Columbia child protection legislative framework. The central focus is the British Columbia *Child, Family and Community Service Act* (1996). My primary research question is the extent to which children's rights as outlined in the United Nations *Convention on the Rights of the Child* (1989) are reflected in key provisions of this legislation. Three secondary research questions are: whether the due process and procedural measures provided for in the legislation are sufficient in terms of children's rights; whether the child advocacy measures are sufficient from a children's rights perspective; and the extent to which the treatment of children's rights in the child protection legislation diverges from or reconciles with critical social work and feminist theory.

My main findings are that the British Columbia child protection legislation lacks in terms of children's rights in several significant ways, notably, in a failure to incorporate adequate due process, procedural and advocacy measures for children. Drawing on both legal analysis and critical inquiry, this thesis outlines recommendations for reform to the British Columbia child protection legislation and overarching legal structure to more effectively address the rights of children in this province. In addition, I argue for a proactive, multi-dimensional and child rights focused social work practice in the field of child welfare.

## Table of Contents

Abstract.....	ii
Table of Contents.....	iii
List of Tables.....	vi
Introduction.....	1
 Chapter 1      Context of the Study.....	3
The State of Child Protection in British Columbia.....	3
Research Questions.....	6
Significance of Study to Social Work Practice.....	7
Methodology.....	12
Standard Legal Method.....	13
Critical Inquiry.....	13
Limitations of the Study.....	18
 Chapter 2      The International Convention on the Rights of the Child.....	21
 Chapter 3      British Columbia Child Protection Legislative Scheme.....	31
Background of the Legislation.....	31
Overview of the Current Legislation.....	33

Chapter 4	Central concepts in the British Columbia Child Protection Legislation	
	within the Context of Human Rights.....	38
	<i>Parens Patriae</i> .....	38
	Protection.....	42
	Safety and Well-Being.....	46
	Best Interests of the Child.....	49
	The Child's Family.....	55
	Due Process.....	61
	Alternative Dispute Resolution.....	63
	The Child's Views and Right of Participation.....	68
	Statement of Children's Rights.....	72
	Administrative Accountability.....	75
	Advocacy for Children.....	77
Chapter 5	Discussion.....	90
	The Question of Rights.....	90
	Social Work Criticisms of Canadian Child Welfare	
	Policy and Legislation.....	98
Chapter 6	Findings and Recommendations .....	103
	Summary of Findings.....	103
	Research Question a: The Reflection of Children's Convention Rights in	
	the <i>Child, Family and Community Service Act</i> .....	103

Research Question b: Due Process and Procedural Measures in the <i>Child, Family and Community Service Act</i> .....	104
Research Question c: Child Advocacy.....	104
Research Question d: The Treatment of Children’s Rights in the Child Protection Legislation and Critical Discourse.....	105
Recommendations.....	108
The Definition of “Protection”.....	108
Acknowledgement of Caregiver Vulnerabilities.....	109
Counselling Services for Children.....	110
Child Advocacy.....	112
Further Development of Alternative Dispute Resolution.....	115
Increased Legal Aid Coverage.....	116
Unified Family Court.....	116
Children’s Court.....	118
Statement of Children’s Rights.....	119
An Enhanced Role for Social Workers.....	121
Appendix ‘A’ – Summary of Recommendations.....	125
References.....	127

## List of Tables

Table 1.1	Number of Children in Care, British Columbia, March 2003.....	4
Table 1.2	Approximate Percentages of Total British Columbia Child Population Who are in Care, British Columbia, March 2003.....	4
Table 1.3	Protection Investigations, Fiscal Year Totals, British Columbia. ....	5
Table 3.1	Implementation Status of the Gove Report Recommendations that relate to the British Columbia Child, Family and Community Service Act.....	35-36
Table 5.1	The Ethic of Care and the Ethic of Justice.....	96
Table 6.1	Key Shortcomings in the Child, Family and Community Service Act.....	103

## Introduction

Social workers have an important role in the provision of child protection services in British Columbia. Callahan and Callahan (1997) identify the centrality of the profession of social work in child welfare policy and services. It is my hope that in embarking on this human rights based analysis of British Columbia child protection legislation, I will contribute to further development of contemporary social work policy and practice in highlighting certain human rights considerations for child protection service delivery. To engage with this analysis of the child protection legislative framework, I shall also employ critical inquiry. Because the concentration of child protection is heavily legislated, it is a subject area where law and social work clearly intersect. I will discuss specific legal issues that have not been explored in depth in social work literature relating to British Columbia child protection legislation while at the same time, striving to import a critical lens to the legal analysis I employ.

My focus is provisions of the governing law establishing child protection services in the province of British Columbia, the *Child, Family and Community Service Act* (1996). In addition, I expect to peripherally consider the applicability of other related British Columbia laws including the *Office for Children and Youth Act* (2002) and the *Ombudsman Act* (1996). In order to establish a legal framework for child rights, I shall draw primarily from the United Nations *Convention on the Rights of the Child* (1989) (“the Convention”). In addition, I will consider relevant Canadian case law that provides assistance in legally defining and explaining human rights more generally and the legal nature of children’s rights more specifically in Canada. As a further component of my analysis, I consider the recommendations of the 1995 *Report of the Gove Inquiry into Child Protection in British Columbia* (“the Gove Report”) and the extent of implementation to date. I shall consider and apply critical theoretical writings, most particularly



in the fields of child welfare and justice.

Chapter one sets out the context of the study including the significance of child protection in British Columbia, research questions and methodological approach. Chapter two provides an overview of the Convention. In chapter three, I address the historical context and overall structure of the British Columbia child protection legislation. Chapter four involves a more detailed examination of key provisions of the British Columbia child protection legislative framework as they relate to children's rights. In chapter five, I move into a discussion of critical literature relating to the overarching themes I discuss, notably the law and child welfare policy. Finally, chapter six includes my findings and resulting recommendations, based on the analysis contained in the preceding chapters.

## Chapter One: Context of the Study

### *The State of Child Protection in British Columbia*

The British Columbia Ministry of Children and Family Development (“MCFD”) reports that in the years since the 1996 enactment of the *Child, Family and Community Service Act*, there has been a marked increase in the numbers of children in care in the province; in this time period until 2003, the overall number of children in care increased by over sixty per cent (British Columbia Ministry of Children and Family Development, 2003b). As of April 2003, MCFD reported that province-wide, there are over ten thousand children in the Ministry’s and delegated Aboriginal agencies’ care (British Columbia Ministry of Children and Family Development, 2003a & 2003b), sixty per cent of whom were in continuing custody (British Columbia Ministry of Children and Family Development, 2003a). Of these approximately ten thousand children in care, almost half are less than 12 years old (British Columbia Ministry of Children and Family Development, 2003a).

The government reports that many of these children in care are medically fragile and have special needs (British Columbia Ministry of Children and Family Development, 2002), over fifty percent come from single parent homes (British Columbia Ministry of Children and Family Development, 2002) and over the last decade, sixty-five to seventy percent of the families of children taken into care also received income assistance. Approximately forty per cent of children in care are Aboriginal children (British Columbia Ministry of Children and Family Development, 2002). The total number of all children in care is well above the national average (British Columbia Ministry of Children and Family Development, 2003b). In addition to children in care, as of spring 2003, there were over one thousand children under supervision of the Ministry and Aboriginal delegated agencies (British Columbia Ministry of Children and

Family Development, 2003b). Table 1.1 outlines the numbers of children in care in British Columbia per age category as of March 2003.

Table 1.1

*Number of Children in Care, British Columbia, March 2003*

Under 1 year	286
1 year	321
2 years	309
3 years	295
4 years	349
5 years	321
6 years	376
7 years	410
8 years	425
9 years	496
10 years	512
11 years	592
12 years	584
13 years	666
14 years	647
15 years	750
16 years	760
17 years	765
18 years	714

Source : British Columbia MCFD, Data Services Branch, March 2003

Based on foregoing numbers and total population numbers for each age group derived from the most recent Canadian Census conducted in 2001 (Statistics Canada, 2001), Table 1.2 contains breakdowns showing what approximate percentage of British Columbia children were in care as of March 2003.

Table 1.2

*Approximate Percentages of Total British Columbia  
Child Population Who Are in Care, British Columbia, March 2003*

0 to 4 years	.76 %
5 to 9 years	.84 %
10 to 11 years	1.07 %
12 to 14 years	1.83 %
15 to 18 years	1.37 %

Source: British Columbia MCFD, Data Services Branch, March 2003 and Statistics Canada, 2001 Census

As of April 2003, the government reported for the first time since the enactment of the *Child, Family and Community Service Act* in 1996 that there was seven per cent less children in care than in June 2001 (British Columbia Ministry of Children and Family Development, 2003b). Other decreases of children in care during this period include: a decrease of 12.4 per cent of children under supervision orders and a decrease of 5.9 per cent of children under special needs agreements (British Columbia Ministry of Children and Family Development, 2002). The significance of these relative numbers is beyond the scope of this thesis but represents an issue worthy of further consideration and study. A possible reason for these decreases is the fiscal cutbacks recently introduced by the British Columbia Liberal government which may leave some children and their families without any form of publicly funded service.

Table 1.3 contains a breakdown of the reasons for protection investigations taking place between 1997 and 2003. Although less than half of these children ultimately ended up in care, it is worthy of note that the largest numbers of investigations relate to multiple types (a term that means more than one of the listed reasons) and neglect. Not publicly available from MCFD is a further breakdown of the multiple types category.

Table 1.3

*Protection Investigations, Fiscal Year Totals, British Columbia*

Allegation type	1997/98	1998/99	1999/2000	2000/01	2001/02	2002/03	
Physical abuse	4,696	4,404	4,439	3,943	3,832	3,327	16.3%
Sexual abuse	1,368	1,352	1,148	882	878	649	3.2%
Neglect/ not P	7,657	7,598	7,706	7,104	7,010	6,413	31.4%
Other	1,554	1,451	1,278	1,124	1,046	807	3.9%
Multiple types	8,150	9,331	9,750	9,387	10,343	9,252	45.2%
TOTAL	23,425	24,425	24,321	22,440	23,109	20,448	100%

Source : British Columbia MCFD, Data Services Branch, March 2003

According to MCFD, only thirteen per cent of child protection investigations per year

lead to applying for a court order (British Columbia Ministry of Children and Family Development, 2003a). Consent orders are significant in child protection cases. As of March 2003, children go into care by way of consent orders in thirty three per cent of cases (British Columbia Ministry of Children and Family Development, 2003a). In relation to supervision orders, fifty per cent of these orders are consent orders (British Columbia Ministry of Children and Family Development, 2003a).

I discovered upon contacting MCFD that there are some gaps around the statistics that they have available to the public. These gaps in statistical information relate to particular areas I consider in this thesis. For instance, there are no currently available government statistics to indicate how many child protection matters province-wide get resolved in the court process prior to trial nor are there numbers around what other alternatives to trial are used to resolve cases (British Columbia Ministry of Children and Family Development, 2003a). In addition, there are currently no provincial government statistics about how many child protection cases are dealt with by way of mediation outside the court process (British Columbia Ministry of Children and Family Development, 2003a). It is my belief that these gaps in available empirical information underscore how certain issues can simply be written out of public policy. Despite the gaps, the available MCFD statistics support the significance of examining the issue of “child protection” in this province. These numbers not only provide the context for my analysis of the provincial child protection legislation but also highlight the importance of conducting future legislative and social policy analysis in this subject area.

### *Research Questions*

In this thesis, my primary research question is:

- a. To what extent are children’s rights as outlined in the Convention reflected in the key

provisions of the British Columbia *Child, Family and Community Service Act* and child protection legislative framework in the province?

My secondary research questions are:

- b. Are the due process and procedural measures provided for in the *Child, Family and Community Service Act* sufficient in terms of children's rights?
- c. How does the British Columbia child protection legislative scheme purport to understand the concept of child advocacy; are the provisions in the legislation pertaining to child advocacy sufficient from a children's rights perspective?
- d. To what extent does the treatment of children's rights in the British Columbia child protection legislation reconcile with or diverge from critical social work discourse and what are the resulting implications of applying a critical lens to the consideration of children's rights in the British Columbia child welfare legislative context?

Finally, I shall consider what, if any, changes could be implemented in the context of the child protection legislative framework and associated procedures.

### *Significance of Study to Social Work Practice*

In my move from law practice to social work, I have become aware of the number of areas in which legal and social work concerns overlap, and child protection is one such area. What is often absent from child protection discourse however, is a common ground understanding between the disciplines of the issues at hand. I endeavour to address this gap between social work and law in moving toward a legally informed critical social work perspective about British Columbia child protection law. Ultimately, it is a goal of this thesis that social workers involved in the delivery of child services in British Columbia acknowledge

the importance of and advocate respect for children's human rights not only in their practice but also in the broader development, implementation and delivery of child protection services in the province.

As stated, social workers have a central role in the provision of child welfare services including child protection in the province. There is a need for social workers to understand the legal and policy realm in which they operate because:

1. Of their central role;
2. The law does not establish with clarity where social workers' expected primary loyalty rests in the child protection context;
3. There is a lack of formal accountability measures / rights enforcement mechanisms attaching to social workers' involvement with child protection cases.

Child protection is an area of social work practice that has developed in a highly legalistic fashion (Johnson & Cahn, 1995). Currently, British Columbia is experiencing a state of flux in regard to the provision of social services, and child welfare services including child protection are very much affected by changes being implemented.

Under the current governing legal framework for child protection in British Columbia, child welfare social workers have a high level of responsibility and a great deal of legislated power. It is my view that social workers in this context somehow need to come to terms with whose interests they primarily serve and emphatically establish a collective guiding philosophy for the work they do, with the aim of injecting a further level of accountability into child protection service delivery in British Columbia. In further defining their roles, it is important that social workers appreciate and understand the human rights context of their work.

The philosophical orientation of the profession of social work is consistent with respect

for children's human rights. Reamer (1999) cites social work values as including: respect for individual worth and dignity; respect of persons; valuing individuals' capacity for change; client self-determination; providing opportunities to individuals to realize their potential; seeking to meet individuals' basic common needs; non-discrimination; client empowerment; and social justice (p. 21). Both the Canadian Association of Social Workers' (1994) and the British Columbia Association of Social Workers' (1999) codes of ethics contain provisions that reflect these values but do not contain associated accountability mechanisms. Despite the written articulation of these ethics, the profession of social work should not become complacent. Rather, in the child protection realm, there is a need for social workers to identify what principles guide their work as professionals and to strive to have those principles put into effect.

Controversy abounds in the social work literature about whether the appropriate role for social work is to advocate for more state assistance for people (McInnis-Dittrich, 1997) or to challenge the existence of larger oppressive structures such as legislated regimes (Mullaly, 2002). Meinert (1995) states about the profession of social work more broadly, "perhaps the major issue facing both social work practice and education today is one of arriving at consensus about the central purpose of the profession" (p. 7). In addition, Meinert (1995) maintains that "an assumption exists within the profession that there is basic agreement about the fundamental purpose of social work" despite the lack of empirical support to establish whether such consensus exists (p. 7). Similarly, Reamer (1999) discusses how debate about the profession's mission and values has been historically "considerable" (p. 13).

Child welfare agency-based work in particular is fraught with potential philosophical conflict, for instance, whose interests are social workers ultimately going to represent and protect. For instance, Savoury and Kufeldt (1997) point to a tension between doing both child



protection and family support work. Callahan (1993b) identifies how the potential for conflict is always present in carrying out child protection social work. Coupled with this uncertainty, the wording of the British Columbia *Social Workers Act* (1996) provides that social workers under the authority of the Minister of Children and Family Development need not register with the Board of Registration for Social Workers in British Columbia and as such, are not formally accountable to professional social work standards for practice established by the board. The *Social Workers Act* (1996) is the governing legislation for the profession of social work in the province. Section 8 of this Act states that one must not represent himself or herself as a social worker unless registered as such. An exception to this registration requirement is a person employed by the government as is currently the case for many child protection social workers. The effect of this lack of formal professional accountability for child protection workers is outstanding ambiguity about social workers' practice standards in the child protection realm.

Additionally, Schmidt (1997) suggests that in certain cultural and geographic contexts, standardized ethical standards for social workers do not fit. Rhodes (1991) discusses how social workers face ethical dilemmas which are frequently obscure and not straightforward – she also emphasizes that whether or not social workers are aware of it, certain assumptions define and influence social work practice. Despite these challenges with setting workable standards for social work generally, in the absence of identifiable and binding ethical standards, where do children's rights come into play and how will they be enforced in the delivery of child protection services that lacks formal professional accountability measures? One might expect that in light of this explicit exemption in the social work legislation, the matter would be covered off in the governing child welfare legislation, the *Child, Family and Community Service Act*, but it is not. To the contrary, Section 101 of the Act only sets out an exemption from legal responsibility for

social workers and others who perform functions under the Act: “No person is personally liable for anything done or omitted in good faith.” As things currently stand from a legal perspective, it appears child welfare workers engaged in child protection work pursuant to the legislation, are primarily responsible to the agency and the Director’s mandate whether or not that mandate is consistent with a child’s human rights. The wording of the legislation leaves open this possibility. Mullaly (2002) identifies a central paradox in social welfare work being that although social services focus on ameliorating social problems, “there is no agreed-upon definition or explanation of what a social problem is or why it occurs” (p. 3). In the context of child welfare work then, child protection social workers are left functioning in the legislatively defined context wherein abuse and neglect of children, as legally defined social problems, form the legal basis and provide the rationale for social work intervention.

In response to such contemporary social work practice challenges, Ife (2001) advocates a more proactive role for social workers; he argues that in embracing human rights standards as the cornerstone of practice as opposed to adhering to specific ethical standards, service users necessarily become more active participants in decision-making processes. According to Ife (2001), using children’s human rights as the starting point for social work practice not only could create a frame of reference for bringing about accountability in delivery of child protection services but also could help to provide solutions for some of these social work practice tensions. A focus on human rights according to Ife (2001) leads to a “stronger capacity for empowerment-based practice; the emphasis is on realising and protecting the rights of the client, rather than facilitating the professional decision-making of a social worker” (p. 105).

Mullaly (2002) outlines that legislative formulation and associated structures, such as the British Columbia child protection legislative scheme, are according to critical social work theory,

problematic for assuming that members of society agree on the values and rules that should guide them. Critical social work theory in contrast, rests on no such assumptions but rather, actively seeks to challenge them with a goal of bringing about liberating social change. According to a critical social work approach, a thorough examination of social problems such as abuse and neglect of children requires an understanding of larger oppressive societal structures. Critical social work perspective also conceives of the rule of law, supporting ideologies, government and legal processes as manifestations of a larger oppressively-structured context.

In championing critical anti-oppressive social work practice, Mullaly (2002) calls for social work “modes of intervention that bridge the separation of existential freedom and socio-political liberty” (p. 171). In other words, anti-oppressive social work practices at the individual level - such as critical child protection work - involve an appreciation and awareness of the connection between structural causes and personal problems (Mullaly, 2002, p. 171). At the structural level of practice, Mullaly (2002) calls for “confronting and changing those social institutions, policies, laws and economic and political systems that operate in a way that benefits the dominant group at the expense of subordinate groups” (p. 193).

It is my hope that this study will help lay the groundwork for critical social work practice that integrates aspects of both Ife’s (2001) and Mullaly’s (2002) recommendations. It is also my hope that this form of social work practice will further develop in the British Columbia child welfare context and will prompt social workers who work with children in this field to consider seriously the issue of children’s rights and how they are to be reflected in service provision.

### *Methodology*

The qualitative methodology I employ is policy analysis (Patton, 1999). Patton (1999) outlines that when one sets out to assess the effectiveness of laws passed through data collection

and thoughtful analysis, one is engaged in evaluation research which is a form of qualitative research method (p. 141). Policy analysis is also said to be largely applied research (Rossi et al., 1999). White (1998) stresses the importance of “reasoned and critical discourse” among different perspectives about a given policy statement (pp. 863-4). In undertaking this policy analysis, the specific methods I use include standard legal method and critical inquiry grounded in critical social work and legal feminist theory.

### *Standard Legal Method*

The primary aspect of my methodology is standard legal method. For instance, when discussing particular terms such as “best interests of the child” in the legislation, I intend to approach the term from a judicially considered perspective. I apply various legal cases to the particular legislative provisions under consideration. My objective in this regard is to inject an element of legal analysis into a broader-based critical inquiry of the legislative provisions under study. Critical social work inquiry about child welfare policy and practice tends not to engage in traditional legal analysis, its focus instead being externally located critique. The legal analysis component is intended to provide an additional layer of depth and complexity to my discussion with a goal of further contributing to evolving social work understandings of these matters.

An important aspect of my legal analysis is specific consideration of the contents of the international statutory statement of children’s rights, the Convention. I use the Convention as a reference point to consider children’s rights in the British Columbia child protection legislative context.

### *Critical Inquiry*

The second aspect of my methodology is critical inquiry. This aspect of my inquiry is grounded in critical theory which according to Mullaly (2002), is “motivated by an interest in

those who are oppressed, is informed by a critique of domination and is driven by a goal of liberation . . . [and]. . . it concerns itself with moving from a society characterized by exploitation, inequality and oppression to one that is emancipatory and free from domination” (pp. 15-16). He suggests that what distinguishes critical theory from other social theories is its focus on change rather than only understanding (Mullaly, 2002). In the words of Freire (2001), “To surmount the situation of oppression, people must first critically recognize its causes, so that through transforming action they can create a new situation” (p. 47). A focus of the critical inquiry I employ is to attempt to identify and address oppression. According to Mullaly (2002), an aspect of oppression is a lack of “rights that the dominant group takes for granted” (p. 28). In approaching the question of oppression, I consider the interrelationship between such social trends as poverty, family composition, and age and gender discrimination on the one hand and a number of the legal concepts and formal statements of rights I analyze on the other hand in order to reach a more complex understanding of human rights and the extent of their inclusion in the legislation under study.

Saulnier (1996) outlines the complementary relationship between feminist theory and social work, and Mullaly (1997) identifies critical feminism as a particular example of a critical social work inquiry. Feminist legal theory is a particular approach to understanding within the broader critical feminist perspective (Rhode, 1991). As I will demonstrate, this critical feminist discourse has particular relevance to the issue of child protection, specifically as constructed in the British Columbia legislative context.

