THE UTILITY OF PUBLIC LAW AND PRIVATE LAW IN INCORPORATING THE VOICE OF THE CHILD IN FAMILY LAW PROCEEDINGS

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Introduction

Both social science research and a major international agreement support incorporating the voice of the child into family law disputes.[1] In the Canadian context, however, quantitative research in this area shows that children's evidence is mentioned in less than half of decisions. And even where it is mentioned, it is more often through assessments (or "child custody evaluations") rather than legal representation or "direct" evidence from children. This has led some to advocate for a uniquely public law solution: that children, like the accused in the realm of criminal law, have a right to legal representation. However, this paper will argue that this solution is misguided for two reasons. First, it drastically underestimates the role the private law has played in important developments in family law over the last several decades. Second, it ignores fundamental difficulties in relying on the public law and the *Charter*[2] when it comes to advancing social causes. As a solution, this paper will suggest that the judicial interview, wherein a judge meets with a child in order to ascertain their views and interests, is an adequate mechanism to incorporate the voice of children in the family law context. At the same time, because this method is underutilized, it will be argued that the private law, in the form of detailed legislation mandating when interviews should occur, the required training for judges, and the procedure to be followed, will best vindicate the interests of children entangled in these difficult legal proceedings.

1. The Voice of the Child in the Family Law Context

As Rachel Birnbaum and Nicholas Bala point out, "there is a growing amount of research that recognizes the value for both decision-makers and children in having children actively involved in family law dispute resolution processes."[3] For example, the meaningful participation of children in decision-making can reduce their exposure

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[1] Rachel Birnbaum and Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24:3 Intl JL Pol'y & Fam 300 at 300.

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] Birnbaum and Bala, *supra* note 1 at 300–01.

to the negative side-effects of a family breakdown.[4] In addition, empirical studies on children's desire to be included suggest that they want to be kept informed and want their needs and interests heard.[5] These sentiments are reflected at the international level in the United Nations *Convention on the Rights of the Child*, of which Canada is a signatory.[6] In particular, Article 12 provides that:

> 1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
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> 2. 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.[7]

The United Nations Committee on the Rights of the Child, which was established to monitor the implementation of the convention, adds the idea that it is not up to a child to demonstrate their capacity to participate – rather, it should be presumed.[8]

At the same time, however, there is considerable controversy regarding *how* to include children in dispute resolution processes in the family law context.[9] In addition, there is evidence from Canada that suggests children's evidence is included in an alarmingly small number of cases. For example, Noel Semple conducted a quantitative survey of 181 reported custody and access cases from 2009 and examined the extent to which they mentioned any of the following forms of children's evidence: (1) Direct evidence (e.g., an affidavit or written communication from a child); (2) Child-focused evidence (e.g., assessments of the child's best interests conducted by social workers); and (3) Derivative evidence (e.g., information from child protection employees who worked personally with the child).[10] What he ultimately found was that, first, children's evidence was only mentioned in 45% of the decisions and, second, even when it was mentioned, it was most likely to come in the form of an assessment conducted by a psychologist or social worker (30% of cases).[11] Direct evidence from children and legal representation of children was found to be very rare,

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[4] For example, see CA Crosbie-Currie, "Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals" (1996) 20:3 L & Human Behaviour 289, cited in *ibid*.

[5] Birnbaum and Bala, *supra* note 1 at 301.

[6] 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, accession by Canada 13 December 1991) [*CRC*].

[7] *Ibid* at art 12.

[8] Birnbaum and Bala, *supra* note 1 at 301.

[9] *Ibid*.

[10] Noel Semple, "The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases" (2010) 29:1 Can Fam LQ 1 at 2–3.

[11] *Ibid* at 2.

accounting for 3% and 7% of 181 judgments respectively.[12] In his conclusion, Semple muses that the paucity of direct evidence suggests that "judges and others who make decisions about children's evidence have not embraced the child liberationist doctrine that children should be active participants in important decisions that affect them."[13]

Perhaps in response to this state of affairs, some have suggested that the right to counsel – a right that is currently confined to the accused in criminal law cases – should be extended to children in the family law context. For example, Caterina Tempesta and former British Columbia Supreme Court Justice Donna Martinson argue that favoring the use of limited resources on legal representation in criminal law "minimizes the protection and advancement of children's rights in an area of law with the potential to impact on their daily [lives] in a way that may negatively impact their physical and psychological integrity."[14] In addition, they claim that the *CRC* imposes "clear obligations" on Canadian governments to implement children's rights, which includes legal representation.[15] They also suggest that various laws and policies in different provinces "are not consistent with a child rights approach, and therefore not in the best interests of children."[16] As an example, they point to a provision in British Columbia's *Family Law Act*[17] that limits the ability of judges to appoint lawyers for children.[18] Finally, they argue that limiting the legal representation of children violates their section 7 *Charter* right "as informed by the *Convention*" because their security of the person may be engaged in family law disputes.[19] That right, they point out, cannot be deprived except in accordance with the principles of fundamental justice,[20] which potentially includes legal representation.[21]

It is not at all surprising that, in light of a perceived injustice committed by the state against a vulnerable group, Tempesta and Martinson would invoke the *Charter*. It is, after all, a constitutional document that codifies the rights of all citizens and places significant limits on government action. Historically, it has also been the basis for multiple progressive decisions by the Supreme Court of Canada, including

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[12] *Ibid*.