Feminist legal theory specifically focuses on the law and legal system. Some feminist legal theorists suggest that the contents of the written law contribute to and reinforce the “masculinization” of the legal system and order. Law then becomes a particular discursive

resource as described by Fraser (1989). Fraser (1989) defines “sociocultural means of interpretation and communication” as a “historically, culturally specific ensemble of discursive resources available to members of a given collectivity in pressing claims against each other” (p. 164). In western capitalist societies according to this view, such discursive resources lead to patterns of domination and subordination (Fraser, 1989). As MacKinnon (1989) states, “The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender - through its legitimizing norms, forms, relation to society and substantive policies. The state’s formal norms recapitulate the male point of view on the level of design” (pp. 161-2).

Because the goal of critical inquiry is to arrive at an understanding of the supporting politic of domination or oppression, it becomes relevant to consider how “identities are discursively constructed” (Lindenmeyer, 2000, p. 129). In my consideration of British Columbia child protection law, I intend to analyze certain provisions of the *Child, Family and Community Service Act*, related legislation and case law, as these provisions and the supporting structures concern children who form a vulnerable group in society. Cornell (1991) maintains that, “Within feminine jurisprudence, we can and should understand the deconstructability of law to open up the space for the reinterpretation and reinvention that allows feminist inroads into the law” (p. 111).

Reinharz (1992) discusses how feminist scholars support moving beyond disciplinary boundaries as a viable social science approach. My belief is that analysis grounded in feminist critique adds to and complements standard legal method in understanding the content of the law. Not only do feminists theorize about the causes, nature and effect of oppression in society but also, feminist theorists seek to move beyond the status quo. Because children are among the most vulnerable members of society, legal feminist theory, with its discourse directed at

dissecting and challenging subordination and oppression in the law and legal system (Fraser, 1989; MacKinnon, 1989; Smart, 1989; Baier, 1994; West, 1997; Lacey, 1998; Moller Okin, 1989 & 1999; Young, 1999), contains some insights and understandings which have direct applicability and relevance to children. Using a gendered perspective to explain women's subordination, this feminist discourse speaks to the context, essence, substance and meaning of rights (Benhabib, 1987; Smart, 1989; Moller Okin, 1989, Rhode 1991; Comack, 1999). In addition, critical feminists have explored the areas of families and child welfare and child protection more specifically as subject areas falling within feminist concern (Callahan, 1993a & 1993b; Krane, 1997; Swift, 1995 & 2001). For these reasons, critical feminist analysis provides a useful method of analysis to engage with the fragility and elusiveness of children's rights as treated and understood by the law and society.

Fook (2002) identifies that aspects of a critical approach include: "the recognition of interactive and reflective ways of knowing; the recognition of the connections between structural domination and personal self-limitations; and the recognition of possibilities for both personal and social change" (p. 17). In engaging with this critical inquiry, I bring to the analysis my own narrative and experiences of having practised human rights and family law as a lawyer and studied critical theory from a social work perspective.

During the course of my legal education in Victoria, British Columbia, and experience as a lawyer predominantly in Prince George, British Columbia, I witnessed trends of domination and oppression in the legal system which transcended a legal framework of understanding. While employed as a lawyer, I frequently found myself limited in what I could do to assist more economically and socially vulnerable persons in the legal context due to constraints that blocked their access to and full participation in the legal system. In this way, I often came face to face

with my own limitations as a potential advocate within the legal framework. It is for this reason that I believe it is important that I also use critical inquiry as I proceed with this study.

I have made further sense of some of my own experiences with the law through conversations I have had with colleagues working in the legal field, conversations on which I also intend to draw as I embark on this analysis. Although I have worked as a lawyer in a number of cases involving children, I have not yet had the opportunity to engage in child-centered advocacy work. Much legal work for children is done through adult representatives of the children and not on their own right. A further limitation of my experience and understanding is that I have not worked in the child protection field as a social worker.

My experience as a lawyer provided me with context for understanding that formal legal statements of rights alone insufficiently protect more vulnerable members of society including children from experiencing oppression. The content of the law is only as strong as the means available to enforce it and is subject to interpretation by persons who may lack a broader understanding of and sensitivity to overarching trends of oppression in society. The content of the law rather than the broader social context guides judicial legal interpretation so if legislation lacks provisions addressing oppression, so too will the interpretation of those legal instruments.

My social work education has reinforced and added depth to my legal practice perspective that broader trends of oppression frequently goes unaddressed in the existing child protection legal framework. While enrolled in the University of Northern British Columbia Social Work Program, I had the opportunity to travel to Bolivia as a volunteer cooperant to work at addressing women's human rights in a social development context. The program was funded by the Canadian International Development Agency. What I discovered in that country is that statements of international human rights are only as strong as the means by which to protect and



enforce them in a given country. I also discovered that human rights cannot be taken and treated as a stand-alone issue removed from the broader social context of people's lives.

In Bolivia, I witnessed how the majority of children in that country live in poverty and spend long hours either working in demanding jobs in which they are paid next to nothing or begging in the streets. The families of many children cannot afford to adequately provide for these children, and the children must go out and fend for themselves at very young ages. I saw in Bolivia a shortage of tangible means for protecting children from exploitation, poverty and lack of opportunity. This phenomenon prevails despite regular rights-focused international funding accompanied by strong formal statements of children's rights and the presence of United Nations funded organizations in the country. This experience in Bolivia led me to consider the question of children's rights in the British Columbia context and to question how this province's law measures up to international statements of children's rights and the extent to which children's rights are protected and advanced here.

Who I am and the particular experiences I have had influence my lens of understanding the British Columbia legislation as I draw on the tools of legal method and critical inquiry. As I proceed with my analysis, it is my hope to synthesize the sometimes incongruent, sometimes merging perspectives of legal method and critical inquiry to arrive at themes which both address and transcend the "constellation of beliefs, values and techniques" (Kuhn, 1970, p. 175) of the traditional legal system.

### *Limitations of the Study*

An aspect of qualitative research is the researcher's own examination and judgment of the data under study (Patton, 1999), an inquiry necessarily informed by the researcher's subjective experience. Having grown up in an English-speaking European cultural context and having been

trained in the legal tradition, I find it challenging to reach out beyond a traditional (liberal) legal views of “rights.” In approaching this thesis question from a “rights” perspective, I realize I have given a certain amount of deference to the liberal legal approach; however, I also feel it can be helpful and instructive to engage in (or at least attempt) critical analysis from within the legal framework itself, in a sense importing critical perspective.

As I have stated, I limit my inquiry to child protection as legislatively constructed in the British Columbia *Child, Family and Community Service Act*; however, child protection is a limited aspect of child welfare. I have imposed this limitation on myself with the aim of more particularly entering into analysis of this legally defined subject area. Legal consideration by its very nature requires an element of specificity or constraint of subject which I realize from a more critical perspective, is potentially problematic, but my intent is to explore this particular subject area in greater depth than would be possible with a broader scope of enquiry and to be able to effectively use legal method as a tool of inquiry.

In writing this thesis, I am keenly aware that I do not adequately address the particular plight of Aboriginal children who make up the highest percentage of children currently in the care of British Columbia child protection services; however, to address Aboriginal children’s situation would far exceed the scope of this thesis due to the number and complexity of the issues relating to Aboriginal children (Schmidt, 1997). To discuss the various complex legalities and unique situation of Aboriginal children in relation to the law and child protection would take me far beyond the space limitations of this thesis. This subject area is rather complicated by the current state of flux in provincial Aboriginal child welfare policy. How Aboriginal child protection policy will evolve in British Columbia remains rather uncertain at the present time. The contents of this thesis relate to all children including Aboriginal children; however, I do not

address the complex relationship between “child protection” and Aboriginal children in the detail required for adequate examination of this expansive subject. Although I draw on the Convention in my identification of global child rights, Aboriginal children not only have these rights but also have recognized Aboriginal rights at both domestic and international law. This area of research, though critically important and necessary, is beyond the scope of this thesis.

I also have not addressed the particular plight of children with special needs who are particularly vulnerable to how their rights are constructed and interpreted. As I have outlined, MCFD statistics indicated a recent decrease province-wide of children under special needs agreements (British Columbia Ministry of Children and Family Development, 2002). An important future area of research would be to examine the reasons for this decline and the resulting implications on the lives of children with special needs. Human rights concerns for children with special needs who are subject to child protection proceedings are compounded by the number and variety of social services many of these children need to access. Article 23 of the Convention speaks specifically to governments’ obligations to children with special needs over and above other child-centered responsibilities. Again, my discussion of the child protection legislation pertains to children with special needs as it does to all other children, but more complicated issues beyond the scope of this thesis require further consideration in relation to children with special needs. To consider in further depth these children’s human rights is an area that requires further particularized research.

## Chapter Two: The International Convention on the Rights of the Child

This chapter provides a context for the international *Convention on the Rights of the Child* in terms of history of international human rights law and the current means of implementation of the Convention in Canada. In addition, this chapter provides an overview of the key provisions of the Convention itself.

Since the 1980s, there has been formal acknowledgment and incorporation of human rights in Canadian law and social policy (Armitage, 1993). The notion of international human rights codified in international law dates back to the early 1900s. In the period shortly after World War II, the *Universal Declaration of Human Rights* (1949) and other international human rights conventions came into existence (Siegel, 1988). Two subsequent human rights treaties, *the Covenant on Civil and Political Rights* (1966) and the *Covenant on Economic, Social and Cultural Rights* (1966) expanded the Universal Declaration.

With respect to children's human rights, international convention formulation has been slower. The *Geneva Declaration on the Rights of the Child* (1924) marked the first acknowledgement that children have human rights. Subsequently, the *Declaration on the Rights of the Child* (1959) was created by the United Nations. These instruments together with other international law instruments acknowledged that children are a group especially in need of protection (Flekkoy & Kaufman, 1997). In November 1989, the United Nations General Assembly unanimously adopted the *Convention on the Rights of the Child* ("the Convention"), and Somalia and the United States are the only two countries that have not ratified it (Harris-Short, 2001). Canada ratified the Convention in 1991, thereby becoming a "State Party" to it (Canadian Coalition for the Rights of Children, 1997).

The Convention establishes a global statement of children's human rights. The Preamble

recognizes “the inherent dignity and equal and inalienable rights of all members of the human family” and also makes reference to the rights set out in the *Universal Declaration of Human Rights*. This Preamble also acknowledges children’s entitlement to special care and assistance and their need for special safeguards and care, including appropriate legal protection. It further states children should “grow up in a family environment, in an atmosphere of happiness, love and understanding” and that the importance of “traditions and cultural values of people” should be given “due account.” Article 1 of the Convention defines “child” to mean “every human being below the age of eighteen years old unless under the law applicable to the child, majority is attained earlier.”

In addition to the Preamble, the Convention consists of two parts and fifty-four articles. In Part I, Articles 1 to 41 set out the specific rights that children are to enjoy. Part II, the remainder of the Convention, sets out procedures to monitor state parties’ implementation of the Convention provisions. The rights set out in the Convention fall into five general categories:

1. Partnership: the need for commitment at various levels of government - provincial, federal, international;
2. Protection: parental, state and global responsibility to protect children’s rights;
3. Participation: the right of a child to be heard in administrative, judicial and national proceedings;
4. Provision: that the basic needs of children be met; and
5. Promotion: promoting children’s awareness of their rights (Tang et al., 1999).

A number of writers have commented on the meaning and international significance of the Convention, and these writers’ observations focus on the nature of emerging children’s rights. Veerman (1992) discusses how the rights included in it address “quality of life” in addressing

“needs and end results” (p. 51). Lundy (1997) describes the Convention in the following terms:

[It is] the first United Nations human rights instrument since the Universal Declaration on Human Rights which brings together as inextricable elements of the life of an individual human being the full range of civil and political rights, and economic, social and cultural rights. It can do this because it treats children as completely rounded individuals, rather than as elements in either political society or economic systems. . . The rights defined in the Convention are interdependent; you cannot take one in isolation. They must all be implemented simultaneously to respect the rights of every child (p. 25).

Although the Convention’s text is mostly influenced by western legal perspective and the “state-centric” United Nations is dominated by men of western cultural background, women and representatives of the “developing world” also had some influence and input in the drafting of the Convention (Harris-Short, 2001). According to this commentator (2001), one non-western notion not carried over to the text is the recognition of children’s duties, notably to family and community. Conversely, a part of the Convention that reflects non-western (non European-based) influence is the recognition of the child’s extended family (Article 5).

Although the Convention sets out a number of individual inter-connected rights that children possess, the Preamble of the Convention explicitly acknowledges the importance of the family unit as a cornerstone for children’s rights. It states, “the family. . . should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.” In this regard, the Convention addresses the importance of the child’s interconnectedness with the family. According to feminist theorist West (1997), “our legal institutions and common law rules have failed us. . . the good connections - such as the sustaining and nurturing connections in a healthy parent-child relationship - are not sufficiently

protected, and at times are actually threatened” (pp. 2-3). According to this view, our “connected selves” tend to be very much neglected by a law premised on the centrality of individual human rights (West, 1997, p. 7). The emphasis of the Convention on family poses an intriguing contrast with the individualistic nature of human rights discourse as it has traditionally developed in western law.

The Convention is also unique in international law in that it speaks about the rights of the child as rights *per se* (Wolf, 1992), in a way similar to other international human rights declarations and conventions that have practicably, in recent history, been primarily predicated on a notion that adults are the holders of such rights (Lundy, 1997). As outlined, the notion of adults’ human right arises through liberal theory. John Stuart Mill in his *On Liberty* reflected that liberalism relates only to “human beings in the maturity of their faculties” (Allen, 1998, p. 6). As such, the Convention arguably marks something of a departure from protectionist notions in the law directed at children and enshrined in international and Canadian law such as the doctrine of *parens patriae*. Just as human right have emerged through the liberal tradition, so too has the doctrine of *parens patriae* that relates to children and child protection; therefore, at the root of the contemporary shift to child rights discourse in the law rests this basic and unresolved tension between children’s rights on the one hand and historical protectionism and paternalism toward children as still reflected in current law.

In signing the Convention in 1991, Canada assumed an international responsibility not only to implement its provisions but also to monitor and report to the United Nations Committee on the Rights of the Child every five years (UNICEF, 2003). Although Canada is a signatory to the Convention and as such, the government undertakes to implement its provisions into child-related laws, the domestic character of the Canadian legal structure is also relevant to the

question of its implementation.

Part II, Articles 42 to 45, of the Convention sets out procedures to monitor state parties' implementation of the Convention provisions. First, Article 42 sets out an obligation on the state to undertake to make the principles set out in the Convention widely known to the public. Within two years of ratifying the Convention, Canada was obligated to report on the measures taken which give effect to the rights recognized in the Convention, which it did (United Nations Office of the High Commissioner for Human Rights, 1995a and 1995b). This reporting requirement carries on every five years thereafter; however, information provided in the initial report need not repeat basic information already provided. Canada made its second report in 1997 (United Nations Office of the High Commissioner for Human Rights, 1997). An interesting note in this regard is that the Convention makes no mention of what should occur if the government's initial report contained information about measures implemented which were subsequently rescinded – in other words, an assumption in the Convention appears to be that implementation of the Convention within countries will occur in a progressive linear fashion. There is also a stated responsibility on the part of the state in Article 44(6) of the Convention to make the report on implementation of the Convention widely available to the public within the country. Being international conventional law, there is some flexibility concerning the implementation of these measures.

An international Committee on the Rights of the Child, made up of elected international experts, was established in 1991 (UNICEF, 2003); however, due to the number of countries who have ratified and provide updates as to implementation of the Convention, this committee is behind in reviewing countries' commitment (UNICEF, 2003). The Convention anticipated ten members of this committee, but there are changes underway to increase the number to eighteen



for more effective monitoring. An important aspect of this international monitoring process is that the focus is on how well governments are implementing the Convention's provisions; in other words, the focus is not on the private sector and individuals (UNICEF, 2003). The general reporting process is as follows:

1. Preparation of the initial report;
2. Pre-sessional working group;
3. Government response to a List of Issues;
4. Plenary session;
5. Follow-up to the concluding observations;
6. Requests for additional information; and
7. Periodic reporting (UNICEF, 2003).

In its first report about Canada's implementation of the Convention into domestic law in 1995, the United Nations Committee on the Rights of the Child found a "lack of progress" (Covell and Howe, p. 102). One particular area of the Committee's observation related to children's participation rights pursuant to Article 12 of the Convention. The resulting request made of Canada was to "provide further information on the measures taken to ensure that the right of the child to express his/ her views and to have those views taken into account..." (United Nations Office of the High Commissioner for Human Rights, 1995a, paragraph 8).

In a 1995 reply, the British Columbia government referred to both the establishment of the then Office of Advocacy for Children, Youth and Families and the guiding principle in the legislation that the child's views should be taken into account (United Nations Office of the High Commissioner for Human Rights, 1995b). In a second report in 1997 for the period January 1993 to December 1997, the response of the Government of British Columbia included

information for the committee about the enactment of the *Child, Family and Community Service Act*, the *Children's Commission Act* (1997) and the *Child, Youth and Family Advocacy Act* (1996). The reference to the *Child, Family and Community Service Act* describes it as "child-centered legislation." As I shall discuss in more depth, the *Children's Commission Act* (1997) and *Child, Youth and Family Advocacy Act* (1996) have now been repealed.

The Canadian Coalition for the Rights of the Child with a head office in Ottawa receives federal government funding and is a coalition of organizations including the Canadian Association of Social Workers and youths concerned with the rights of children in the Convention. The Coalition performs a lead monitoring, educational and communications role concerning Canada's implementation of the Convention. The Coalition points to the federal aspect of Canadian law being a complicating factor in that the federal government bound Canada to the Convention and yet provincial and territorial governments also have spheres of jurisdiction that relate to children (Canadian Coalition for the Rights of the Child, 1997).

An interesting aspect of the Coalition's work is how it is located outside of government. The federal government does very little public reporting with respect to implementation of the Convention nor does the government engage in holistic monitoring at the national level. In 1999, after country-wide consultations, the Canadian Coalition for the Rights of the Child prepared a report entitled, *The UN Convention on the Rights of the Child : How Does Canada Measure Up?* In that report, the Coalition commented on the lack of national standards and fragmentation in child welfare, noting that child welfare services within jurisdictions are uncoordinated and unevenly resourced; for on-reserve Aboriginal children, service delivery is further complicated by jurisdictional ambiguities (Canadian Coalition for the Rights of the Child, 1999).

In May 2002, there was a United Nations Special Session of the General Assembly on

Children to consider the net progress on implementation of the Convention's provisions across the world (Canadian Coalition on the Rights of Children, 2002). Canada participated by way of interdepartmental committee that was made up of members of Department of Foreign Affairs and International Development, Canadian International Development Agency, Health Canada, Status of Women and other federal departments (Canadian Coalition on the Rights of Children, 2002) as well as other individuals from the provinces and non-governmental organizations, including the umbrella organization, Canadian Coalition on the Rights of Children. In its non-governmental organization report to this United National General Assembly Special Session, the Coalition reported the following in regard to the implementation of the Convention in Canada:

1. There is a lack of knowledge about the status and procedures for implementation of and compliance with the Convention;
2. Domestic concerns cloud an awareness or appreciation of international concerns and initiatives;
3. Children and child programs are front line targets during downturns in the economy;
4. There is urgent need for coordinated programming for Aboriginal children;
5. Cooperation among all levels of government is essential for the development of legislation and policy and to the provision of programs for children that are consistent with their rights;
6. It is important that the Convention rights be incorporated into domestic legislation (Canadian Coalition for the Rights of the Child, 2001, p. 38).

Discussing the formal legal status of international conventions in Canada, Hogg (1992) holds that they are enforceable as international law but not in domestic courts of law unless incorporated into federal or provincial law. The legal issue of the extent to which Canada's

international conventional obligations strictly bind provincial legislatures to enact consistent measures in their statutes remains undecided definitively at law. What is clear is that in the interpretation and legal application of domestic laws, if not the enactment, international law is both relevant and influential as in the British Columbia Court of Appeal *Auton* decision and the Supreme Court of Canada *Baker* decision.

The recent British Columbia Court of Appeal decision *Auton v. British Columbia (Attorney General)* (2002) addressed the dual applicability of the Charter and the Convention in the case of children with autism denied state-funded health services particular to their condition. The Court clearly acknowledged in that decision that the Charter does apply to children. Section 15 of the Charter establishes equality rights for Canadians. Section 15(1) states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In her decision, Madam Justice Saunders for the Court of Appeal emphasized that “age” is one of the enumerated items in that section of the Charter, thereby suggesting that section 15 has direct applicability to children. The Court held that the “Convention has moral force relevant on an assessment of whether there is a Charter violation. . . even though it is an international commitment by Canada and the impugned measure is a subject area within provincial constitutional competence” (paragraph 63).

In the case of *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), the Supreme Court of Canada directly addressed the status of the Convention in Canadian law. This case was an appeal from a woman with Canadian-born children who had been ordered deported.

She was seeking an exemption from deportation on humanitarian and compassionate grounds. One of the issues before the Court was whether the immigration authorities were under an obligation to give primary consideration to the children's best interests given the absence in the federal immigration legislation of reference to the Convention. The Convention outlines the paramountcy of children's best interests in states' decisions. The majority of the Court held that the children's interests and rights were central humanitarian and compassionate values in Canadian society. The Court stated that because the Convention has not been implemented by statute, it has no direct application in Canadian law; nevertheless, the values reflected in international human rights conventions inform the context for statutory interpretation and judicial review. Legislatures are presumed to respect the values and principles of international treaties such as the Convention. As such, this international document provides value-based context for statutory law in Canada.

### Chapter Three: British Columbia Child Protection Legislative Scheme

This chapter outlines the historical context and background of the current British Columbia child protection legislation. It also contains an overview of the current provincial child protection legislation, the *Child, Family and Community Service Act* (1996).

#### *Background of the Legislation*

An important part of the history of legal treatment of children in the British common law was the first industrial revolution between the late 1700s and early 1800s during which time children in Britain and the colonies were treated as a type of mini-adult who could provide cheap labour (Denney, 1998). Gradually, wide scale exploitation of children in Europe and the colonies led to a realization for the need to put into place special protections for children. According to Swift (1995), the first time protection of children was legislated in Canada was during settlement years when a number of children were being either orphaned or abandoned. The first Canadian child welfare legislation was the 1779 *Act to Provide for the Education and Support of Orphaned Children* in Upper Canada (Melichercik, 1995). Toward the end of the nineteenth century in Canada, children began to be viewed quite distinctly from adults and as needing special protections (Macintyre, 1993). According to Macintyre (1993), this development coincided with a trend toward urban-based nuclear families, with distinctive mother and father roles, with mothers also being viewed as economically dependent. The first legislation in the province of British Columbia focused on child welfare was the *Infants Act* enacted in 1901; during that time, children's aid societies formed in urban areas to care for orphaned and neglected children. The *Infants Act* was amended in 1934 to provide for prevention, and the provincial Child Welfare Division formed in 1935 to take over care of children from children's aid societies (Gove, 1995).

In the early 1970s, the government established community resource boards which brought

planning and some decision-making to local levels, but this trend came to an end in 1975 with the election of the Social Credit government, a government which advocated centralization as a cost-saving measure (Gove, 1995). Justice Thomas Berger led a Royal Commission on Family and Children's Law in 1973. His ideas, most of which were not implemented by the Social Credit government, included the ambit of legal recognition of children's rights; creation of family advocate lawyers to represent children in court; unified family court; multi-disciplinary child abuse teams; family support services; narrower grounds of apprehension; and voluntary custody agreements (Royal Commission, 1976). Among these specific recommendations which have never since been implemented are:

1. Judges appointed to the provincial and supreme courts (family division) should have special interest and aptitude for cases involving families and children;
2. There be family advocates appointed in each justice region where practicable, to serve the whole province;
3. There are family and juvenile court committees with accountability powers appointed by municipal councils;
4. There should be legislation enacted to include a statement of children's rights.

The Social Credit government introduced the *Family and Child Service Act* in 1981 (Gove 1995), legislation which did not incorporate these recommendations of the Berger Commission.

The current *Child, Family and Community Service Act* was enacted in 1996 under New Democratic Party British Columbia leadership to replace the *Family and Child Service Act*. This legislation came into effect in the aftermath of and in partial response to Judge Gove's 1995 comprehensive review of the state of child protection in British Columbia. At the finality of his review in 1995, Judge Thomas J. Gove produced the Gove Report. The full title of the report is,

*Report of the Gove Inquiry into Child Protection in British Columbia: A Commission of Inquiry into the adequacy of the services, policies and practices of the Ministry of Social Services as they relate to the apparent neglect, abuse and death of Matthew John Vaudreuil.* At the age of 5 years old, Matthew died of asphyxia while in his mother's care. He was the victim of serious abuse including torture before his untimely death. There had been at least sixty reports to the Ministry about his well-being prior to his death, and he had been involved with at least twenty social workers at various times who were part of the then Ministry of Social Services. The overall conclusion of Gove's commission of inquiry was that "serious inadequacies in the ministry's child protection system, and in the provision of child protection services by ministry social workers, contributed to Matthew's suffering and death" (Gove, 1995, Vol. 1, p. 1).

In calling for substantial reform to the child protection services that existed in British Columbia at the time of Matthew John Vaudreuil's death, the Gove Report contains 118 recommendations for change. These recommendations addressed the following thematic areas: how the ministry protects children; death and injury reviews; qualifications of service providers; the legislation; and designing a new child welfare system.

#### *Overview of the Current Legislation*

Fragmentation and a lack of a unified legislative and policy approach characterize children's services and public treatment of children's rights in Canada (Tang et al., 1999; Swift 1995). The variation of services across the country arises from the constitutional federal / provincial division of government areas of jurisdiction. Child welfare is an area of provincial responsibility; therefore, legislative responses vary from province to province. As a partial solution to this issue in British Columbia, the Gove Report (1995) recommended that all child welfare services of the provincial government be brought together into one ministry – the



Ministry of Children and Family Development was formed subsequent to this recommendation no. 106 of the Gove Report (1995).

As stated, the current British Columbia *Child, Family and Community Service Act* was enacted in 1996, the same year as the creation of the new children and families' ministry. The stated legislative attempt at the time was to respond to many of the Gove Report recommendations (British Columbia Ministry of Social Services, 1996). A significant shift in this legislation (versus the predecessor legislation) is the stated focus on the safety and well-being of children as paramount; the prior legislation had focused more on a family-centered approach. Part 1 of the current *Child, Family and Community Service Act* contains the introductory provisions including definitions. Part 2 is about family support services, youth and transitional support services and agreements. Part 3 is the largest part of the legislation; it is divided into seven divisions which outline technical procedures relating to child protection: responding to reports; cooperative planning and dispute resolution; how children are protected; child protection hearings and orders; continuing custody hearings and orders; related orders; and procedure and evidence. Part 4 is about children in care. Part 5 is confidentiality and disclosure of information. Part 6 outlines appeals and reviews. Part 7 relates to administration and the last two parts are miscellaneous and transitional provisions.

Both the Gove Report (1995) and the British Columbia Ombudsman (1998) noted that the enactment of this new Act was important to help bring the child welfare legislation more into line with the Convention. Some but not all of the Gove Report legislative recommendations were included in this new Act. Table 3.1 contains a breakdown of the status of implementation of the Gove Report recommendations in the legislation, identified by the British Columbia Ombudsman in 1998 and still accurate at date of writing.

Table 3.1

*Implementation Status of the Gove Report Recommendations that Relate to the British Columbia Child, Family and Community Service Act.*

[Information included in brackets refers to changes made between 1998 and date of writing. Table continues onto next page]

Gove Report Recommendation	Status of implementation & British Columbia Ombudsman's comments
Recommendation 36: Strengthen the role of the child advocate by clearly stating in legislation the role – that it relates to all children in the province receiving child-related services & authority to appoint legal counsel.	Partly implemented due to establishment of Children's Commission & Office of Child, Youth and Family Advocate [since abolished]. The Ombudsman called for more resources to be provided to these two advocacy offices.
Recommendation 39: Children, parents & caregivers affected by administrative decisions need consistent, accessible complaints process headed by recognized review bodies & persons affected need to be informed of right to review of the process.	Partly implemented due to wording of Section 70 which provides information about and assistance with contacting Child, Youth and Family Advocate [since abolished]. The Ombudsman recommended development of a public plan to explain how children in care could access independent advocacy.
Recommendation 68: Rephrase wording of section 2 to state that safety & well-being of child shall be paramount considerations.	Fully implemented.
Recommendation 69: The Act should be amended to state the right of children to early determination of decisions relating to them is paramount and the onus is on any other party to show its interests should take priority over the child's.	Not implemented.
Recommendation 70: initial temporary care order for children under 5 years should last up to 6 months.	Not implemented.
Recommendation 72: The Act should provide that director can bring case to court by way of summons.	Fully implemented.
Recommendation 74: there should be notice and consultation rights for any child capable of forming views & to allow a child to make access application to parent or foster child.	Not implemented. Committed & work in progress.
Recommendation 73: should be made clear director can in limited circumstances, retain control of child's care while leaving child in the home.	Fully implemented.
Recommendation 75: The Act should provide that children & youth capable of forming own views be informed of important administrative & judicial process affecting them & be given the opportunity to express their views. It should include right to attend court & other proceedings affecting them.	Not implemented – the statutory provisions fall short of Article 12 of the <i>Convention on the Rights of the Child</i>
Recommendation 76: there should be appeals from Provincial Court directly to the Court of Appeal.	Not implemented – Ombudsman disagrees with this recommendation.
Recommendations 77(a) & (b): Define aboriginal ancestry so the ministry will know who to notify & recommendation & the issue of aboriginal ancestry should be canvassed early in proceeding for purpose of certainty around notice to Aboriginal community.	Not implemented – this term <i>aboriginal ancestry</i> is vague and uncertain.
Recommendation 79: The circumstances of emotional	Not implemented.

harm as ground of protection should be amended to include likely to be harmed by parents' conduct.	
Recommendation 80: Section 16 of the Act should require an initial investigation of child's need for protection in response to initial report.	Not implemented – the Director need only assess information received.
Recommendation 81: The director should be required to make reasonable efforts to report results of initial & subsequent investigations to parent, reporting person and other involved bodies.	Fully implemented.
Recommendation 82: There should be new section to allow for third party applications for child to be removed.	Not implemented.
Recommendation 83: The threshold belief a director must form before obtaining an order for access to an endangered child should be eliminated.	Not implemented – viewed by the Ombudsman as unnecessary.
Recommendation 84: The Act should provide that director can seek court order to produce information necessary for director's investigation.	Not implemented.
Recommendation 85: the use of family conference should be discretionary on the part of the director.	Fully implemented.
Recommendation 86: time limits around family conferences should be removed & criteria for decision to refer to family conference should be when child's safety has been ensured & family could benefit from family support services or other child welfare services.	Not implemented.
Recommendation 88: Caregivers including foster parents who have custody for 6 months or longer should receive minimum 72 hours notice before custody transferred.	Not implemented in the legislation – occurs by policy or agreement.
Recommendation 89: the 30 day time limit on when the director can apply for continuing custody should be replaced with 60 days at least.	Fully implemented.
Recommendation 91: Court review of director's decision to withdraw should be legitimized by director filing report or allowing court to question withdrawal of a case.	Not implemented.

Source : Ombudsman British Columbia (1998). *Public report no. 36. Getting there : A review of the implementation of the report of the Gove inquiry into child protection.* Victoria : Ombudsman British Columbia.

Therefore, the British Columbia Ombudsman's (1998) findings about implementation of the Gove recommendations are mixed. It is interesting to note that many of the recommendations that directly address children's specific human rights have not been implemented by the provincial government, in particular, concerning children's right to participate in decisions affecting their lives. This continuing gap in implementation has significant implications for the status of children's rights in the province.

The Gove Report (1995) went beyond the scope of the legislation and contained comments on the entirety of the British Columbia child protection scheme. In addition, the Gove Report includes specific recommendations calling for the establishment of both a provincial child advocate and a children's commission. The New Democratic government of the time implemented these measures; however, under the current British Columbia Liberal government, both offices have been abolished and replaced with the Office of Children and Youth with a much narrower mandate than what the Gove Report recommendations called for in terms of child advocacy measures. These recommendations were intended to dovetail with and complement an improved complaints process relating to the Ministry's administrative decisions.

The current provincial Liberal government's policy statement (British Columbia, 2002) is to decentralize the administration of child welfare services including child protection throughout the province. This process will involve designation of regional boards and specific Aboriginal agencies to administer child protection services. The *Community Services Interim Authorities Act*, Bill 65 - 2002, reached third reading on October 29, 2002, in the Provincial Legislature. The devolution of services has not occurred yet as of date of writing. The fiscal arrangements for this devolution of services have not yet been finalized.

## Chapter Four: Central Concepts in the British Columbia Child Protection Legislation within the Context of Human Rights

Various provincial Acts in British Columbia pertain to aspects of child welfare, but to date of writing, no one Act addresses “child welfare” as a holistic concept within the province. As stated, the *Child, Family and Community Service Act* is the piece of legislation that governs child protection services in the province of British Columbia. This law sets out the provincial government’s responsibility for administering defined child welfare services including child protection and sets the parameters under which this particular area of service delivery transpires. This chapter outlines the central legal concepts in the British Columbia child protection legislation and the relationship of these concepts to children’s rights.

### *Parens Patriae*

Although the *Child, Family and Community Service Act* does not expressly include the term *parens patriae*, it is a defining aspect of this legislation; the Act has roots in this historical legal notion. *Parens patriae*, or “the state as parent,” arises out of the common law (judge-made law) with a history dating back to the law courts of England. As such, it is a legal concept with an entirely different legal history than individualistic-based human rights. This term is central to and gives justification for any Canadian or provincial statute that relates to children or any other individuals with what is considered to be a legal handicap. It is a concept heavy with paternalistic overtones.

In the case of *E. (Mrs.) v. Eve* (1986), the Supreme Court of Canada specifically examined the history of the *parens patriae* doctrine in Canada. The concept’s origins are, according to the Court (quoting from H. Theobald, *The Law Relating to Lunacy* 1924), “lost in the mists of antiquity” but it is most probable that this legal principle gained substance during

feudal times in England. The Supreme Court of Court cited the British case of *Wellesley v. Duke of Beaufort* (1827), and the following quote of Lord Eldon, then Lord Chancellor, for that Court:

it belongs to the King as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them" (p. 243).

What is interesting in the wording of this case is a presumed understanding of the notion of "care;" there is in this case dating back to the early 1800s the basis of contemporary legal discourse around that matter.

In a more recent British case cited by and relied on by the Supreme Court of Canada, *Re X (a minor)* (1975), Justice Latey discussed the wide breadth of the *parens patriae* doctrine:

the powers of the court in this particular jurisdiction have always been described as being of the widest nature. That the courts are available to protect children from injury whenever they properly can is no modern development.

On appeal from this same case, the British Court of Appeal did not dispute this description of *parens patriae* but only added the idea that there should be incorporated some limitations to its scope. In the words of Sir John Pennycuick as quoted by the Supreme Court of Canada in *E. (Mrs.) v. Eve* (1986):

...the courts, when exercising the parental power of the Crown, have, at any rate in legal theory, an unrestricted jurisdiction to do whatever is considered necessary for the welfare of a ward. It is, however, obvious that far-reaching limitations in principle on the exercise of this jurisdiction must exist. The jurisdiction is habitually exercised within those limitations. . . .Latey J's statement of the law is I think correct, but he does not lay

sufficient emphasis on the limitations with which the courts should exercise this jurisdiction.

In the Supreme Court of Canada decision, *Winnipeg Child & Family Services v. W. (K.L.)* (2000), Madame Justice Arbour in dissent commented that although the *parens patriae* tradition provides government child welfare agencies jurisdiction over children to protect them from harm, this power must be balanced in a democratic society, with “ensuring that state actors cannot remove children from their parents’ care without legal grounds” (p. 139).

*Parens patriae* jurisdiction lies with both the Crown and the superior courts. The Crown in Canada takes the form of federal and provincial levels of government. According to Hogg (1992), the *British North America Act, 1867*, the basis for the Canadian Constitution, provides for general executive authority in Canada to vest with the Queen (the Queen of England) with specific powers granted to the Governor General. Therefore, the Canadian voted Members of Parliament and of the provincial legislatures technically have an advisory role for the Crown. The legislative arm of government comprises the Crown (as represented by the Governor General federally and the Lieutenant Governor provincially) in council with the elected ministers. Only this branch of the Crown can make laws (statutes and regulations) in Canada. The executive, that is the government bureaucracy, is also a part of the Crown, responsible for administration of the Crown’s responsibilities pursuant to the legislative body’s delegation. According to the doctrine of “parliamentary sovereignty” under which Parliament and the provincial legislatures act, there is no limit on the powers that can be delegated to the executive branches (Jones & Villars, 1994).

The *parens patriae* jurisdiction not only vests in both branches of government but also rests with the Supreme Court judiciary. Section 96 of the Canadian Constitution establishes that the Governor General of Canada appoints judges of the provinces’ superior courts (in British

Columbia, the British Columbia Supreme Court and British Columbia Court of Appeal). As provincial courts assume their jurisdiction from provincial statute, they do not inherently possess *parens patriae* jurisdiction; however, much provincial legislation including the *Child, Family and Community Service Act* are informed by this doctrine.

Canadian courts have established that the extent to which children's views are considered in the realm of family law is dependent on their level of capacity. The determination of capacity is an entirely discretionary matter and hinges on judicial discretion on a case-by-case basis; therefore, it is a matter far from being definitively determined by the courts. In the case of *Alexander v. Alexander* (1988), Mr. Justice Locke for the British Columbia Court of Appeal stated, "What the child wishes is not necessarily best for the child, but there does come a point when at near adult years a child capable of responsible thought must now be deemed to be able to settle his own future in this important matter [i.e. custody with one parent or another]." In other words, the courts have discretion to determine that the best interests of the child lie completely elsewhere from the views of the child. In the case of *Dove v. Dove* (2002), Justice Edwards of the British Columbia Supreme Court summarized the state of the law concerning young children's input into custody and access decisions:

The preference of a child of nine may be given some weight but it is not determinative. It is a matter of discretion as to whether the court takes the views of any child into account.

The court is not bound by the preference of a child where it appears the best interest of the child lies in granting custody elsewhere (paragraph 42).

In terms of Fraser's (1989) discussion of the discursive resources in western society leading to domination and subordination, the law and legal tradition are centrally recognized idioms in our society for pressing claims, and such claims must fit within this existing framework



and connect to recognized legal language if even awkwardly. Such appears to be the case with emerging children's rights and their treatment within the legal landscape influenced by *parens patriae* and the dependent position of children in society. "Rights" language by Fraser's (1989) understanding, is a particular vocabulary, and the notion of competing rights is a "paradigm of argument" as described by Fraser (1989, p. 164), but so too is state "protection" of children and the legal doctrine of *parens patriae*. Here in exists a profound tension. Law narratively constructs individuals' placement in society and as such, positions individuals and groups of individuals in relation to each other. In this regard, children have historically assumed a paradoxical role of not only legal insignificance on the personal level - the issue of limited capacity rendering them less than full persons before the law - but also worthiness to receive the fullest paternalistic protection afforded by the law.

### *Protection*

Section 2 of the British Columbia *Child, Family and Community Service Act* states that, "children are entitled to be protected [emphasis added] from abuse, neglect and harm." The concept of protection is another term not defined in this piece of legislation, but from the wording of the provisions of the Act, underlying assumptions about the meaning of the word become apparent.

Consistent with the doctrine of *parens patriae*, "protection" in the context of this legislation assumes state-administered protection as an opposed to family care of the child. Section 13 of the Act is subtitled "When protection is needed," and the wording sets out that protection is akin to the state taking over from the parent/s when a delegate of the Director (a child protection social worker) believes there is a shortcoming on the part of the parent/s:

A child needs protection in the following circumstances:

- (a) if the child has been, or is likely to be, physically harmed by the child's parent;
- (b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;
- (c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable [emphasis added] to protect the child;
- (d) if the child has been, or is likely to be, physically harmed because of neglect [emphasis added] by the child's parent;
- (e) if the child is emotionally harmed by the parent's conduct;
- (f) if the child is deprived of necessary health care;
- (g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment;
- (h) if the child's parent is unable [emphasis added] or unwilling to care for the child and has not made adequate provision for the child's care [emphasis added]. . .

This section does not set up a cooperative role of the state with the parent or parents in these circumstances, but rather, presupposes an adversarial context. The underlined words refer to situations where for whatever reason, the Director or delegates may believe protection is needed merely because a parent lacks resources or capacity needed to adequately provide for a child. In such discretionary cases, the Act provides for this state-administered and decided version of protection to come into effect. This wording has definite implications for single mothers in particular, who tend to head lower income families and who also make up a larger proportion of protection investigation "clients" (Swift, 1995).

As outlined previously, the British Columbia government reports that over fifty percent of

children taken into care come from single parent families and approximately sixty-five to seventy percent are from families on income assistance (British Columbia Ministry of Children and Family Development, 2002). In addition, “many” of these children have fragile medical concerns and special needs (British Columbia Ministry of Children and Family Development, 2002). The implication is that children from lower income brackets, particularly those requiring services their parents may not be able to afford, appear to be more susceptible to protection proceedings. The underlying assumption of this legislative provision therefore, is that the state is better situated to provide “protection” than a parent or caregiver is in the circumstances enumerated in the Act. This assumption proves interesting and arguably inconsistent with other areas of family law in which the law emphasizes the paramountcy of parental nurturing and parental responsibility to address the child’s well-being and best interests.

The inherent tension between the legislative concept of “protection” and parental or caregiver nurture also shows up in case law. Canadian courts have interpreted the notion of “protection” in a way that is consistent with the state intrusion meaning of the word outlined in the British Columbia legislation. In the Supreme Court of Canada decision, *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)* (2000), although Madame Justice Arbour in dissent acknowledged the importance of family in a child’s life, she clearly differentiated the notion of protection: “In my view, not only should the Court recognize the child’s interest in being protected from harm [emphasis added], but we must also recognize the interest of a child in being nurtured and brought up by his or her parent” (p. 138). While the Court emphasized the importance of nurture, Justice Arbour also distinguished the word “protection” from parental nurture. In another Supreme Court of Canada decision, *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)* (1997), the Court held, “child protection involves state

intervention [emphasis added] in complex and interdependent relationships. These family situations often lack clear heroes or villains” (paragraph 5). Although these court decisions reflect the legislative distinction between “protection” and parental or caregiver nurture, they also hint at the wording of the Convention more than does the current wording of the British Columbia child protection legislation. These judicial pronouncements do not preclude a supportive role of government to caregivers in bringing about enhanced protection of children. Of course, the courts only go so far in this regard. Their role is not to create social policy but only to comment on existing government legislative approaches and to determine whether they comply with established Canadian law.

Absent from the British Columbia legislative wording is a notion of an “ethic of care” (Gilligan, 1982). According to Moore (1999), this ethic rests on “an alternative moral outlook distinct from the impartial perspective. [T]he central preoccupation of a morality of care. . . is responsiveness to others, exemplified by concern to provide care, prevent harm, and maintain relationships with others” (p. 2). The legislation also lacks a more comprehensive definition of protection. “Protection” as legislatively constructed, has more to do with the superiority of state-administered care for children than caregiver or parental nurturing. This same assumption further implies that the statutory list of potential shortcomings in the care of a child do not attach to the state or state-administered versions of care. In other words, there is no provision in the legislation providing for “protection” of children from child protection. This gap proves intriguing when taken together with other gaps in the legislation that I will discuss.

The wording of this section also contrasts in some interesting ways with the use of the word “protective” in Article 19(2) of the Convention. That article states, “Protective measures should, as appropriate, include effective procedures for the establishment of social programmes

to provide necessary support [emphasis added] for the child and for those who have the care of the child.” In other words, the Convention envisions a different conceptualization of “protection” than how this term is presented in the *Child, Family and Community Service Act* with the Convention’s focus on “support.” Although there is provision for family supports to be provided to families on the discretion of the Director under the British Columbia legislation, none of these “support” clauses specifically describe family supports by the government as a viable means of protection.

In response to Canadian child welfare public policy trends, Pulkingham and Ternowetsky (1997) argue, “protection is actually performed by women in the private sphere of the family . . . mothers are not written into the protection mandate explicitly. . . State intervention in the guise of ‘relief for the family’ typically involves little respite for mothers who are given minimal material and other supports in taking on this role for the state” (p. 27). The legislation constructs child protection as a runaway need in that it has fled the domestic realm and entered the “social arena,” leading to “noncoincidence with the family” (Fraser, 1989, p. 109); therefore, in terms of the wording of the Convention and critical consideration, the legislated definition of protection is lacking.

### *Safety and Well-Being*

The guiding principles of the *Child, Family and Community Service Act* are set out in Section 2. The first part of the section refers to the “safety” and “well-being” of children being paramount considerations. The inclusion of these concepts in the legislation followed recommendation no. 68 in the Gove Report (1995) which called for such rewording. Neither term is specifically defined in this legislation but both track the wording contained in the Convention. Article 3(2) of the Convention includes the word “well-being,” undefined, and

Article 3(3) mentions the child's safety as being a concern in the provision of State services.

Section 2 of the *Child, Family and Community Service Act* also outlines that, "the family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents." This aspect of the legislation explicitly places an onus on the family to be the primary caregiver for the child and interestingly, there is here no corresponding mention of familial rights. Such wording contrasts with the wording included in the Convention. Article 3(2) of the Convention states, "State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents." Whereas previous British Columbia legislation had more of a familial context (Gove, 1995), the current British Columbia child protection legislation does not so clearly identify that parents have definite rights in relation to parenting their children. The Gove Report (1995) called for a clear statement to be included in the legislation that would put children first; this report did not go as far as to examine more holistic aspects of child welfare. The focus of the Gove Report (1995) was a more formal legalistic understanding of children's rights as distinct from parents'. Canadian courts' consideration of the matter elaborates further on parental rights; however, in the child protection context, the courts have not yet outrightly tied parental rights to children's well-being, as provided for in the Convention.

In one Supreme Court of Canada decision however, the Court identified parental interest in raising a child as a right of fundamental importance worthy of Charter protection. In the case of *New Brunswick (Ministry of Health and Community Services) v. G. (J.)* (1999), three of seven judges of the Supreme Court of Canada held that the right set out in Section 7 of the Canadian *Charter of Rights and Freedoms* extends to psychological integrity, and they found an

infringement of this right in the context of a child protection proceedings on the part of the parent. The *Charter of Rights and Freedoms* is part of the Canadian Constitution and Section 7 of the Charter establishes the following constitutional right:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In the *New Brunswick* decision, Chief Justice Lamer stated:

State removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B.(R.)*, [1995] 1 S.C.R. 315 at paragraph 83, an individual interest of fundamental importance in our society.

Interestingly, the Supreme Court of Canada here focused on the parent's right rather than the apprehended child's; furthermore, there is no mention that the child's well-being attaches primarily to parental care. In taking this approach of describing parental rights as a type of stand-alone right, the Court provides the context for a competitive notion of rights to prevail within the child protection context, that is, parent versus child. Although the Court's focus is not on the child's rights, Bala (2000) observes that this case dramatically changes judicial approach to family law with the consideration of constitutionally-based rights for parents. This judicial approach has two-fold potential implications: on the one hand, it could further develop to encompass children's rights in the future; on the other hand, a focus on separate and distinctive parental rights invites continued emphasis on legalistic measures such as rigid timeframes, complex processes and emphasis on law courts as the most appropriate arbiter in cases involving children.

In an earlier case, the Supreme Court of Canada had hinted at extending the section 7 *Charter* constitutional right in a child protection context to the child too; however, it was not a decisive statement. The case was *B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1995). The facts of this case involved the parent's refusal to consent to a blood transfusion for their child. Four of the nine Supreme Court of Canada justices confirmed parental rights including the right to nurture the child, care for its development and make decisions regarding fundamental matters such as medical care. The State should only be permitted to interfere in that realm when parents' conduct falls below a socially acceptable threshold. Justices Iacobucci, Cory and Major acknowledged that parents have a right to nurture a child, care for his or her development and make decisions about fundamental matters; however, these parental rights cannot override children's rights to life and security of person. In the *B.(R.)* case however, the Court's analysis of children's rights according to Bala (2000) could potentially mean that designates of the State could use children's rights as a way to limit parents' rights. The child, deemed incapable at law of articulating a sound view on what his or her rights should be, would be excluded from participating in decisions about his or her life. Absent then from the Court's consideration of parents' and children's potentially contradictory rights is an examination of whether the State's perspective will always accord with the child's rights and if there is a question in that regard, what then is the child's recourse? The Court makes the assumption in this case that a child subject to protection proceedings orchestrated by the State will have no rights concerns vis-à-vis the State. In addition, to date, the law conceives rights as a type of either / or proposition, reflecting the historic treatment of rights in the legal system. Rights according to this perspective then, become a matter of black and white, in essence, legally pitting parent against child.



### *Best Interests of the Child*

Howe (2002) suggests that with the ratification of the Convention, public policy across Canada moved away from “centering on the family to one centering on the best interests of the child” (p. 370) and nowhere was this clearer than in British Columbia. Running through the British Columbia law relating to children including the *Child, Family and Community Service Act* is this cornerstone concept; it is another concept central to the law relating to children in Canada. It is dually influenced by *parens patriae* and emerging child rights discourse. Section 4(1) of the *Child, Family and Community Service Act* states,

Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child’s best interests, including for example:

- a) the child’s safety;
- b) the child’s physical and emotional needs and level of development;
- c) the importance of continuity in the child’s care;
- d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
- e) the child’s cultural, linguistic and religious heritage;
- f) the child’s views;
- g) the effect on the child if there is delay in making a decision.

Taken one step further, this best interests provision in the British Columbia *Child, Family and Community Service Act* is only as strong as corresponding provisions and measures that address implementation and enforcement. What is lacking from the British Columbia legislation is a provision that would assure how the child’s views in this context will be advanced and considered. In addition, all parts of this stated best interests test are discretionary, meaning that

at first instance, the arbiter of what best interests means in a given situation is the MCFD Director and delegates (the social workers) and at the second level, the courts. A great deal of discretion therefore rests with a provincial court judge to determine best interests of the child in child protection matters. Child protection determinations fall within the jurisdiction of the provincial court.

On its face, the provincial child protection legislation is consistent with the Convention in regard to the inclusion of the best interests principle. The Act goes one step further in terms of specificity. What the Act does that the Convention does not, is to provide some parameters around what the “best interests” concept means. Article 3(1) of the Convention provides, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests [emphasis added] of the child shall be a primary consideration.” Further, Article 9(1) establishes a child shall only be separated from parents “when competent authorities subject to judicial review determine. . . that such separation is necessary for the best interests of the child.”

Parker (1994) identifies that the concept of best interests in and of itself, is a subjective matter: “the likelihood of any single meaning being adopted by a decision-maker, can depend in large part on localized understandings or conventions” (p. 39). Similarly, Alston’s (1994) view is that the concept of “best interests” needs to maintain such an element of indeterminacy (p. 18); this writer points out how its inclusion in the Convention is subject to criticism for this very reason (p. 18). In 1975, Mnookin critiqued the “best interests” principle for being indeterminate and commented that there is no consensus on identifying the values that inform the concept; according to Mnookin (1975), the resulting problem of this indeterminacy is that it is more difficult to pinpoint allocation of responsibility between family and State for children’s best

interests. Notwithstanding this uncertainty, the evolving common law indicates that in the Canadian courts too, the “best interests of the child” is increasingly understood as an articulation of children’s rights.

In Canadian law, the “best interests” principle has broad applicability in any law pertaining to children. For instance, in family custody and access court disputes, whether or not the state is involved, judicial determination regarding children’s situations within family contexts will hinge on what is determined to be in their best interest. In the Supreme Court of Canada decision *Gordon v. Goertz* (1996) for instance, the Court held that in assessing custody and access arrangements, the focus will be on the child’s interests and not the parents’ interests and rights. The Court specifically considered the “best interests” test. They referred to this test as being “indeterminate” and a type of “legal aspiration” rather than strict “legal analysis” (p. 192). The court cautioned that the essence of “best interests” requires an element of indeterminacy because any other more definitive and precise approach to assessing the situation of a child would run the risk of seconding the child’s interests to concerns such as certainty and expediency. According to Canada’s highest court then, the multitude of factors relating to a child’s situation requires an element of indeterminacy. With such indeterminacy, comes a broad scope for judicial discretion on an individual case-by-case basis to determine what is, on the particular facts at hand, in the child’s best interests.

Boyd (2000) critiques the *Gordon* decision as opening the door to potentially “contradictory” and “problematic” judicial understanding of best interests (p. 175). Canada’s highest court’s acceptance of a central role for judicial discretion on a case-by-case basis suggests a view of the “best interests” concept that is reflective of the *parens patriae* inspired role of the court to assume a quasi-parental role as considered necessary. The discussed wording of Section

4(1) of the *Child, Family and Community Service Act* could be open to comparable “state” discretion, both on the part of the director and delegates operating under the legislation and on the part of the courts. For instance, the “child’s physical and emotional needs” is a concept providing for a certain amount of discretion : who precisely determines what a child needs and on what basis? Similarly, the “quality” of a child’s relationships is also very much open to subjective determination. What exactly constitutes quality and who will determine that is not set out. Therefore, a great deal of subjectivity and room for interpretation attaches to the concept of “best interests” at both the British Columbia legislative and judicial levels of the law. In these ways, through both legislative wording and judicial discretion, the “best interests” standard raises questions about how the doctrine of *parens patriae* will inform child rights discourse in Canadian law into the future.

In the prior case of *Young v. Young* (1993), the Supreme Court of Canada had also emphasized the centrality of the “best interests of the child” in custody determinations. Justice L’Heureux-Dubé specifically focused on the children’s rights within the family context as inherent in the best interests standard when she held as follows:

The power of a custodial parent is not a ‘right’ with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child’s best interests. The duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being (p. 6).

An interesting aspect of this judgment is how it seems to pit the child’s rights or best interest against the parent’s rights. Young (2001) suggests that this case was driven “less by the interests

of the child and more by the notion of parental rights that in effect require dividing the child equally” (pp. 770-771), and to settle the parents’ competing rights as against each other, the Court gave paramountcy to the child’s right to effective parental care.

Young (2001) maintains that in Canadian jurisprudence, one can find a developing tradition of a rights culture within the realm of family law. Interestingly, this notion of the child’s rights in the context of family has not yet been so forcefully articulated by the courts in the realm of child welfare, specifically in cases involving child protection and apprehension of the child from the family setting. To date it appears that judicial discourse concerning child protection matters regardless of the stated best interests principle in the legislation, is still more consistent with more paternalistic elements of the law that have grown out of the common law.

In describing the best interests test as one of two possible approaches to human rights public policy approach, Brennan and Noggle (1997) caution that there are two limitations to the concept. The first, they suggest, is that in interpreting the term, judges must have and apply a standard of well-being, an approach which does not necessarily put children’s rights *per se* first. Secondly, they suggest the “maximizing nature” of the best interests test can potentially lead to more intervention in family life whether or not that intervention is consistent with children’s rights. In other words, even perceived small gains for children could lead to increased state involvement in their lives. On the other hand, according to this view, it is problematic to treat parental rights as property rights such as is the situation in a policy directed at keeping families together at all costs. Brennan and Noggle (1997) instead suggest a middle ground approach which would treat parental rights as a type of “stewardship” rights in regard to their children’s lives, limited only by the children’s rights. This latter approach has merit due to its acknowledgement of children’s rights as central and parental rights as supportive and very much

related to and interdependent with children's rights.

The significance of the "best interests of the child" statement in the Convention is subject to much discussion in the literature on point. Wolf (1992) posits that because the term is in the Convention, it inherently relates to children's human rights as is the approach taken by Canadian courts (pp. 126, 128). He suggests that the Convention's wording opens up a new conceptual understanding of children's rights which was previously not supportable in international law more focused on special protection for children. Wolfson (1992) views this provision in the Convention as "an attempt to articulate and enumerate the practical implications of the [best interests of the child] standard" (p. 7).

Wolfson's (1992) view is characteristic of the interest-based position which holds that rights represent a means of advancing one's interests; therefore, only a being with interests can hold rights. According to such an interpretation, the articulation of children's rights very much parallels discourse on adults' human rights. These ideas suggest that "best interests of the child" in the Convention is a statement of children's rights. As stated, the *Child, Family and Community Service Act* goes no further than Section 4 in defining what best interests will be taken to mean in the British Columbia child protection context. If "best interests" is indeed a paramount statement of children's rights as suggested by the literature and the development of judicial pronouncement in Canadian family law, it should then be taken as a term that meaningfully reflects the entirety of children's rights outlined in the Convention. Missing from the Act are legislated supports that would address best interests in terms of the partnership, provision and promotion rights of children set out in the Convention. As I will discuss, the Convention's participation rights are weakly addressed in the British Columbia "best interests" statement and support mechanisms. Finally, protection rights for children as set out in the

Convention are defined narrowly in the British Columbia legislation.

### *The Child's Family*

Krane (1997) suggests that throughout Canada, there is currently a shift away from a general concern for the social welfare of children to a narrower emphasis of resource expenditure on investigating allegations of abuse and neglect. Although Moroney (1991) looked at American trends, his observations can be applied to the British Columbia context. He holds that whereas former paradigms of social welfare policy were more proactive and premised on the notion of universality, current global trends see a move toward residual social policy. He suggests that on its face, contemporary child welfare policy in the family context generally tends to have two stated focuses: one being to provide strengthening supports to family; and the second being to develop appropriate alternatives to the family where there is a perceived family breakdown. One of these focuses may prevail over the other.

Due to the combination of the residual approach and a pervasive western cultural notion that the family is a private entity, the focus of child welfare policy in the family realm tends to be on “intervention in family life only when necessary . . . the more appropriate role for the state is to become involved only when there is clear evidence of family breakdown” (Moroney, 1991, p. 141). Similarly, McInnis-Dittrich (1994) contends that the “social welfare system is based on the assumption that the family and the marketplace should be expected to meet our individual needs before we expect help from others or from the government” (p. 7). Such residual focus rests on an assumption that in a normal course of events, a family is an independent entity. This trend provides an interesting contrast with the potentially broad scope of “protection” measures and discretion envisioned by the British Columbia legislation when the family, the presumed cornerstone unit of society, is viewed as having broken down. Another challenge to this

underlying assumption of the residual approach about familial independence is the increasing number of children who have been taken into care in British Columbia in recent years.

Also lacking from the residual social policy approach is a failure to go beyond conceiving family as an uncomplicated social entity. Such residually based social policy fails to address family dynamics including possible internal power differentials and abuses of power that may exist within a given family unit. The wording of the British Columbia child protection legislation does not at all distinguish between the roles or positions of the parents nor have regard for extended family. An exception is a recently enacted clause in the legislation, Section 54.1, which provides that the Director or delegate can make application to have a child in care permanently placed with someone other than parents. The discretion here rests with the Director or delegate to determine whether involvement of the extended family is appropriate. Article 5 of the Convention states, “State Parties shall respect the responsibilities, rights and duties of parents, or, where applicable the members of the extended family or community as provided for by local custom.” Although this legislation contains specific provision for regard and involvement of an Aboriginal child’s community in a child protection proceeding, there is no corresponding provision relating to children of other cultural backgrounds whose extended families may also be important people in their lives.

The Act’s equal treatment of both parents is consistent with Article 18 of the Convention that recognizes, “the principle that both parents have common responsibilities for the upbringing and development of the child.” An assumption therefore of both the provincial Act and the Convention is that the child will be part of a nuclear family and that both parents each have comparable relationships with the child; however, the number of single parent residences in Canada is steadily increasing, from 953,640 in 1991 to 1,137,510 in 1996 (Statistics Canada,



1996) to 1,311,190 in 2001 (Statistics Canada, 2001). Pulkingham and Ternowetsky (1997) observe that “children from lone parent families have a much greater chance of being raised in poverty” (p. 18). According to Swift (1995), the subjects of child protection investigations across Canada, especially neglect cases, are most frequently single mothers and their children. This observation is consistent with the reported MCFD statistics indicating that just over thirty per cent of protection investigations relate to suspected neglect and over forty five per cent are categorized as “multiple types,” a term that is not further defined by the provincial government (British Columbia Ministry of Children and Family Development, 2003a).

The *Child, Family and Community Service Act* nowhere refers to nor is there provision to account specifically for violence or abuse by one parent against the other parent. A history of abuse on the part of the other parent with whom the children are not currently living may or may not be held to be relevant in the child protection court proceeding, particularly if that history is against the other parent and not directly against the child and the parents are now living separately. There is no provision in this or any other legislation to provide that additional emotional supports will be provided as the protection investigation proceeds, to a parent who may have been in receipt of such abusive conduct by the other parent. Callahan (1993a) describes how in earlier decades with the emergence of feminism, activist women “addressed family violence by establishing alternate social service organizations” and consequently, “activist women and their reforms have had little influence on child welfare services” (p. 173). The two areas – violence in relationships and child protection – are very much separated out from each other in the social policy approach of the current provincial government. In addition, the relative economic circumstances of the two separated parents may be viewed as a significant factor in a child protection proceeding in terms of deciding which parent is in the better financial position to

provide for the child or children. Due to the wording of Section 13 of the legislation, the provision that sets out the child's need for protection, "inability to provide for the child," which could potentially be interpreted as financial inability, could provide the basis for an apprehension and relocation of a child to the wealthier parent or other wealthier family member.

This phenomenon overlaps with current cutbacks to family legal aid coverage in the province of British Columbia. The current legal aid system in British Columbia is increasingly less than adequate to deal with overarching patterns of social inequity that may exist between two parents. In a report into the state of legal aid conducted for the Law Society of British Columbia, Trerise (2000) observed,

most of the parents coming before the court to deal with child protection matters are women. . . . often the parent does not get legal advice at the earliest stage of the proceeding, which is the Presentation Hearing. . . .the Presentation Hearing must be convened within a few days of a child being apprehended, which means that it often happens before the parent has applied for legal aid (p. 34).

She further stated:

[there are] numerous observations about the number of unrepresented people in court. . . . Some lawyers have suggested that women are less equipped than men to appear in court unrepresented for a number of reasons. . . far more women than men are refused by legal aid. This may support the concern expressed by several lawyers that women are more intimidated by the court process and simply will not participate in it without the support of counsel. Several interviewees believe that, because of this dynamic, women are staying in or returning to bad relationships because they cannot leave without the support of the legal system. Others are leaving but slipping into poverty because they do not

advance their claims for legal rights (p. 35).

With respect to Trerise's latter comment, recent cutbacks to the legal aid tariff have made it very difficult for poorer people to get into court and advance family law claims, particularly if there are property division matters outstanding over which only the supreme courts and not the provincial courts have jurisdiction. Other than child protection matters, the only persons who qualify for family legal aid coverage are those persons who are advancing an allegation of violence (British Columbia Legal Services Society, 1999). The implication of this policy is that people may feel they need to file child protection complaints against the other parent in order to qualify for legal aid coverage. Here then is an example of male-centeredness of the law at the level of design of the legal system (McKinnon, 1989).

The number of hours allowed under the child protection legal aid tariff (British Columbia Legal Services Society, 1999) is also limited so that at times, there may be insufficient funding available to a legal aid lawyer to adequately prepare and present a complete case on behalf of the client or to see the matter through to trial due to the capped number of hours available which may only provide a lawyer with sufficient funds to act as far as interim proceedings. A capped number of hours attach to the lawyer's various functions in addressing the steps set out in the *Child, Family and Community Service Act* on behalf of a parent client. Trerise (2000) outlines that,

Because of the new models of service in the practice of child protection, the Ministry now produces reams of documents that counsel must review, and trials tend to be much longer. . . lawyers are not given prep time to the level that this work now demands, and there is no mechanism to apply for additional hours (p. 34).

The child protection legal aid tariff does however provide more coverage than the general family

legal aid tariff currently does.

These patterns in the legal system underscore how access to justice currently parallels one's advantaged or disadvantaged position in society and how Fraser's (1989) view of "patterns of domination and subordination" in society get reflected in the legal system. The current Liberal government has instituted further cutbacks including closures of courthouses in small towns and further clawing back of legal aid availability. Without access to justice and means to enforce rights as stated in the laws, rights become no more than stated ideals and lose their tangibility in Canadian society. Without realistic means to enforce their rights when threatened, the vulnerable members of society do not have concrete rights. These trends can have significant impact on the lives and rights of children in the families affected.

#### *Due Process*

Some critics like Bala (1991) comment on how the Canadian *Charter of Rights and Freedoms* has influenced current child welfare practice in that the focus of the law tends to be on formal due process entitlements for the parents, whether or not such due process can be exercised in reality as anticipated in the wording of the legislation, due to financial and other constraints. In terms of specific due process provisions, Bala (1991) outlines how "parents whose children are apprehended from their care are entitled to a judicial hearing within a reasonable time . . . [and further, the Charter also] restrict[s] the authority of child protection workers to apprehend children without prior judicial authorization" (p. 5). Bala (1991) however does acknowledge that delays still continue to occur in the courts (p. 5). Ironically, Blishen (1991) discusses how legally formalizing Canadian child protection legislation "increasingly mirror[s] society's focus on protection of individual civil rights" (p. 195) as reflected in the Charter. According to Blishen (1991), this focus leads to a more court-based adversarial approach to child protection.

The court process sets out in the legislation that the Director or delegate must apply for a supervision order (section 29.1) at a presentation hearing that must occur no later than seven days after removal of a child (section 34). The subsequent step to the presentation hearing is a protection hearing which the court must set on the earliest possible date for hearing (section 37). The legislation anticipates that the protection hearing will occur within 45 days of conclusion of the first hearing date. If the Director or delegate seeks to remove a child, the presentation hearing is also stated to take place within seven days (section 42.1). Many of the *Child, Family and Community Service Act* provisions together establish an involved and complex legal court-focused process relating to child protection matters.

On the face of the legislation, exact time limits attach to the various steps and procedures; however, the courts do not necessarily apply so rigorously those time lines, and there are a number of factors that are generally treated by the courts as a reasonable justification for delays. Current closures and cutbacks in service delivery within the provincial courts affect availability of court dates, particularly in more remote areas of the province. For instance, the protection hearing rarely if never occurs within the 45 day timeframe.<sup>1</sup> Sometimes legislated time frames in child protection proceedings become practical impossibilities. At the practical level during these delays, not only are the parents' due process rights compromised but also, there arises detrimental impact on children. Children who are subject of the protection proceedings can be left in a state of uncertainty and instability, moving between parental and government-administered care. In the case of *Jack v. Director of Child, Family and Community Services* (2000), the British Columbia Court of Appeal made little of the "legislative intent" to establish

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<sup>1</sup> A major factor in Prince George and other parts of northern British Columbia for delay in scheduling court hearings is lack of court date availability. This information I have gathered from my former practice as a family lawyer and discussion with other lawyers in Prince George.

certain time limits in stating,

Because these cases are evolving situations involving the lives of children and their parents, it is generally not desirable that flexibility in dealing with these matters should be in any way discouraged by the courts. The process should be kept as informal as possible (p. 456).

The Court also gave deference to consensual resolution whenever possible as the best approach to these cases.

Recommendation no. 69 of the Gove Report suggested that the new legislation, the *Child, Family and Community Service Act*, establish that children have a right to early determinations of decisions affecting their lives and that if delays are due to other parties, there be an onus on the other parties to justify such delay. This onus has not attached to the court system itself, the frequent cause for delay. In undertaking the review of the extent of implementation of the Gove Report recommendations, the British Columbia Ombudsman (1998) commented on the rationale of the children's ministry for not addressing Gove's recommendation no. 69 with the following words:

The Ministry is concerned that, if this recommendation is adopted, courts may have to bump criminal and *Young Offenders Act* cases to accommodate child protection cases.

The Ministry questions how it can direct a court on how it will decide which cases it will hear in which order. It is up to the court to determine its own procedure and priorities (p. 29).

The Ombudsman made these comments prior to the current fiscal cutbacks to the court system throughout the province. The full impact of recent court-related cutbacks remains to be assessed.

### *Alternative Dispute Resolution*

Concurrent with these larger trends in the justice system is an increasing use of mediation in child protection cases. Provisions in the *Child, Family and Community Service Act* provide for alternative dispute resolution processes including family conferences and mediation. Consistent with broader trends in the justice system, the current focus of MCFD is to move increasingly in that direction.

Section 20 sets out the terms of a family conference. The purpose of such a conference is to assist the family to develop a plan that will serve the child's best interests. An interesting aspect of this section is that the plan should, "take into account the wishes, needs and role of the family." Here in other words, the family is treated as a unified whole with consistent wishes and needs among the family members presumed. The only reference in this section to a possible spokesperson on behalf of the family is in section 20(4) which states, "the family conference coordinator may, after talking to the parent or other family member, convene. . ." A family conference coordinator according to Section 1 of the Act is someone designated by the Director. Here then, much discretion is left to the Director and designates to determine who will be deemed to speak for the family. The wording of this provision in referring to "the parent" assumes a single parent without addressing the possibility that two parents with opposing views may be involved. Further, in contrast to other provisions in the Act concerning court processes that specifically address children 12 years and older, there is no mention here of the child or children being entitled to have any role in or be informed about the family conference.

Section 22 of the Act addresses mediation. This section refers to "the director and any person" agreeing to mediation or other alternative dispute resolution mechanism. In other words, it is left wide open as to who the person participating in the mediation or other alternative dispute resolution mechanism might be. A related aspect to the use of mediation is that as set out in

section 23, the court may adjourn the court proceedings for up to three months so that this process can take place. The notion of mediation as an alternative dispute resolution process presumes a relatively equal balance of power between the two parties to the mediation and is not a preferred practice where one party cannot assert his or her position without being under fear or duress (Landau et al, 2000). The legislation is not at all developed in terms of addressing the respective rights of parties to mediation, whether those parties are the parents or child.

To the contrary, the three-month possible delay envisioned in Section 23 could potentially interfere with the Section 7 right of the parent identified in the discussed case of *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (1999), that being the psychological integrity of the parent and the right not to have that interfered with by the government except in accordance with principles of fundamental justice. The provision in Section 23(1) of the *Child, Family and Community Service Act* that there first to be a court application is an important guideline in this regard.

The wording of Section 22 sets out no limit on what an agreement between the Director and person should look like when entering into an alternative dispute resolution process, thereby leaving open the possibility that such “agreement” may take place by coercive means on the part of Director or delegate pursuant to the legislation. The reference to “any person” allows for the possibility of this provision being invoked in relation to a dispute between Director or delegate and anyone, whether or not a party or person entitled to notice in the court proceeding.

The Surrey Court Project: Facilitated Planning Meeting (Focus Consultants, 2002) is a pilot project in the South Fraser region of British Columbia which develops mediation beyond the scope of Section 22 of the legislation. In this pilot project, a court work supervisor identifies potential mediation child protection cases, receives referrals, attends orientation sessions with the



social worker and attends the mediation session (“planning meeting”). An administrative coordinator assigns a mediator and schedules meetings. The pilot project has yet to fully address children’s rights.

It remains to be seen whether current liberal discourse around human rights developed in a highly legal procedural manner will translate to emerging alternative dispute processes. Barsky (1999) and Savoury et al (1995) outline that situations involving risk or potential risk and the issue of whether or not abuse or neglect has taken place are not appropriate subjects for mediation; however, the British Columbia legislation contains no such limitation. In looking at the issue of attorney - social worker relations with each other in northwest United States in the context of collaborative child welfare practice, Johnson and Cahn (1995) suggested that barriers to collaborative (versus adversarial) approaches arise out of “conflicting conceptions of the role each profession should play,” a phenomenon aggravated by the structure and requirements of the court system that handle the issues” (p. 385).

Indeed, this reference to alternative dispute resolution in the British Columbia *Child, Family and Community Service Act* is crowded by an elaborate, technical and most often adversarial court context where rights tend to be aggressively advanced. Some lawyers practicing child protection law in British Columbia simply take the approach of advising their clients not to participate in child protection mediations.<sup>2</sup> The question that remains before the law is to what extent mediation and other alternative dispute resolution processes deal with the issue of rights.

Alternative dispute resolution processes like mediation have significantly different

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<sup>2</sup>This statement I gather from information provided by other lawyers and firsthand experience practising family law in Prince George, British Columbia.

philosophical bases and orientations than court processes do. The basis for court process is very much liberalism which according to Mullaly (1997), rests on central concern for individualism and individual freedoms. Emerging notions of alternative dispute resolution do not have this same philosophical basis. For instance, whereas the courts focus very much on the individual “rights” and “positions” of the parties, current alternative dispute resolution practices such as mediation in the province rest more on the “interests” of the participating parties. In discussing emerging models of child protection mediation in British Columbia, Christofferson et al (2002) distinguish between a rights-based approach to mediation and an interest-based approach, the latter being focused on substantive, procedural and psychological needs of both parties rather than the two parties’ rights pitted against each other.

This distinction may be significant when considering children’s rights as set out in the Convention. It is unclear from the wording of Sections 22 and 23 of the *Child, Family and Community Service Act* what role if any children are to take in such alternative dispute resolution processes. In the absence of legislative stipulation to the contrary, it appears that children could participate in such processes; however, the British Columbia legislation makes no provision for legal counsel in this context. Furthermore, there are not other legislated safeguards in place at present to provide protection for the interests (or rights) of the child in this context.

Whereas there is a clearly identified overlap in the Convention between children’s rights and interests, the way in which legal rights for the most vulnerable members of society have evolved in the common law tradition is through the rule of law as interpreted and applied by the courts. On a more practical level however, the Convention sets out a unique version of human rights somewhat distinctive from adults’ rights, for instance, in its insistence on the importance of family and adequate care in the child’s life. Stated otherwise, the Convention does not posit a

child as an independent individual as presupposed for adults in contemporary Canadian law and as articulated in traditional liberal legal rights discourse. In moving away from the traditional liberal philosophical basis, alternative dispute resolution offers the potential to address children's "rights" in novel ways; however, the current British Columbia child protection legislation, court-focused as it is, does not currently allow for such potential development to occur.

Emerging alternative dispute resolution initiatives, while holding the potential of enhancing increased community involvement (Barsky, 1999), present a number of challenges relating to the rights of parents, one or the other of the parents (for instance if there is abuse by one parent of the other), extended family and children themselves. The full impact of these challenges is beyond the scope of my inquiry but will need to be addressed in the future if human rights are to continue as currently understood in legal discourse.

### *The Child's Views and Right of Participation*

An aspect of the "guiding principles" set out in Section 2 of the *Child, Family and Community Service Act* is that "the child's views should be taken into account when decisions relating to a child are made." It is a broad statement of principle, with no age limitations explicitly attached to it; however, there is virtually no further direct addressing of this principle in the legislation. Therefore, lacking from the legislation is the practical means by which this principle is to be put into effect, especially for children under 12 years old.

Article 12 of the Convention sets out:

The child who is capable of forming his or her own views [has] 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.

For this purpose, the child shall in particular be provided the opportunity to be heard in any

judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Recommendation no. 75 of the Gove Report called for children to be informed about judicial and administrative decisions affecting them and to be able to express their views. The *Child, Family and Community Service Act* includes notice provisions directed at older children who are subject of protection proceedings but is silent on their views being expressed. In the 1998 review of the implementation of the Gove Report, the British Columbia Ombudsman held that these notice provisions are defined in the following ways:

1. They apply only to children 12 years and over;
  2. They relate only to court and not to administrative decisions; and
  3. They do not specify children's rights to attend at and participate in hearings
- (Ombudsman British Columbia, 1998, p. 32).

Therefore, despite the legislative emphasis given to court process in the *Child, Family and Community Service Act*, very little emphasis is placed on children's roles and none of the provisions address their right to participate in these proceedings, the emphasis instead being on the parents' roles. In fact, the law places much emphasis on parents' right in this context, going as far as to characterize them as Section 7 Charter rights as in *New Brunswick (Minister of Health and Community Services v. G. (J.))* (1999).

An interesting aspect of the *New Brunswick* (1999) case is how there is no mention of children's due process rights alongside discussion of the parents. What the Court says is, "A removal and court proceeding are undoubtedly difficult for a young child and children should be protected from further stress to the degree feasible without infringing on the due process required

to protect the interests of the parents.” This judicial comment parallels the gap in the *Child, Family and Community Service Act* with respect to due process rights for children. The issue of whether or not the Act is sufficient in this regard was not before the Court. In judicial determinations, the Convention is persuasive but not strictly binding. The tenor of this decision strongly suggests that the courts view parents’ and not children’s due process rights as a central aspect of the *Child, Family and Community Service Act*. It is in cases such as this one that the role of the Court is to provide interpretation that is consistent with legislative intent and Canadian law.

Coupled with this gap in the legislation is the issue of legal aid availability in British Columbia. The *Child, Family and Community Service Act* states in a number of clauses that a child over 12 years old should be notified about court process concerning his or her case; however, there is only provision in the legal aid tariff providing for the child to be referred to a lawyer in two situations: if the child is over 12 years old and subject to a Section 60 consent order; or if she or he is a ward of the Director AND consents to the adoption of his or her own child (British Columbia Legal Services Society, 1999). It is limited coverage. The first, that is over 12 years old and subject to a Section 60 consent order, is the most common area of legal aid referral.<sup>3</sup>

Section 60 of the *Child, Family and Community Service Act* speaks to consent orders. This section establishes that after a presentation hearing in court, and with the written consent of the affected parties including the child over 12 years old, the court may make a custody or supervision order including a continuing custody order. This order would be entered without a

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<sup>3</sup>As of date of writing a spokesperson for the Ministry of Children and Family Development Data Services Branch reports that the Ministry do not keep statistics on the number of lawyers appointed to children. A lawyer employed by British Columbia Legal Services Society furnished the information stated in this thesis, based on her experience.

full court hearing taking place. In other words, if a child protection matter is contested regardless of the child's age, it may proceed to court hearing without an obligation on anyone to see that the child is provided with access to and financial resources to pay for a lawyer.

The *Child, Family and Community Service Act* includes a significant number of provisions setting out the court proceedings in child protection cases. Although the Convention makes no such distinction, the Act at a number of places, arbitrarily distinguishes between children 12 years and older and children under 12 years old, with respect to their right to be informed about protection proceedings. As stated, according to British Columbia government statistics (British Columbia Ministry of Children and Family Development, 2003a), almost half of the children in care as of March 2003 were under 12 years old. In the provisions concerning notice about child protection court proceedings, the Act states that if the child is 12 years or older, she or he must be notified of the various mandatory proceedings. Even in the case of children 12 years and older, the statutory obligation goes no further than simply providing notice of a given hearing. This provision is inadequate when considered in the context of the Convention.

Article 12 of the Convention sets out clear participation rights of the child not only to freely express his or her views but also to participate in any judicial or administrative proceeding affecting him or her. Although the Convention establishes age and maturity of the child will be relevant to the weight of his or her views, these factors are not set out as reasons to preclude a given child from the participation right. Covell and Howe (2001) assert that "participation" of the child is a fundamental component of the "best interests principle" (p. 25). As Flekkoy (1997) outlines, this right of participation is inherent and should not require a child first meet a particular threshold before considered to have that right :

Incompetence cannot fairly be a good reason for denying rights, for children any more than for adults. If this were done, many adults would also be excluded. But in the present situation there is discrimination against children, who seem to be obliged to prove competence, while adults can only be denied rights if they are proven incompetent. This should also be the principle for children (Flekkoy, 1997, p. 48).

### *Statement of Children's Rights*

In addition, the single articulation of children's specific rights in this legislation is tied to children in care; the Act lacks a more general statement of children's rights regardless of whether or not they are in care and there does not exist in British Columbia at present any other legislated statement of the rights of all children. The Convention contains no such limit on children's rights. Section 1 of the *Child, Family and Community Service Act* defines "care" as "physical care and control of the child," and in the context of Section 70, presumably means in the care of the Director. According to Section 70(1) of the Act, children in care have certain rights including the following:

- b) to be informed about their plans of care;
- c) to be consulted and to express their views, according to their abilities, about significant decisions affecting them;
- n) to be informed about and to be assisted in contacting the child and youth officer under the Office for Children and Youth Act or the Ombudsman;
- o) to be informed of their rights under this Act and the procedures available for enforcing their rights.

This Section arguably then, does not relate to the situation in which a child protection

investigation is underway, but the child is not in care of the Director. In addition, this section lacks specific provision for how these rights are going to be supported or enforced. Such a statement of rights, while identifying certain entitlements children in care have, places no clear responsibility on anyone to ensure that these rights are respected and enforced. There is no provision for a child or child's advocate to seek a remedy through the court of an alleged right violation; therefore, the issue of whether or not the rights are enforced becomes an administrative matter. In the absence of specific legislative provision speaking to enforceability of these rights, at law, this legislation is nothing more than a hollow statement of rights. In other words, much is left to the discretion of those persons administering the legislation. There is no consequence set out for anyone who chooses not to implement these particular rights; therefore, these identified rights potentially have very little import in the absence of adequate procedures that would see them come into effect in a consistent and meaningful manner.

In addition, the wording leaves much discretion as to the parameters of the rights. In reference to (b), what constitutes sufficient information to the child or how it will be implemented precisely is not defined. In relation to (c), it is not established in the legislation how a child's abilities will be determined or exactly who will have the responsibility for determining what his or her abilities are. There is no provision speaking to the accountability to the child on the part of the person who makes such a determination. This clause does not identify what decisions constitute "significant" decisions; the word "significant" is therefore another term open to interpretation. In addition, the clause does not identify who will determine whether or not the decision in question is significant. With respect to (n), the clause does not identify in what situations a child will be informed about the identified external review mechanisms available to him or her nor does it identify what form this informing will take. Finally, in regard



to (o), neither the means nor the procedures available for enforcing rights is explicitly set out, again leaving much to interpretation and diminishing the impact of this legislative provision.

In its *Public Report no. 36* of March 1998, the Ombudsman of British Columbia made two recommendations concerning children's rights to express their views as set out in Article 12 of the Convention:

1. Para. 70(1)(c) [of the *Child, Family and Community Service Act*] apply to all children in the care or custody of the Ministry including those in places of confinement. This recommendation is critical to ensure that particularly vulnerable children in care who may be in places of confinement for treatment or rehabilitation have the right to be heard and to access the Ombudsman and Advocate.
2. All sections of the [legislation] that impose an arbitrary age restriction (under 12 or 12 and over) on the duty contained in paragraph 70(1)(c) 'to be consulted and to express their views, according to their abilities, about significant decisions that affect them,' be removed, including sections 55 through 60 of the [Act]. The right to be consulted in paragraph 70(1)(c) would extend to all children in receipt of services under the [Act].

This is in keeping with the UN Convention on the Rights of the Child (p. 32).

These recommendations are both astute and worthy of incorporation in the British Columbia legislation in order to bring about further compliance with the Convention and increased formal acknowledgement of children's rights.

The facts of the British Columbia Supreme Court decision, *L.S. and S.S. v. The Ministry of Children and Family Development et al.* (2003), involved a 10 year old child with fetal alcohol syndrome placed in a foster home under a continuing custody order. The foster parent of the child filed in court to enforce the child's rights as against the Director. Following allegations of

sexual touching eventually determined to be unfounded, the foster father was not permitted by the Ministry to live in the home with the child and sought to re-enter the home on the basis that the child's interests would be "best served by living with the only father she knows, this being a right to be nurtured according to community standards for which Section 70(1)(a) of the Act provides."

In considering the ambit of Section 70(1) of the Act, the Court cited how Section 10 of the former *Children's Commission Act* permitted a complaint about breach of a Section 70 right to the children's commissioner. Because that Act had been repealed, the Court held that foster parents had no legal basis to initiate proceedings to have the child's rights enforced. The Court stated, "it does appear that the current legislation provides for rights the breach of which is without remedy as long as the Director remains the guardian of the child" (pp. 11-12). This case is currently under appeal to the British Columbia Court of Appeal. As Kent (1995) notes, "human rights in the law rests on the principle that where there is a right, there must be a remedy" (p. 147).

#### *Administrative Accountability*

Kent (1995) identifies how, when addressing children's human rights, implementation and accountability mechanisms are both crucial and both should be reflected in the law itself. He maintains, "If the law says that children are entitled to some particular service as a matter of right, the law should also establish an accountability mechanism" (p. 145). Article 25 of the Convention provides, "State Parties recognize the right of a child who has been placed by the competent authorities for the purpose of care, protection or treatment of his or her physical or mental health to a periodic review of the treatment provided to the child." On its face, this provision could relate to child protection placements. As identified, much focus of the *Child*,

*Family and Community Services Act* is setting out court procedure; however, few of these legislative provisions relate to administrative decisions which fall outside the scope of court reviewed decisions of Ministry staff and delegates. Section 93(3) of the Act establishes that the Director must “in accordance with the regulations, establish a procedure for reviewing the exercise of the director’s powers, duties and functions under this Act.”

The Act here leaves discretion to the Director about what the procedure will include and in this way, this particular provision may be lacking from a constitutional perspective. Jones and Villars (1994) suggest “it is extremely important to identify the ambit of discretion which legislation has delegated to a particular executive office” (p. 75), but in terms of administrative accountability, this has not been done in the *Child, Family and Community Service Act*. Legislative delegates such as the Director in this case are legally bound to follow the principle of natural justice and the duty to be fair (Jones and Villars, 1994), concepts that have evolved through the common law. Human rights parallel this common law principle and have direct relevance in assessing the adequacy of administrative discretion in particular circumstances.

In 1997, MCFD implemented an internal complaints resolution process (Children’s Commission, 2001). In 1999 and 2000, before its abolition, the British Columbia Children’s Commission conducted evaluations of this internal complaints process of the Ministry (Children’s Commission, 2001). The standards used for monitoring in this evaluation process included: child-centeredness; fairness; accessibility; and responsiveness (Children’s Commission, 2001). The Commission found that over forty per cent of the complaints related to issues about children in care. The complaints were then broken down in relation to the rights set out in Section 70, and some of those findings are as follows:

(b) to be informed about their plan of care	20.2%
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c) to be consulted and to express their views 10.6%

about significant decisions affecting them

(n) to be informed about and assisted with contacting 3.4%

the [then] Family Advocate or Ombudsman

(Children's Commission, 2001).

The Children's Commission (2001) also found that children and youth were the complainants in nine per cent of cases and sixty five per cent were by family members. They interviewed thirty-two complainants. In over thirty per cent of these cases, the complainants identified that a barrier to child-centeredness in this complaints process was that children were not provided an opportunity to be heard. There was not sufficient input from the child or youth in question. Another related concern is that the Commission had a perceived lack of power to resolve complaints as in many cases, the complaint was redirected to MCFD and the complaint process became lengthy. The Commission's recommendations were not binding. Only one third of complainants felt they were treated fairly during the complaints process due to such factors as perceived power imbalance; resources; legal representation; knowledge of the system; length of the process; and dismissive attitudes of Children's Commission staff. Overall, the evaluation findings indicated that the complaints resolution process was lacking. The key recommendations of the Commission coming out of this evaluation were that a more comprehensive complaint resolution process be implemented, evaluated and monitored jointly by MCFD and the Commission; that guidelines be established to assist staff in responding to complaints; and regular reporting from the Ministry to the Commission about progress. The Children's Commission was abolished in 2002 and so, has not undertaken any further work in this regard nor does the legislation establish a legal requirement for any independent body to do any follow-

up or further in-depth evaluation of the quality and procedure around MCFD internal complaint processing.

### *Advocacy for Children*

In the field of child welfare, the concept of “child advocacy” has historically been used broadly to describe “anyone who works for or on behalf of children who have been abused or neglected” (Litzelfelner & Petr, 1997, p. 394), an amorphous understanding of the term that possibly has contributed to the term’s loss of specific meaning. In a field such as child welfare which tends toward detailed legislative policy provisions, particularly in terms of court processes, this critique of the vagueness of the advocacy definition appears legitimate. In the broad sense, two rather different understandings of the term emerge: on the one hand, social advocacy, meaning political action to effect large scale changes for all children involved in the child welfare system; and on the other hand, case advocacy, meaning advocacy on a case-by-case basis (Litzelfelner & Petr, 1997).

Currently in terms of social advocacy, the Canadian Coalition for the Rights of the Child and its member organizations across the country have taken a lead role in terms of commenting on government policy (the focus being federal), maintaining communication with the United Nations and providing for direct youth input and involvement. The Coalition’s mandate is broad however and does not focus as much on the day-to-day functioning of the British Columbia child protection system and its impact on the lives of particular children and their families.

At the provincial level, the British Columbia Association of Social Workers is one of over sixty organizations which are part of First Call, BC Child and Youth Advocacy Coalition. Based out of Vancouver, this coalition has a mission to increase understanding and advocacy for legislation, policy and practice to assist children and youth to have resources and opportunities to

reach full potential and to participate more fully in society (First Call, 2002). This coalition formed in the aftermath of Canada's ratification of the Convention and is active in terms of social advocacy for children in this province (First Call, 2002).

Traditionally, the latter of these two understandings of advocacy, case advocacy, has found purchase in various legislative provisions. Blishen (1991) outlines how child advocacy on an individual level pursuant to the law has traditionally encompassed one of three specific approaches: advocate; guardian; or *amicus curiae*. An advocate focuses on advancing the child's interests. A guardian serves a dual role as investigator and counsel. The main goal of *amicus curiae* - friend of the Court - is to provide assistance to the Court (p. 197).

Litzelfelner and Petr (1997) critique advocacy models that involve either child welfare agency workers or lawyers exclusively filling the role of child advocate due to the limitations inherent in either position that do not fully address the unique needs of children in abusive or neglectful living situations - on the one hand, agency child welfare workers have institutional mandates to fulfill and as I have outlined, may find themselves conflicted between the objectives of the organization and the best interests of the child in a given case. On the other hand, lawyers are uncomfortable dealing with potential discrepancies that might arise between a child's wishes and best interests. Added to this latter point is the issue of capacity; lawyers tend to be uncomfortable taking legal instructions from individuals such as children deemed by the law to be under a legal handicap and to lack capacity to instruct counsel. Melton (1986) asserts that "child advocates are apt to find themselves quickly on the defensive if their focus is protecting children's individual rights due to a prevalent perception that protecting children's rights will undermine the traditional family unit" (p. 1234) and with the family, children's welfare.

Discussions around child advocacy beg the question articulated by some writers including

Litzelfelner and Petr (1997): Who is the best spokesperson for the child? Bala (1991) observes how child advocacy programs “reflect a concern that the bureaucratic nature of child protection agencies may not always be in the best interests of children” (p. 14). Melton (1986) looked at the ethical issues that might arise during the course of child advocacy work. He suggests the role of an advocate is rather political in that it is not simply to help children but to empower them in such a way they are better able to make use of societal resources (p. 358).

In British Columbia, the Gove Report (1995) recommended the establishment of a Children’s Commission as an independent complaints investigator with a central quality assurance role (Vol. II, p. 282). His vision was that this Commission would accompany and work alongside a Child Welfare Review Board which would have responsibility for the review of rights violations for children in care pursuant to section 70 of the *Child, Family and Community Service Act* and for reviewing complaints about child welfare service providers’ administrative decisions (Vol. II, p. 282). No such body currently exists in British Columbia.

Unlike some other jurisdictions’ child protection legislation, the *Child, Family and Community Service Act* lacks specific reference to advocacy services for children. In terms of legislated child advocacy in British Columbia, the two most significant current Acts are the British Columbia *Office for Children and Youth Act* (2002) and the *Ombudsman Act* (1996). The *Office for Children and Youth Act* (2002) was proclaimed into law in September 2002 to replace the *Child, Youth and Family Advocacy Act* (1996) and the *Children’s Commission Act* (1997). Both the *Child, Youth and Family Advocacy Act* (1996) and *Children’s Commission Act* (1997) were enacted subsequent to the Gove Report (1995) and were the enabling statutes for the Office of Child, Youth and Family Advocacy and the Children’s Commission. The provincial government has also repealed the regulations enacted pursuant to the two former Acts. No

regulation accompanies the new legislation as of the date of writing.

In the *Convention on the Rights of the Child Second Report of Canada covering the period January 1993 to December 1997* (United Nations Office of the High Commissioner for Human Rights, 1997), submitted to the United Nations, the British Columbia government at the time outlined some of the measures taken at the provincial level to bring about compliance with the Convention. In that document, “General Measures of Implementation” included the following:

the proclamation of the *Children’s Commission Act*. . . and the creation of the Children’s Commission in September 1996. The purpose of the commission is to ensure that key aspects of the child-serving systems of government are monitored and that the quality of its work is assessed and reported on publicly (Para. 595).

In addition,

there is now a Child, Youth and Family Advocate established through the *Child, Youth and Family Advocacy Act*... The advocate’s role is to help children, youth and their families who are involved with the Ministry of Children and Families to ensure that they receive the services they are entitled to and to ensure that proper processes are followed in the delivery of those services” (Para. 596).

Under the former *Child, Youth and Family Advocacy Act* (1996), a limitation of the child advocate role was that Section 5 stipulated that the advocate was not to act as legal counsel. Instead, the legislation set out for the advocate a number of powers including: investigating; initiating and participating in case conferences, administrative reviews, mediations and other processes about provision of designated services; meeting with and interviewing children and



their families; informing the public about children's needs and rights; and making recommendations about legislation, policy and practice; and making agreements to ensure child advocacy. In addition, for the purpose of carrying out the powers set out in the Act, the advocate could enter facilities wherein services are provided to children and youths.

Some of the powers of the now abolished Children's Commission were: collecting information about critical injuries sustained by children while receiving designated services; making recommendations concerning such critical injuries; setting standards to be followed by prescribed ministries or government agencies; monitoring the extent to which the ministries and agencies are following any prescribed standards; reviewing and resolving complaints by a child, the child's parent, the Advocate or other person representing the child about the child's rights being breached while in care or decisions concerning the provision of designated services; monitoring and auditing plans of care for children in continuing care of the government; and providing public education aimed at increasing understanding of the Commission's role (*Children's Commission Act*, 1997, Section 4 [repealed]). The role of the Children's Commission in reviewing possible rights violations under Section 70 of the *Child, Family and Community Service Act* is abolished. An important aspect of the Children's Commission was how it had a mandate to address the cases of all children in the province, whether or not in care. In its 1998 review of the implementation of the Gove Report, the British Columbia Ombudsman noted that recommendation no. 95 of the Gove Report called for child welfare constituency in the province to include all children.

A related recommendation of the Gove Report (1995) was the establishment of a Child Welfare Review Board which would have a mandate to review the following:

1. The apparent breach of a child-in-care's statutory rights under section 70 of the *Child*,

*Family and Community Service Act*; and

2. Any other important administrative child welfare decision respecting entitlement to or quality of service (Gove, 1995).

To this date, the British Columbia government has not established a Child Welfare Review Board as proposed in the Gove Report; however, in its 1998 review of the Gove Report implementation, the British Columbia Ombudsman observed that the Tribunal Division of the Children's Commission satisfied the anticipated function of such a review board. With the repeal of the *Children's Commission Act* (1997), the tribunal division is also abolished.

Collectively, the role of these two offices was to help bring about a certain amount of accountability on the part of the provincial ministries that provide services to children and youths in British Columbia. The offices addressed formal legal accountability if not practical accountability. On the practical level, the extent to which these bodies were effective throughout the province remains unclear; both were centralized out of Vancouver or Victoria and quite removed from the day-to-day line level functioning of child welfare services throughout the province.

The current *Office for Child and Youth Act* (2002) establishes the Office for Children and Youth in place of the two pre-existing child advocacy offices. Section 3(1) of the Act sets out that the functions of this office are to "provide support to children, youth and families in obtaining relevant services and to provide independent observations and advice to government about the state of services provided or funded by government and youth." The corresponding investigatory powers of this office are much more limited than those of the previous Children's Commission and Child, Youth and Family Advocate. Section 6 of the *Office for Child and Youth Act* (2002) stipulates that this office can conduct investigations at the request of the

Attorney General and then must submit a confidential report of the findings to the Attorney General. Pursuant to subsection 6(2), the Attorney General retains discretion to decide whether or not the report is to be kept confidential. The only stated investigatory powers of the office relate to this limited function; for the other listed functions of this office, there are no corresponding powers of investigation, monitoring or enforcement set out in the legislation.

In Section 3, one of the stated discretionary functions of this office is to “provide information and advice to children, youth and their families about how to become effective self advocates [emphasis added] with respects to the rights of children and youth in care under the *Child, Family and Community Service Act*. There is at date of writing no corresponding provision in the *Child, Family and Community Service Act* to outline how or who would have responsibility to respond to such self-advocacy and by what means. Rather, the *Child, Family and Community Service Act* is entirely silent on the matter of advocacy.

The advocacy role of this office is limited to “extraordinary circumstances” in subsection 3(2)(c) of the Act. Extraordinary is a word subject to interpretation and suggestive of cases outside the norm; therefore, the role of this office is much more limited than the previous Children’s Commission and the Office of the Child, Youth and Family Advocate. Another legislated function of this office is to promote and coordinate “in communities [emphasis added] the establishment of advocacy services for children, youth and their families” (subsection 3(2)(d)). In other words, just as the British Columbia government anticipates as the administration of child protection services is to be decentralized (British Columbia, 2002), so too is child advocacy. This wording suggests that child advocacy offices will be non-governmental organizations. What is lacking from this and from any other legislation is the identification of exactly what community-based child advocacy services should or will entail and who is to take

financial responsibility for the associated expenses. In addition, what is not identified is the particular role and mandate of these offices, nor what authority they will have. In the absence of specific legislative provisions outlining specifically what the offices will do and what powers they have, there could be a lack of effectiveness on the part of these offices in implementing changes as there will be no formal obligation on the child protection service providers to account to these offices. In addition, in the context of small towns and rural areas in particular, it remains to be seen what form child advocacy will take. Without a legislative framework for the delivery of these services, checking public accountability becomes a more complex and daunting task. In other words, law provides the means by which offices such as advocacy offices obtain clout and credibility, having behind them the force of law. In the absence of supporting legal provision in such a highly legislated context, child advocacy becomes difficult.

Other than this reference to self advocacy in the *Office for Child and Youth Act* (2002), there is currently no British Columbia legislative provision that supports or outlines the ability of children and youths to self-advocate and be heard, in terms of child protection and other child-related services in the province. As identified, Article 12 of the Convention provides the basis for such a role on the part of any child capable of forming his or her own views. The implication of this legislative gap is that if children and youths are to self-advocate, there is no legally enforceable means by which there is a requirement on others (policy developers and service providers within the administrative realm) to take account of the views and input of children and youths nor is there specific provision for resources to support child self-advocacy programs. In 1999, under the auspices of the former Children's Commission, there was generated a brief public report entitled *The Youth Report: A Report About Youth by Youth*. Four youths travelled around the province to interview other youths. A statement in this report is as follows:

Youth in care have opinions and need to be heard!! This is the main message that we were given by youth living in foster care and in group homes across B.C. They told us that sometimes they are not taken seriously by adults, and so they would like to see youth in care educating adults about the issues and challenges that they deal with (Children's Commission, 1999, p. 24).

The age group of the youths interviewed was between 12 and 19 years old; younger children did not participate. In addition, these interviews focused on youths in care. Despite recent examples in British Columbia of some youths in care becoming more vocal about their situations, there is still a legislative gap in this regard. In the absence of legislative provision outlining not only youths' formal role but also the obligation of service providers to respond meaningfully, such youth activism may have limited effectiveness in bringing about youth-recommended changes in the child protection realm. It remains to be seen whether child and youth self-advocacy can develop in a meaningful and impactful way in British Columbia.

The identification of "self advocacy" in the *Office for Child and Youth Act* (2002) did not exist in the prior legislation and thus marks something of a philosophical shift in the provincial government's approach to child advocacy. It represents an interesting contrast with the way in which the law relating to children has evolved in both international conventional and Canadian law. The Preamble of the Convention states, "the child, by reason of his [her] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection....," a notion that has some similarities to *parens patriae* as it has developed in Canadian law. The wording of the Convention's Preamble does not reconcile with this new wording contained in the *Office for Child and Youth Act* (2002), thereby marking a philosophical conflict between universal human rights as enshrined in the Convention on the one hand and residual social policy

orientation on the other. The residual approach, according to Moroney (1991) rests on the “fundamental belief [that] most of the time, people will be able to take care of their own needs” (p. 140). This residual approach has interesting implications when applied to children in light of the overarching protectionist quality of the law pertaining to children and the perceived vulnerability of children.

In regard to the Convention Preamble’s mention of children needing “special safeguards and care, including appropriate legal protection,” this concept becomes rather unclear in the context of the current trend of decentralization in British Columbia. What is legal protection? British Columbia law is built on the foundations of the English common law and the Canadian Constitution that establishes a legal division of powers between the federal and provincial governments. With the current trend toward decentralization in the realm of child welfare, the “rule of law” and the concept of “legal protection” are to be cast into a rather different light than has been traditionally understood in Canadian society. Law-making power, as understood within the legal community and system, rests with the judiciary (through judge-made case law), federal Parliament, the Provincial Legislatures and to a lesser extent, municipal governments. There are no other bodies or groups of people who are recognized under the legal system as having the ability to create enforceable laws. In addition, according to Jones and Villars (1994), a legislative body such as the British Columbia government cannot legally “abdicate their legislative functions” (p. 28). Delegation however, is appropriate. If the administration of child welfare is to be devolved to the community level, it remains to be seen how appropriate legal protection as called for in the Convention, will be put into place.

The abstract concept of “community” as set out in the *Office for Children and Youth Act* (2002) remains unclear. In addition, because such “communities” have no law-making authority

or constitutional standing recognized in the Canadian legal system, the notion of “legal protection” mentioned in the Convention becomes in this context, non-existent other than in relation to the extent of the provincial government’s continuing involvement. A related issue is that the Convention establishes that the “State Parties” agree to these human rights standards for children. There is no mention in the Convention of any “communities,” other groups of people or other organizations agreeing to the contents of the Convention nor do any other entities than “State Parties” take on any responsibility to comply with the Convention. In the British Columbia child welfare context, that “State Party” is the provincial government. With these anticipated changes to the delivery of child welfare services, it remains to be seen how the implementation of the Convention will play out.

The *Ombudsman Act* (1996) establishes the role of the provincial Ombudsman located in Victoria. Section 10(1) establishes that:

The Ombudsman, with respect to a matter of administration, on a complaint or on the Ombudsman’s own initiative, may investigate:

- (a) a decision or recommendation made,
- (b) an act done or omitted, or
- (c) a procedure used

by an authority that aggrieves or may aggrieve a person.

In a news release of January 24, 2003, the British Columbia Ombudsman outlines how an anticipated budget cut of thirty-five per cent over three years will impact on the services of this office. Acting Ombudsman Howard Kushner states,

As an independent watchdog, my office was created to ensure that citizens are treated fairly by public agencies. These cuts mean I am no longer able to carry out my mandate

in full. I deeply regret the necessity of this action (Ombudsman British Columbia, 2003).

In addition, as there is not now nor ever has been a legal counsel role provided by the Ombudsman, Office for Children and Youth, or two pre-existing offices, a related issue is the extent to which children and youths were and are able to access legal aid and accountability measures on their own through the legal system where necessary. The only provision in the *Child, Family and Community Service Act* relating to independent counsel is in section 60, in relation to consent supervision or custody orders. As I have outlined, under this section if a child over 12 years old consents to such an arrangement, the Ministry is supposed to advise the young person to consult with independent legal counsel before the order is granted by the court. In addition, a judge may make a child a party to a protection hearing in which case that child should be entitled to speak to a lawyer. Otherwise, there is no specific legislative provision that provides the child or youth with the right to access counsel for non-criminal matters.



## Chapter Five: Discussion

### *The Question of Rights*

Currently, according to critical feminist discourse, a liberal notion of rights prevails in the Canadian legal system, a notion with which critical theorists take issue (Smart, 1989; Moller Okin, 1989; Comack, 1999). Smart (1989) advances an argument about the limitations of liberally articulated “rights” as part of feminist legal strategy:

1. Rights oversimplify complex power relations: exercises of power may have little to do with rights. Rights do not present a solution to these more complex matters. Such factors as economic dependence may prevent a person from exercising formal rights and may lead to undesirable consequences;
2. A vulnerable party’s rights can be countered by resort to a more powerful individual’s competing rights;
3. Although rights are typically formulated to address social wrongs, they are structured so that the onus falls on the individual to establish that a violation has occurred;
4. Rights may be co-opted for purposes not originally intended by specific statements of rights (Smart, 1989).

Rhode (1991) argues that critical feminism should “acknowledge the indeterminate nature of rights rhetoric” while in certain situations, drawing on this rhetoric to “promote concrete objectives and social empowerment” (p. 343). She suggests that what is important is “the communal, relational and destabilizing dimensions of rights-based arguments” (p. 343). Accordingly, this feminist perspective lays the groundwork for a revised understanding of the potential of human rights and the nature of the morality in which they are implicitly founded. Feminist legal critical discourse therefore poses challenges to the philosophical underpinnings of

human rights law and asserts the importance of relationship, care-giving and connectedness being acknowledged at law.

As outlined, the Canadian legal system has proven less than optimally responsive to the more vulnerable members of society including women and children (Law Society of British Columbia, 1992; Monture Angus, 1995). Systemic biases in the legal system reflect greater societal patterns of discrimination, for instance, in relation to women, Aboriginal people, other ethnic minorities and persons with disabilities (Monture Angus, 1995; Ross, 1996; Comack, 1999). Comack (1999) observes that whereas “‘equality of all before the law’ and ‘blind justice’ are hallmarks of the rule of law. . . law’s preferred person is most likely to be a male who fits the needs and priorities of a modern, industrial, competitive market society” (p. 23). According to Baer (1999), the legal system assumes that individuals are rational maximizers and will aggressively assert their rights. In addition, according to Comack (1999), people are abstracted from social context according to the rule of law; the “abstract legal person” assumes for a legal purpose that all persons are equal before the law in terms of freedom, capability and competitive ability (pp. 23-24). Cornell (1991) identifies how, according to this view, enforcing law “reinforce[s] the male viewpoint, in spite of law’s claim to do the exact opposite” (p. 122).

Communitarian Sandel (1982) maintains the philosophy of Kant is prevalent in contemporary mainstream legal theory and liberal thought. According to Mullaly (1997), a central tenet of liberalism is its emphasis on individual freedom, an emphasis which has provided a basis for individual-oriented human rights statements of law. In discussing Kant’s metaphysical starting point, Sandel (1982) observes :

For Kant, the priority of right is ‘derived entirely from the concept of freedom in the mutual external relationships of human beings, and has nothing to do with the end which

all men have by their nature (i.e. the aim of achieving happiness) or with the recognized means of attaining this end'. . . As such, it must have a basis prior to all empirical ends. Even a union founded on some common end which all members share will not do. Only a union 'as an end in itself which they all ought to share and which is thus an absolute and primary duty in all external relationships whatsoever among human beings' can secure justice. . . Only when I am governed by principles that do not presuppose any particular ends am I free to pursue my own ends consistent with a similar freedom for all (pp. 5-6).

Sandel (1982) further discusses how Kant assumed an individualistic focus. To gain justice (and rights) according to Kant, "we must stand at a certain distance from our circumstance. . . as transcendental subject " (Sandel, 1982, p. 175). Abstract reasoning therefore becomes necessary according to Kantian philosophy.

More recently, liberal theorists have built and expanded on the work of Kant (Sandel 1982; Moller Okin, 1999). In his seminal and influential *Theory of Justice* (1971), liberal theorist Rawls states that, "a conception of right is a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons" (p. 135). According to Rawls (1971),

1. A just society will give each of its members the same amount of liberties or rights;
2. If there are inequalities, a just society will make sure each citizen has equal opportunity;
3. Inequalities are only justifiable if they maximize the position of the worst-off members of society over time.

For Rawls, the starting point to arrive at justice and rights is for an individual to be able to position oneself in what he describes as the "original position" whereby the individual is

theoretically abstracted from one's circumstances. Rawls' original position assumes that all people are able to be rational and mutually disinterested. People when abstracted from socio-economic context, are able to assume a "veil of ignorance" that "prevents. . . unfairness by depriving the parties of the ability to identify principles that would favour their own particular class or group" (Scanlon, 2003, pp. 154-55). In Rawls' version of justice, every member of society "accepts and knows that the others accept the same principles of justice" (Scanlon, 2003, p. 157).

Critical feminist writers critique aspects of Rawls' work. Benhabib (1987) outlines how for liberal theorists like Rawls, the autonomous self - that person entitled to hold rights - is disembedded and disembodied from social context pursuant to the law. Of the liberal articulation of justice, advanced by Rawls and reflected in western law, Benhabib (1987) says, "this is a strange world. . . it is one in which individuals are grown up before they have been born; in which boys are men before they have been children; a world where neither mother, nor sister, nor wife exist" (p. 85). She describes such liberal notion of rights as substitutive in that "the universalism [that this liberal theory] defends is defined surreptitiously by identifying the experiences of a specific group. . . invariably white, male adults who are propertied" (p. 81). In arriving at his influential version of justice, perhaps the latter was not Rawls' intention; however, feminist legal writings emphasize this perceived adult male-based standard in the law.

Some feminist legal theorists critique the liberal notion of justice and corresponding articulation of human rights as inadequately addressing trends of oppression in society (Baier, 1994; West, 1997), and their comments lend further support to critical social workers' identified concerns with the current Canadian child welfare policy. Whereas feminist writer Baier (1994) maintains that "the moral tradition which developed the concept of rights, autonomy and justice

is the same tradition that provided justifications of [various forms of] oppression” (p. 25), West (1997) suggests that “we must rethink or abandon the Kantian claim that reason, rather than ‘affect’ or ‘inclination’ is the linchpin of moral action” (p. 34). Pollis (2000) further supports these views in suggesting that when human right become “abstract legalities, they lose their association with or meaning within a given community context” (p. 17). Similarly, Lacey’s (1998) view is that “a focus on the priority of justice as between individuals and a relative lack of interest in collective values and in the scope for more affective virtues such as benevolence and altruism [represents an] impoverished view of the potentialities of social life” (pp. 54-5). These comments have direct relevance to the provisions of the *Child, Family and Community Service Act* with its emphasis on lengthy and potentially unworkable adult-oriented due process legal provisions directed primarily at the child’s parents. As I have discussed, although technical legal processes have a central role in the Act, the unique circumstances of children and other more vulnerable persons involved in the child protection system are not adequately acknowledged or addressed.

A dominant feminist critique of Rawls’ *Theory of Justice* (1971) centers on his failure to provide adequate analysis of family. Moller Okin (1989 & 1999) sees Rawls’ failure to consider the institution of family in any depth as problematic. In Moller Okin’s view, if Rawls’ understanding of family structure is not grounded in “principles of justice but in accordance with innate differences. . . imbued with enormous social significance, then [his] whole structure of moral development seems to be built on uncertain ground” (1999, p. 281). While feminists recognize that there exists in Rawls’ theory a notion of welfare state “to promote just distributions between citizens” (Lacey, 1998, p. 49), Baier (1994) addresses how Rawls’ theory “takes it for granted that there will be loving parents rearing children” (p. 6). Baier (1995) also

expresses concern that attaching an obligation of care to certain members of a society that is defined by self-advancement, can lead to exploitation and oppression of the selfless.

Accordingly, “this trend has led to oppression of women and other vulnerable members of society who were expected to provide care” (Baier, 1995, p. 53). Furthering this view, Krane (1997) identifies a lack of explicit acknowledgement and recognition in society for carers such as children’s primary caregivers, which lack of recognition leads to devaluation and decreased public support for that role (p. 72). This comment has particular relevance in the child protection context where there is very little acknowledgement of or public support for children’s caregivers who may be among the more vulnerable members of society.

Furthermore, Young (1999) suggests that a shortcoming of Rawls’ theoretical framework is a failure to make enquiry “about the justice of the social processes and institutional relations which bring particular patterns of distribution about” (p. 300). According to Young (1999), Rawls’ theory needs to go a step further to question whether, rather than assume that, such societal institutions as competitive markets, bureaucracies and nuclear families are just. With respect to the British Columbia child protection context, the lack of accountability measures, directed at government, indicates an underlying assumption of this legislative framework that the State and its representatives need not be kept in check nor accountable for services provided.

In 1982, Gilligan advanced the notion of an *ethic of care* distinct from justice-focused ethical notions. Clement (1996) outlines what she views as the primary differences between Gilligan’s ethic of care and an ethic of justice which she describes as Kantian-inspired (Table 5.1).

Table 5.1

*The Ethic of Care and the Ethic of Justice*

<b>Gilligan's (1982) ethic of care</b>	<b>(Kantian) ethic of justice</b>
1. Focus on unique, particular circumstances of a situation.	1. Focus on abstract principles.
2. Assumption of human connectedness.	2. Assumption of human separateness (choice and will emphasized).
3. Priorities are: maintaining relationships; meeting needs of those to whom one is connected.	3. Priority is arriving at a form of equality.
4. The concept of autonomy is viewed as excessively individualistic.	4. The concept of autonomy is central.
5. Applies to family and friends.	5. Applies to politics / civil society.

Source : Summary of information from Clement, 1996, pp. 12-19.

The question then becomes whether human rights as understood in contemporary liberal theory and western law and partly derivative of Kant, are consistent with and supportive of a type of caring justice proposed by feminist theorists. Moller Okin (1999) suggests that at the center of Rawls' liberal theory is a "voice of responsibility, care and concern for others" (p. 274); accordingly, she posits that Rawls' original position requires one to "consider the identities, aims and attachments of every other person. . . we must [therefore] develop considerable capacities for empathy and powers of communication with others" (p. 290). In this regard, Moller Okin (1999) would not support the care / justice dichotomy emphasized by other feminist writers such as Gilligan (1982) and Benhabib (1987). Similarly, Moore (1999) argues that Rawls' articulated sense of justice could only develop in an individual who had developed bonds of attachment to others. Moore (1999) goes a step further than Moller Okin (1999) in her suggestion that when care is detached from particular historical relationships and extended to everyone, stranger or not, it is indistinguishable from justice. In addition, Moore (1999) argues "autonomy must be conceived in a way that incorporates the relational insights of the ethics of care" (p. 12). These observations suggest that a more caring justice within the existing western justice realm is possible and would help address certain feminist concerns.

West (1997) suggests the need to reconceptualize the moral idea of legal justice in such a way that a notion of care becomes central to the meaning of legal justice relating to both private and public realms of life. In other words, according to West (1997), the law needs to move beyond its focus on consistency, integrity and impartiality to a type of “caring justice” (p. 38) which acknowledges the importance of interpersonal relationships in one’s life, for instance, between child and care-giver. Moore (1999) argues for a more inclusive, contextual interpretation of justice. Her view is the “beliefs, values and relationships that people care about and are committed to should be seen as integral to the development of just people and just society” (p. 14). These visions of caring justice are consistent with the view of Seita (2000) who advocates that in the realm of child welfare, there is a need to move toward the following four child and youth development principles in children’s lives:

1. Connectedness (promoting close, positive relationships);
2. Continuity;
3. Dignity (courtesy, respect and safety);
4. Opportunity (capitalizing on one’s strengths and forming a personal vision) (p. 84).

These perspectives are not inconsistent with human rights if rights are understood as existing independent of and outside the discursive enclave of contemporary law.

Other writers’ comments about the nature and potential of human rights further develop the critical views I have discussed. For instance, Ife (2001) contends that an ongoing struggle for social change is inherent in human rights, a struggle aimed at maximizing human dignity. Similarly, Donnelly’s (1989) view is that human rights provide context for and support for “rights-based demands for social change” (p. 15). Wolfson (1992) contends that human rights provide a more solid basis for regulating behaviour than concepts such as love or altruism in



suggesting that rights “settle [conflicts] . . . in a fair, non-arbitrary and consistent way” (Wolfson, 1992, p. 9). According to Sarat and Kearns (2001), “The language of rights in general, and of human rights in particular, would seem to demand a grounding or foundation in something timeless and universal, something that establishes the transcultural and transhistorical basis of ethics and duty” (p. 9). It is my view that human rights can provide a means by which to ameliorate oppression; however, in resorting to human rights, one must not only consider and seek alternatives to oppressive societal relations and supporting institutions (Swift, 2001; Mulally, 2002) but also address the significance of social context in people’s lives. Human rights, as articulated in liberal discourse and reflected in current Canadian law, provide only one step toward fuller realization of children’s rights.

#### *Social Work Criticisms of Canadian Child Welfare Policy and Legislation*

Social work criticisms of the existing Canadian child welfare policy reflect and expand on critical feminist discourse pertaining to rights and justice. Callahan (1993b) discusses how Canadian child welfare policy and legislation ignore and worsen the disadvantaged position of women and children in the following ways:

1. The system does not address poverty or reasons for it although most women and children involved with the child welfare system are poor - there is a distinctive separation between poverty and child care;
2. Child welfare policy does not address women’s frequent inability to protect children from violent or sexually abusive partners;
3. Child welfare policy perpetuates a private / public division.

To address these factors identified by Callahan (1993b) would provides a concrete starting point for challenging patterns of oppression in the British Columbia child protection legislative

context.

Swift (1995) contends that child protection policy in Canada focuses almost exclusively on women and their inadequacies as mothers, a focus that diminishes an understanding of the social and economic context of neglect. Likewise, according to Pulkingham and Ternowetsky (1997), “women’s inadequacies as wives and mothers” are a defining aspect of child welfare policy. Pulkingham and Ternowetsky (1997) further suggest that it is only where the presupposed mothering role breaks down that child protection social policy, residually formulated, fills the gap left. Independently provided care-giving and protection therefore, are presumed functions of proper mothering (Krane, 1997).

Swift (1995) critiques not only the emphasis on casework putting the family as the location of problems but also the increasing legalization which effectively turns social workers into evidence collectors in anticipation of court. According to Swift (1995), this latter emphasis takes away the social worker’s potential to engage in relationship-building and anti-oppressive practices. In addition, Swift (2001) contends that the separation of child welfare policy from social context “creates an extremely narrow version of social reality” (p. 68) and legitimizes existing power relations. This comment is consistent with feminist writer Young (1999) who argues that a shortcoming of Rawls’ liberal justice theory is failure to consider social relations and supporting institutions that create power for certain members of society and not for others; in other words according to Young (1999), a “discussion of power as some kind of ‘stock’ which can be distributed obscures the fact that power, unlike wealth. . . does not exist except through social relations. . . and supporting institutions” (pp. 299-300).

As I have discussed, the 1996 enactment of the *Child, Family and Community Service Act* has led to increased legalization of the child protection system of British Columbia without

specific acknowledgement of underlying social relations. As I have identified, a significant part of the Act sets out court process for child protection cases and the procedural steps that child protection workers, notably social workers, are to take. In light of this high degree of formal legal process, it is significant that gaps respecting children's rights continue.

Early (2000) reports on a qualitative study that she conducted of child protection social workers under the current British Columbia child welfare legislative framework. The social workers she interviewed cited that a problem in the current legislation is the dichotomy created between keeping families together and protecting children; this dichotomy according to Early (2000) leads to interventions only in critical situations and lack of emphasis on preventative measures. Savoury and Kufeldt (1997) critique contemporary legislative child welfare approaches as being focused on provision of services only when there are protection concerns and inadequacy of funding to provide a continuum of support services to families.

Child welfare policy including British Columbia child protection legislation, according to these views, rests on particular assumptions about the family. Social work critiques of the legislation in this regard parallel feminist concerns about familial assumptions inherent in the mainstream justice ethic developed by liberal theorists such as Rawls. Krane (1997) contends that the very idea of viewing the family as a social unit is heavy with assumptions about parental roles. According to Ackelsberg and Lyndon Shanley (1996), who and what constitutes a family is merely a derivation of the law, and it is "impossible. . . to distinguish clearly and permanently 'public' from 'private'" (p. 219). Similarly, Moroney (1991) holds that, "there is a widely held belief that family life is and should be a private matter. . . this approach supports the notion of intervention in family life only when necessary" (p. 141). If social policy treats the family as an entity unto itself, the role of primary caregivers within the family structure becomes lost to the

policy eye.

This social work critique gains further support from feminist discourse. Moore (1999) outlines one result of the problematic public / private dichotomy in the following words: “the tendency to conceive of care for others as a ‘private choice,’ as a self-interested act, locates the problem of welfare with the single mother herself, rather than with the economic and structural conditions in which welfare operates” (p. 13). According to Moore (1999), being situated within the private realm can lead to invisibility in public policy, a phenomenon that can further accentuate the divide while at the same time, artificially constructing “public” social policy concerns as somehow more worthy of public support.

Pulkingham and Ternowetsky (1997) describe how “anachronistic” social policies rest on “a set of contradictory prescriptions rooted in the attempt to privatize (individualize) responsibilities, through the ‘family’ and / or the ‘market’” (p. 19). Moller Okin (1989) critiques what she sees as an underlying assumption of political theories: “that the sphere of family and personal life [is conceived as] so separate and distinct from the rest of social life that such theories can justifiably assume but ignore it” (pp. 125-126). Similarly, according to Eekelaar (1994), the “liberal perception of the relationship between state and citizen” rests on an understanding that “state interventions in citizens’ lives should be as far as possible clearly defined and predictable” in order that parents are not “too vulnerable to unpredictable and largely unchallengeable impingements on their upbringing of their children” (p. 45).

In this context, the notion of care becomes something assumed to be provided by primary caregivers, often women, as something that lacks inherent worth before the law. Callahan (1993b) discusses how “child care has become women’s work, both publicly and privately, that is devalued and underpaid” (p. 190). Pulkingham and Ternowetsky (1997) further characterize

contemporary declining public social policy (including child welfare) trends as “neoliberal non-interventionism” that leaves women “obliged to undertake more unpaid caring work” (p. 26).

Tied to this trend is a weakening of the welfare state and with it, a challenge to the notion of universality (Mishra, 1999) as articulated in international instruments such as the Convention. Mishra (1999) and Schwab and Pollis (2000) emphasize the increasingly significant impact of globalization as serving to diminish the role of the state and associated government services in the realm of social policy. The continuing effect that globalizing trends will have on the British Columbia child protection legislative scheme and associated social work practice remains to be seen.

In summary, social work and feminist criticism share in a number of observations that can be applied generally to the legal system and specifically to contemporary legislated British Columbia child welfare policy. Critical social work writers and feminists support how the current British Columbia child welfare legislation, as an aspect of the law, fails to address or have regard for overarching patterns of oppression in society. Whereas feminist writers stress how liberal legal discourse takes it for granted that women will fill caregiver roles and do not merit public support services to do so, a critique of child welfare policy centers on women’s perceived shortcomings in regard to this caregiving role. This phenomenon results in the more punitive and less supportive quality of British Columbia child welfare legislation and resulting policy. Whereas a noted shortcoming of contemporary child welfare policy is its emphasis on legalization at the expense of social workers’ relationship-building potential, feminist writers stress the need for the notion of justice to be tempered by or incorporated with care and the importance of personal relationships among people. In these ways, feminist critical discourse responds to contemporary critique of British Columbia child welfare legislation and policy.

## Chapter Six: Findings and Recommendations

Based on the foregoing discussion, in this chapter I outline my findings in response to each of my research questions. Following the discussion of findings, I proceed into my recommendations which arise out of my findings. Appendix “A” provides an overview of my key recommendations and the corresponding level of policy reform required for each.

### *Summary of Findings*

#### *Research Question a: The Reflection of Children’s Convention Rights in the Child, Family and Community Service Act*

There are some shortcomings in the British Columbia *Child, Family and Community Service Act* in terms of the children’s rights outlined in the Convention. Table 6.1 outlines some of the key shortcomings I have discussed.

Table 6.1

#### *Key Shortcomings in the Child, Family and Community Service Act*

<i>Child, Family and Community Service Act</i>	<i>Convention on the Rights of the Child</i>
Children over 12 years old are given notice of child protection proceedings but there is no specific provision outlining what children’s rights of participation are. In addition, there is no means by which children can have input into administrative decisions affecting them.	Article 12 of the Convention establishes that children capable of forming own views be informed of administrative & judicial processes affecting them and be given the opportunity to express their views including the right to attend proceedings affecting them.
The Act fails to outline the measures by which children’s views will be advanced / considered to determine best interests of the child.	Article 3(1) of the Convention outlines best interests of the child as a primary consideration but taken with Article 12, children’s views (when capable) should be a consideration in determining best interests.
The definition of protection is adversarily constructed and fails to recognize government support for children and their caregivers as a viable means of protection. The definition contains an assumption that only the ministry for children and families provides protection when a child is taken into government care.	Article 19(2) of the Convention establishes that protective measures should include social programmes for necessary support for the child & those who have care of the child.
The Act fails to acknowledge or address social context of children including : poverty, violence they have witnessed, lack of accessible services for children and their caregivers.	Article 19(2) of the Convention establishes that protective measures should include social programmes for necessary support for children & caregivers.
There is a lack of administrative accountability provisions in the Act (in terms of administrative non-judicial decisions made) about children.	Article 25 of the Convention provides for a child’s right to periodic review of treatment provided when placed by authority for purpose of care or protection.

*Research Question b: Due Process and Procedural Measures in the Child, Family and Community Service Act*

Flowing from the preceding question and findings, the due process and procedural measures provided for in the *Child, Family and Community Service Act* are legally deficient in terms of children's rights. In particular, the provisions setting out children's right to be informed and to participate are inadequate in terms of the Convention. Whereas the British Columbia legislation makes a distinction between 12 years and over and under 12 years, the Convention makes no such specific age distinction, focusing instead on capability. In addition, there are no specific participatory provisions for children in terms of court and administrative decision-making processes in the *Child, Family and Community Services Act*. The availability of legal aid and other supports for children closely relates to this issue of due process and the extent to which children can realistically participate. The due process provisions in the legislation tend to focus on parents' entitlements. Further, in terms of emerging alternative dispute resolution approaches such as family conferences and mediation, there is no legislative provision setting out children's participation rights.

*Research Question c: Child Advocacy*

The current British Columbia child advocacy legislative provisions are lacking in terms of children's rights. To consider this question, it becomes necessary to consider other legislation including the British Columbia *Office of Child and Youth Act* (2002) and the *Ombudsman Act* (1996) alongside the *Child, Family and Community Service Act*. The role of the advocate would ideally be to assist with the protection and advancement of children's rights. Despite the existence of this legislation, the scope of services provided for under the legislation is far from sufficient in terms of children's rights due to the magnitude of issues potentially impacting

children's rights in the child welfare legislative realm.

*Research Question d: The Relationship between the Treatment of Children's Rights in the Child British Columbia Child Protection Legislation and Critical Discourse*

The treatment of children's rights in the British Columbia child protection legislation is very much premised on liberal notions of rights as articulated by such theorists as Kant and more recently, Rawls. A critical feminist social work lens allows for an expanded understanding of children's rights as a phenomenon less individual in nature but more consistent with relationship and nurture characteristic of an ethic of care. As such, the notion of care becomes a central concern from this critical perspective. The extent to which care and relationships are considered alongside liberally articulated and abstractly formulated rights is a critical factor in assessing the extent to which the legislation addresses or fails to address children's rights. As outlined, in some respects, this critical perspective is not inconsistent with the Convention which not only stresses the importance of children's social context but also emphasizes their vulnerability and dependent circumstances. From the critical perspective then, the British Columbia child protection legislation is lacking for its failure to adequately address and respond to social context in its treatment of children's rights. For instance, the rigorous court procedures directed at adult parents (who, unlike children, are seen as capable holders of rights) fails to adequately address the rights of children. In addition, the lack of legislative acknowledgement for social factors such as poverty relating to children underscores an incomplete understanding of and approach to children and rights protection. The lack of support services for children and their primary caregivers also reflects a disregard for the unique circumstances and needs of children identified in the Convention.

Wilson (1994) suggests that since legal discourse has shifted to child "rights," little has



changed substantially in related Canadian law. He argues that child protection legislation tends to rest on certain implied assumptions including:

1. A child belongs to only one set of parents; when one fails, a second takes over to the exclusion of the first;
2. A failed family is the fault of a set of parents rather than the community-at-large; issues such as economic deprivation and societal contribution to a state of neglect are considered irrelevant;
3. Betterment of a child's circumstances requires removal from the home; therefore, more resources are spent outside instead of within the family;
4. Children are dependent, innocent and vulnerable so their rights relate to these concepts rather than them having independent and separate status (p. 3.3).

According to Wilson (1994), these underlying assumptions limit children's rights from being substantively protected in the law but the question remains whether the legal system itself is capable of moving beyond such assumptions. As I have outlined, the notion of legal rights itself carries with it a bundle of related assumptions. Simon (2000) advances another view related to the limited application of children's rights in child welfare law such as the *Child, Family and Community Service Act*. His perspective about the limited nature of children's rights in child protection legislation focuses on how rights attach to the individual and what he views as an unnecessarily adversarial relationship created by rights between parent and child (parental rights versus child rights) (Simon, 2000).

As outlined, the statement of children's rights in the Convention therefore demands a revised understanding of this liberal rights assumption of freedom and autonomy due to the unique legal and social factors associated with children. Critical social work and feminist

discourse provide guidance in this regard. For instance, the issue of children's dependency on others is clearly a central issue in regard to considering children's rights as is the need for a more caring (Gilligan, 1982; Clement, 1996) approach to keeping children healthy and safe. Clement's (1996) view is that increased acknowledgement and integration of an ethic of care with its focus on relationship needs to be further developed in liberal justice theory. She refers to justice and care as "indispensable allies" (p. 109) and advocates for an approach of blending the two rather than going to the extreme of one or the other.

Benhabib (1987) stresses the importance of an approach "that does not deny our embodied and embedded identity [but also which] aims at developing moral attitudes and encouraging political transformations" (p. 81). Children are not entirely autonomous and independent beings, either practically or legally. Therefore, future development of children's rights will potentially lead to challenges of the underlying liberal assumptions associated with legal rights discourse. This reframing of children's rights would lead to a social policy approach that views and treats children's existing relationships as vitally important to their lives.

There is a need to move beyond the public / private dichotomy assumed and supported through contemporary residual social policy (Moroney, 1991). This approach provides justification for viewing a family as an independent and self-sufficient cornerstone unit of society (McInnis-Dittrich, 1994). Such an assumption in turn bolsters the perceived division between public and private realms and provides rationale for a policy approach that provides intervention only when there is perceived family breakdown and deficit in familial functioning. Feminist writers stress the importance of acknowledging the connection of children and family to the larger community (Pollis, 2000; Clement, 1996).

West (1997) and Clement (1996) discuss how an emphasis on the notion of care leads to

recognition of the importance of interpersonal relationships between people, relationships not necessarily confined by the family unit. This feminist view supports a philosophical shift toward placing relationships and connectedness as centrally important to children's needs and rights. In addition, Krane (1997) stresses the need to acknowledge and recognize the role of caregivers in society, in moving beyond the artificial private/ public divide. Other writers who critique the perpetuation of the public / private divide include: Callaghan (1993b); Pulkingham and Ternowetsky (1997); Moller Okin (1989); Ackelsberg and Lyndon Shanley (1996); and Moore (1999). These writers stress the importance of treating care giving to children as worthy of public value and support. The focus of child welfare policy instead should be protecting and emphasizing children's relationships and support systems in a nurturing rather than adversarial manner. While I acknowledge this focus on relationships already occurs in certain cases, it could be made more of a priority on the face of the legislation: to behold children as relationship-holders rather than subjects and to lend support for those relationships.

### *Recommendations*

#### *The Definition of "Protection"*

Consistent with the foregoing observations, the definition of "protection" in the *Child, Family and Community Service Act* needs to be re-articulated to be more consistent with Article 19 of the Convention which stresses the need for governments to provide social programs to support children and their caregivers. The concept needs to be understood more broadly to encompass not only government-administered protection but also caregiver-provided protection. Accompanying this change, there should be provision in the legislation for support of such protection and children's pre-existing relationships.

This recommendation to broaden the conceptualization of protection requires a shift away

from current adversarial child protection context and toward a cooperative approach instead. Consistent with this proposed shift, the legislation should include explicit acknowledgement of children's significant nurturing relationships including extended family and community members where relevant and should emphasize protecting those relationships. Supports to children and their caregivers should not contain negative stigma and should be widely available as a public child welfare service. Consideration of children's significant relationships should be mandatory not discretionary on the part of social workers, judges and others with legislated functions. In addition, there should be included in the legislation mechanisms by which anyone who has such a relationship with a child can have some input and involvement in decision-making processes about the child's life. Counselling and child advocacy services could be designed to help identify these significant nurturing relationships. There may need to be a shift away from the legislated assumption of a nuclear family that may no longer reflect current reality for many British Columbia children.

In essence, support for children and their caregivers needs to be recognized as a fundamental right of children pursuant to Article 19 of the Convention. This recommendation addresses Seita's (2000) contention that continuity and connectedness should be important considerations in children's lives. Similarly, attachment theorists (Holmes, 1993) emphasize the critical importance of children having consistent attachment to a primary caregiver in order to promote their emotional health and sense of security.

#### *Acknowledgement of Caregiver Vulnerabilities*

There should be provision in the legislation for a child's caregiver who has been abused by another party to have additional support through any protection investigation or process. This provision is particularly important in the context of child protection mediations and other

alternative dispute mechanisms. Accompanying services to assist the caregiver need to be developed, perhaps as an addition to or reformulation of existing victim support services. Accompanying this development, there needs to be a higher level of integration when necessary between child welfare and victim support services. These interrelated services should not operate in isolation of each other. Such a change would help redress current discriminatory trends in the legal system as identified by Comack (1999), MacKinnon (1989), Trerise (2000) and the Law Society of British Columbia (1992) whereby women are often discriminated against. As noted by Swift (1995 & 2001), the majority of child protection investigations in Canada involve single mothers. Further development and integration of caregiver-supporting services would also address Callaghan's (1993b) observation that the current child protection framework disregards women's inability to protect children from abusive partners.

Caregivers should not be punished for economic vulnerability but rather, supported. As noted by the British Columbia government (British Columbia Ministry of Children and Family Development, 2002), the majority of children taken into care come from homes receiving income assistance. Single mothers in particular require public child care support. There needs to be a provision in the legislation stating that relative financial positions of caregivers is not relevant in child welfare determinations to the issue of "ability to provide for the child." As noted by Callaghan (1993b), the current child protection legislative scheme fails to consider or address poverty trends relating to child protection investigations; therefore, it is imperative that poverty be addressed directly in future British Columbia child welfare policy.

#### *Counselling Services for Children*

Consistent with the ethic of care (Gilligan, 1982), there is a need for enhanced counselling services to support and work with children and their caregivers through the child

protection process. Counselling services need to be annexed to or connected with the administration of justice infrastructure including the courts and emerging alternative dispute processes for improved integration and inter-connectedness of services. Child protection is an aspect of child welfare and as such, does not necessarily need to be as separated as is currently the case from other areas of child welfare, including custody and access disputes as between family members and quality of life considerations.

In family law custody and access disputes, section 15 of the British Columbia *Family Relations Act* (1996) currently establishes the statutory authority for a custody and access report to be carried out. This section states,

- (1) In a proceeding under this Act, the court may, on application, including application made without notice to any other person, direct an investigation into a family matter by a person who:
  - (a) has had no previous connection with the parties to the proceeding or to whom each party consents, and
  - (b) is a family counsellor, social worker or other person approved by the court for the purpose.

Such a person then reports to the Court as to a recommended custody and access arrangement. Currently, this function is carried out by family justice counsellors or independent contractors. I recommend that this function be further coordinated with a counselling role. Within the child protection realm, counsellors should be in a position to comment objectively when necessary on the needs of children and their caregivers. This role should be arms-length distance from child protection services. Some current family mediation / collaborative law processes in the province of British Columbia already incorporate child specialists into the process. The child specialist is

a counsellor with specialized training to provide therapeutic services to children. Currently, this practice relates only to marital disputes which may involve custody and access issues between parents. It should be expanded to child protection considerations.

### *Child Advocacy*

There is also a need for a strengthened child advocate role in the legislative realm of child welfare in British Columbia. This service could be coordinated with the counselling service. As such, enabling legislation should more comprehensively outline the role, responsibilities and powers of children's advocates to be located around the province rather than centrally located. As identified by Smart (1989), more politically powerful persons' rights can take precedence over more vulnerable persons' in the current legal structure; advocacy services are a means of addressing this phenomenon for children (Bearup & Pulusci, 1999; Flekkoy, 1991). Child advocates need to be locally available throughout the province to enhance accessibility to their services. Further, they should not be constrained to either an out-of-court or in-court role. An office staffed by a multi-disciplinary child-centered team could effectively address both out-of-court and in-court interests and needs of children.

This advocacy role could also expand on Section 15 of the *Family Relations Act* (1996) which provides that social workers can prepare custody and access reports. The advocacy service could also function closely with the counselling service. Social workers have a skill set from which to draw to be effective advocates. Certainly, advocacy is of central importance to the profession of social work (Reamer, 1999). It is important however, that this formal role be somehow separated from child protection work in order to facilitate a higher level of accountability within the system than currently exists. The advocate could also work cooperatively with the child's and caregiver's counsellor.

Advocates need to have skills working with children and youths so they will be viewed as approachable by children. A component of child advocates' work which could be facilitated by social workers is education in the school system and at public functions, directed at all British Columbia children and youths whether or not under child protection services. This educational component should be instructive at the local community level and should identify children's rights and outline support services available. An important role of these child advocacy services would be to facilitate child participation in decision-making processes that impact on their lives. Such advocacy services need to be accompanied by legislative changes that outline not only how children and youths can more fully participate but also the specific role / powers of children's advocates in this regard. Child advocates need to work in concert with children and youths to support the latter's ability to self-advocate and to receive response (Children's Commission, 1999). Legislative amendment will be required to support these advocacy measures and to ensure that service providers are accountable to respond in meaningful ways.

An additional function of these advocates should be to provide their own direct comment to government about policy matters relating to children. This information needs to come directly from the line-level service providers located in various locations throughout the province who work directly with children and youths. The provincial government, including the administration of child protection services, should be under a legislated requirement to respond to this child advocacy feedback in a meaningful way. Whereas the prior Children's Commission and Child, Youth and Family Advocate commented publicly on child-related shortcomings, there were no legislated consequences of the government service providers not responding effectively. The same is the case with the observations of the provincial Ombudsman. These shortcomings need to be remedied so as to ensure a higher level of accountability to children (Flekkoy, 1991).



An important aspect of the child advocate's work would be to acknowledge and provide special services for children with special circumstances. Children with special needs for instance not only potentially require assistance in the realm of child protection but also with a myriad of issues pertaining to accessing special needs services. The advocate's office would either need to provide specialized services to address those needs or alternatively, would need to coordinate very closely in a holistic manner, with other service providers in that realm. Aboriginal children also require particularized services. The current trend toward Aboriginal agencies assuming child protection jurisdiction and Aboriginal rights add further layers of complexity that relate to this group of children. An advocate's office most certainly needs to be available to Aboriginal children who are among the most vulnerable of vulnerable in child protection matters, but cultural sensitivity and appropriateness of services need to be considered.

As I have outlined, a particular concern in British Columbia relates to the potential of decentralization of child welfare services. Child advocates need to be able to hold accountable the emerging service providers and to comment on the quality of the work done by those service providers. There needs to be direct accountability on the part of whoever is given the mandate to deliver child protection services to children and families to ensure children's rights are respected and incorporated into delivery of services.

I specifically recommend these child advocacy centers have a legislated function for the following reasons:

1. Accessibility for the public – the public can access legislation to determine what the role of these advocates is;
2. The way the Canadian legal system is currently set up affords formal accountability structures within the legislative / legal realm; such authority is an important means of

such an advocacy office securing legitimacy in society.

### *Further Development of Alternative Dispute Resolution*

Another potential out-of-court role for the recommended child advocates is participation in emerging alternative dispute resolution processes in the realm of child protection. These advocates would have responsibility for representing the child's interests and / or rights in the mediation, family conference or other alternative dispute resolution process. This role could reflect certain aspects of the concept of the "child specialist" as it is developing in the realm of collaborative family models in the southern part of British Columbia. Alternative dispute resolution could further develop to address administrative as well as court-based decisions.

Mediation and other out-of-court processes could potentially focus on and preserve important relationships. An important component of alternative dispute resolution processes however, is attention to the rights of participants. The issue becomes particularly challenging in light of mediation's focus on interests rather than rights; however, if rights are re-understood as encompassing caring relationships and nurture, they become potentially more consistent with and manageable in alternative dispute resolution processes such as mediation. It is a recommendation therefore that alternative dispute resolution initiatives continue; however, attention to and accommodation for the participants' rights should be addressed. This rights aspect is particularly important due to the potential of coercion and power imbalances in protection matters. Mediation rests on an assumption that the participants are dialoguing with one another on a relatively even playing ground. Child advocates, assisted by counsel where necessary, can play a crucial role in keeping a rights focus for participants to such processes.

Counsellors and other pre-existing supports to children and caregivers need to participate in alternative dispute resolution processes so as to help ensure all parties are treated respectfully

and can participate effectively. While acknowledgement of human rights remains critical, these rights need to be understood to encompass not only formal legal rights but also rights to be cared for and nurtured and to have supported significant relationships in one's life. The public / private divide needs to be challenged in these dispute resolution processes so as to recognize and support caregivers' efforts in a non-punitive spirit.

#### *Increased Legal Aid Coverage*

In addition, legal aid coverage needs to be in step with the requirements of child protection proceedings, and counsel should be available for consultation whether the matter is dealt with in court or through mediated process. The entire issue of people's access to justice in British Columbia needs to be reviewed in an in depth manner. Further, additional research is needed into the impact of fiscal cutbacks to the courts and the legal system, specifically in regard to the due process rights of children and their caregivers in child protection proceedings. The availability of legal aid for children in protection proceedings (whether court-based or not) needs to be improved. Children should have available to them the option of consulting with counsel through child advocacy services when necessary.

#### *Unified Family Court*

The Berger-led Royal Commission (1974) recommended the establishment of a unified family court. A unified family court would be specifically designed to address all family matters and all cases involving children. It would be staffed by family judges with specific skills and aptitudes in this area of the law and would bring together a myriad of family support and child-centered services including the advocates, counsellors, mediation services and court-based referrals to associated services. One point of interest concerning the unified family court idea is that it is designed to address all cases concerning children. Currently under the law, child

protection cases are treated quite distinctly from cases involving children including other custody and access matters. As I have outlined, in the family realm, not only is the governing legislation different - *Child, Family and Community Service Act* versus *Family Relations Act* (1996) and federal *Divorce Act* (1985) - but also, the legal principles from case law have developed differently.

Whereas case law pertaining to family custody and access disputes between parents focuses on children's "rights" language, in child protection case law to date, the predominant statements of judge-made law centre on parents' rights. There has only been minimal judicial pronouncement about the specific rights and entitlements of children who are subject of child protection proceedings. It is an interesting phenomenon which is potentially explained by reference to the legislated "state" as protector of children, as formally established and judicially accepted through the legal doctrine of *parens patriae*.

To date, there has not occurred as much judicial consideration of children's rights vis-à-vis the state apparatus in child protection proceedings. On closer examination of the implications of and shortcomings in the current child protection legislated policy of British Columbia, this lack of judicial pronouncement is a significant gap and could be attributable to lack of resources and ability on the part of persons directly affected by the persons directly affected by the child protection system to advance their concerns to appellate levels of court. At a legal practice level, vulnerable children tend to have neither the resources nor support to take cases to higher levels of court to obtain clarity around questions of law pertaining to their rights and resulting specific entitlements. As such, it is an area of welfare where rights can be eroded without recourse.

To use the unified family court as a means to bring child protection matters under the same administrative / structural umbrella as other family matters, may have a reinforcing effect in

terms of children's rights being acknowledged and protected in a more consistent manner under the law. Integration of child-centered service delivery would be a key aspect of the unified family court. Because of the multi-disciplinary nature of the court, a unified family court would provide a forum wherein legal, social and psycho-educational concerns relating to children and their caregivers could be considered and addressed in a more holistic and less piecemeal way than is currently the case. Legislative provision should set out judges' obligations to consult with and consider the views of other professionals including counsellors, social workers and child advocates.

Another associated benefit of the unified family court is that because the judges would be appointed as both provincial and supreme court judges, they would have inherent jurisdiction under Section 96 of the Canadian Constitution which includes *parens patriae*. Current child protection cases are heard by provincial court judges as the judges of first instance. The vast majority of child protection determinations occur at that level of court before provincial statute-bound judges, meaning they are bound to stay within the wording of the *Child, Family and Community Service Act* and other provincial legislation, regardless of how inadequate.

Therefore, a unified family court would provide an additional layer of regard for the welfare of children even in the face of legislative shortcomings. Social workers could be a central part of a unified family court process, providing counselling, advocacy, alternative dispute resolution and child protection services. An important aspect of a successful unified family court would be multi-disciplinarity focused on providing more holistic child-centered services.

#### *Children's Court*

The unified family court should comprise a form of children's court wherein children and youths could be directly heard in certain cases. The legislation could be amended to provide for

children's recourse to this children's court in situations where their needs within the child protection realm are not being addressed; further, such a court would have broader jurisdiction to consider other child welfare matters beyond child protection. It is my recommendation that such a children's court be open to children's counsel, child advocates and children and youths themselves and should have measures available to them to implement in the face of service providers' failure to account for and respond to children's needs. The presiders (whether judges or a less intimidating decision-maker role) of this children's court should be required to have extensive experience and skills in interacting with children and youth. It would be preferable that the presider of the children's court could be a mediator/ arbitrator or a type of specialized "master" (similar to what currently exists in British Columbia Supreme Court) as opposed to a judge and could make decisions that would be subject to judicial approval without the need for a child to re-attend in a more formal and intimidating courtroom.

#### *Statement of Children's Rights*

Flekkoy (1991) suggests that a service for children needs to have the interests of children as a starting point. As identified by feminist and social work critical writers, social programs and support for children's significant important relationships are crucial to the best interests of children. The wording of Article 19 of the Convention lends further support to this perspective. Canadian law clearly establishes that the "best interests of children" is the foremost consideration in matters involving children, but formal statements of law are only as strong as the practical means by which they are implemented. The current British Columbia child protection legislation is lacking in a number of ways in regard to promoting and safeguarding children's rights.

In addition and as identified, the rights currently set out in Section 70 of the *Child, Family and Community Service Act* are hollow as they are without meaningful remedy or

consequence to a party who does not respect and uphold them. Outside court are the myriad of administrative matters pertaining to children as set out in the provincial legislation. In the context of child protection, for instance, is the concern about children's rights within the administrative decision-making framework. This shortcoming needs to be remedied by inclusion in the legislation of enforceable consequences for service providers who do not uphold children's rights. In addition, all children in British Columbia – whether or not in care – need to have recourse to the children's advocates.

With respect to the matter of children's legislated rights, the advocate office needs to have enforceable powers to act in an investigatory and advocacy role on behalf of children. The Convention provides a starting point for the guiding framework and priorities that would guide its direction. Accompanying the establishment of these local child welfare / advocate centers or offices, there need to be a number of amendments to the existing British Columbia legislation. Providing a space for children's own voices is an important aspect of child advocacy work and is called for by the Convention. In the words of Mansbridge (1996):

Both good relationships and also good democratic institutions should make the use of power *mutually empowering* so that each individual experiences the ability to cause outcomes by shaping others' lives and threatening sanctions. At the same time, both good relationships and democratic institutions should find uses of power and stances toward those uses that strengthen close relations rather than disrupting them (p. 128).

As the Berger-led Royal Commission (1976) recommended, a comprehensive codification of children's rights would provide a useful starting point from which to develop child welfare policy in a more integrated, consistent and mutually reinforcing manner. With a starting point as children's rights, the shortcomings of Section 70 would be addressed.

Without a full-scale legislated statement of children's rights in British Columbia, I recommend the following amendments to Section 70 of the *Child, Family and Community Service Act*:

1. The rights enunciated there need to be expanded to relate to any children who may or may not be in care;
2. The rights should closely reflect the entirety of children's rights set out in the Convention;
3. The rights once expanded, need to be enforceable with consequences to those persons (including representatives of the state) who do not abide by them.

#### *An Enhanced Role for Social Workers*

As outlined, there are a number of reforms to the existing legal structure that could significantly improve the plight of children in British Columbia. To date, social workers' formal role has predominantly been child protection work; however, the myriad of communication, counselling, empathetic skills that social workers develop and emphasize could allow the profession to move into central and more varied roles in the justice system relating to children. Some of the potential roles for social workers that flow from these recommendations are: child advocates; mediators and other alternative dispute resolution facilitators; child counsellors and therapists (attached to unified family and children's courts); child specialists. In addition, social workers could work in a supportive role to children, their families, social supports and communities. Finally, they could perform as presiders in children's court.

In appreciating children's human rights, child protection social workers can also shift their practice and philosophical orientations to be more child welfare centered. The latter role would be further enhanced by child protection workers' mandatory membership in a professional



social work governing body and adherence to professional social work ethics. Governance by a professional body would ensure a higher level of accountability, enhanced compliance with professional social work ethics and increased clarity for the practice of social work in the child protection context. Further, being informed and knowledgeable about the issues at stake and the law is an important step toward a fuller and more dynamic and responsive role for social workers. Social workers are well-positioned to assume a lead role in rallying and lobbying for change on various fronts pertaining to child welfare policy.

The social work profession will have an important role in advocating for children's human rights and the importance of social context in this shifting public welfare policy landscape. Social workers will need to exercise their critical analysis, advocacy and dialogue skills in calling for improved recognition of and attention to children's rights. Allen's (1999) writing supports how a feminist empowerment-based approach, as supported by Gilligan's ethic of care, leads to an emphasis on preservation, nurturing and empowering of children. In calling for a feminist-inspired movement and change, hooks (1984) acknowledges, "leaders are needed and should be individuals who acknowledge their relationship to the group and who are accountable to it. They should have the ability to show love and compassion, show this love through their actions and be able to engage in successful dialogue" (p. 161). Mullaly's (2002) writing on anti-oppressive social work supports these critical and empowerment-focused approaches to practice.

In considering the future applicability of the Convention and emphasizing the need to move beyond western imperialistic tradition, Harris-Short (2001) suggests that there needs to be engagement and dialogue with "the other" with the aim of reaching cross-cultural consensus about children's rights. This suggestion can be applied at the local level between people with

differing priorities and interests. Freire's (2001) view is that "dialogue imposes itself as the way by which [people] achieve significance as human beings" (p. 88); he further suggests that dialogues must engage in thought that "discerns an indivisible solidarity between the world and the people and admits of no dichotomy between them" (Freire, 2002, p. 92). Consistent with the writings of critical feminist theorists influenced by deconstructive method, Freire conceives of reality as an unfolding process rather than as a static entity (2001, p. 92). Accordingly, his view is that focus must be "the present, existential, concrete situation, reflecting the aspirations of people" (p. 95).

With its involvement in the BC Child and Youth Advocacy Coalition, the British Columbia Association of Social Workers has already started to address this concern. This involvement should be increasingly more proactive, vocal and central on the part of social workers who work within and outside the child welfare system. Collaborative and respectful discussions with other concerned groups and government need to continue at both provincial and local levels. In addition, coordination of these efforts is essential. Community-based research, both qualitative and quantitative, that is conducted in a respectful and inclusive manner also invites participation and a voice for individuals who may be affected by current child welfare policy trends. These efforts need to continue and expand.

To move beyond the significant limitations I have identified in the child protection legislative framework, social workers, including child protection social workers, need to assume lead roles in working with British Columbia society to identify the common values we share as human beings. In addition, social workers have an important potential role to play in helping to move society forward in terms of understanding and educating others about children's human rights, participating in ongoing advocacy and support for children and other vulnerable persons,

while acknowledging people's dignity, maintaining professional integrity and practicing respectfully. In addition, social workers need to be able to comment knowledgeably on current social policy and legislative trends and whether they are consistent with the values for which the profession of social work purports to strive. Social workers will need to embrace an openness to move creatively and positively forward into the ever-changing British Columbia, Canadian and global social policy and practice context.

## Appendix 'A'

### Summary of Recommendations

Recommendation	Social policy / legislative change required to implement
Redefine definition of <i>protection</i> to be consistent with Article 19 of the <i>Convention on the Rights of the Child</i> to include supports for and recognition of children's existing nurturing relationships.	Legislative amendment
Reduction of negative stigma for children and their caregivers who receive supportive services.	Legislative amendment
Expand the rights set out in Section 70 of the <i>Child, Family and Community Service Act</i> to provide for human rights set out in <i>Convention on the Rights of the Child</i> for all children whether or not in care	Legislative amendment
Establish remedies in the legislation in the case of violations of and/ or lack of regard for children's rights	Legislative amendment
Consider the extent to which an assumption of nuclear family reflects current societal trends.	Further research & legislative amendment.
Economically vulnerable caregiver/s to have extra child care support	Legislative enactment, policy statement & implementation
Legislative provision that relative financial positions of caregivers not relevant to "ability to provide for child" and accommodation to be made for any discrepancy	Legislative enactment
Increase legal aid coverage for child protection proceedings including alternative dispute resolution processes	Policy amendment & expansion local level service delivery
Caregivers who have experienced abuse to receive extra support in child protection proceedings & corresponding integration of services	Service creation or expansion (victim services) local level
Establish a broader & locally situated range of child advocacy services throughout the province	Legislative amendment & service creation local level
Establish counselling / therapeutic services for children annexed to / affiliated with the courts & alternative dispute resolution processes.	Possible legislative amendment; service creation
Child advocate centres to be multi-disciplinary & child-centred & able to provide both in-court & out-of-court assistance as necessary	Policy & service creation local level (child advocacy service)
Child advocates to have (local) investigatory & advocacy powers	Legislative amendment
Child advocates to educate children/ youths about rights & services	Service creation local level
Child advocates to be able to communicate directly with government / legislators about needed changes & corresponding obligation to respond	Legislative enactment
Child advocates to be independent of government	Expansion of current legislative provision
Child advocates to help identify significant nurturing relationships in children's lives	Policy & service creation local level
Child advocates able to provide support to children and youth self-advocating on local case-by-case basis or to participate in decision-making processes	Policy & service creation local level (create child advocacy service)
Develop specialized child advocacy services for both Aboriginal children & children with special needs	Policy & service creation local level (specialized advocacy service)

<b>Recommendation</b>	<b>Social policy / legislative change required to implement</b>
Establish unified family court to address all family matters within jurisdiction of both provincial and supreme court	Legislative enactment & service creation local level (create unified family court)
Legislative provision outlining judges in unified court will consult with and consider the views of other professionals working with the child and family.	Legislative amendment
Establish specialized children's court in the unified family court responsive to administrative & court-based concerns of children, youths, and / or their social supports & child advocate/s	Legislative enactment & service creation local level (children's court)
Ensure that in emerging alternative dispute resolution processes like mediation, there is a focus on participants' rights	Legislative enactment, policy & service creation local level.
Social workers to engage in ongoing dialogue about children's rights at the provincial and community level.	Service creation local level
Move beyond public/ private distinction to recognize children and their caregivers as an inherent component of community worthy of support.	Community development; possible policy development
The profession of social work to take a more central role in the justice system relating to children. The following are potential roles: child advocates; mediators and other alternative dispute resolution facilitators; counsellors (attached to unified family & children's court); presiders in children's court.	Legislative enactment (not necessary but would reinforce increased role for social workers) & service creation local level
Child protection social workers to become more child rights centred in practice & philosophy- membership in professional social work body & adherence to professional social work ethics for child protection social workers	Legislative amendment <i>Social Workers Act</i> & policy implementation for social work practice

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