[13] *Ibid* at 23–24.

[14] The Honourable Donna J Martinson and Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Childs Rights Approach to Legal Representation" (2018) 31 Can J Fam L 151 at 193–94.

[15] *Ibid* at 194.

[16] *Ibid*.

[17] SBC 2011, c 25, cited in *ibid*.

[18] Martinson and Tempesta, *supra* note 14 at 194–95.

[19] *Ibid* at 195.

[20] It is important to note here that the Supreme Court of Canada has held that the "best interests of the child" is not a principle of fundamental justice. See, for example, *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4 at para 7, [2004] 1 SCR 76.

[21] Martinson and Tempesta, *supra* note 14 at 195.

those that struck down criminal abortion provisions,[22] prohibited discrimination on the basis of sexual orientation,[23] and prevented police from entering a residence without a warrant.[24] As the next section will show, however, there are two fundamental issues with their approach. The first concerns the role played by the private law in significant advancements in family law in Canada, while the second relates to the difficulties inherent in relying solely on public law and the *Charter* in order to advance social causes.

2. Rethinking Public Law and the *Charter*

In terms of the first concern identified above, Robert Leckey has written much on the popular idea of litigation under the *Charter* as an instrument of family law reform.[25] He refers to this as "public law thesis" and describes it as containing two claims.[26] The first concerns the claim that the *Charter*, particularly the section 15 equality right, has influenced the development of family law in fundamental ways.[27] Caselaw examples include *Miron v Trudel*,[28] where the Supreme Court held that unmarried cohabitants must, in certain circumstances, be treated exactly the same as married couples, and *M v H*,[29] where the court held that a spousal-support regime applicable to opposite-sex cohabitants must also apply to same-sex cohabitants.[30] For him, this even extends to arguments concerning the influence of *Charter* "values," which are "thought to have exerted a benevolent influence on the determination of family law disputes." An example here is *Moge v Moge*[31] – a decision that weakened what had previously been understood as an obligation on the part of wives to attain self-sufficiency upon the dissolution of marriage.[32] According to Helena Orton, the court's statutory interpretation of the *Divorce Act*[33] in the case was guided by "equality principles."[34]

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[22] *R v Morgentaler*, [1988] 1 SCR 30, 63 OR (2d) 681.

[23] *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

[24] *R v Feeney*, [1997] 2 SCR 13, 146 DLR (4th) 609.

[25] Robert Leckey, "Family Law as Fundamental Private Law" (2007) 86 Can Bar Rev 69 at 69.

[26] *Ibid* at 72.

[27] *Ibid*.

[28] [1995] 2 SCR 418, 124 DLR (4th) 693 [*Miron*], cited in *ibid*.

[29] [1999] 2 SCR 3, 171 DLR (4th) 577, cited in *ibid*.

[30] *Ibid*.

[31] [1992] 3 SCR 813, 99 DLR (4th) 456 [*Moge*], cited in Leckey, *supra* note 25 at 73.

[32] Leckey, *supra* note 25 at 72.

[33] RSC, 1985, c 3 (2nd Supp).

[34] Helena Orton, "Using Constitutional Equality Principles to Shape Jurisprudence: *Moge v Moge*, Spousal Support under the *Divorce Act* and Women's Equality" (Special Lecture delivered at the Law Society of Upper Canada) at 63, cited in Leckey, *supra* note 25 at 73.

The second claim is that family law in Canada has not only been influenced by the *Charter* but transformed or "constitutionalized."[35] This occurred in a "broad, principled sense which has affected the substance and principles of family law."[36] As a result, it is no longer possible to characterize this area of law as falling within the purview of private law.[37] As Leckey points out, however, this is not to be understood in a literal sense – that is, that family law no longer falls within the jurisdiction of the provinces – but rather that "family law's animating values are public values, of which substantive equality under the *Charter* is an example."[38] In addition, it implies that "the traditional resources of the private law are inadequate for addressing [the challenges of this area of law]."[39]

Before proceeding further, it is important to note that the term "private law" as it is used here is defined in the same way as it is in Leckey's piece. That is, it encompasses "rules and principles regulating relations between private persons" and is not limited to property, contract, and tort.[40] Rather, it includes family law and "[f]ormally, may be enacted or unenacted."[41] With this in mind, it is much easier to see how the private law has influenced the development of family law in Canada. In the 1970s and 1980s, for example, it was the court *and* legislature that precipitated changes to the patrimonial treatment of spouses and cohabitants.[42] More significant, however, is Leckey's contention that "it is unquestionably legislatures that have most changed family law in the last fifty years."[43] Indeed, as he points out, the list of fundamental reforms initiated by Parliament and provincial legislatures in this area is lengthy: the instatement of no-fault divorce; the abolition of illegitimacy; the civil emancipation of the married woman in Quebec; the abolition of spousal unity; reform to the law of successions; children's law reform; and reform of family property regimes.[44] Interestingly, Leckey also provides a reinterpretation of what he calls the "flagship" case supporting the public law thesis: *Moge*.[45] As noted above, some have interpreted the court's decision as reflecting "equality principles" based on the *Charter*. However, Leckey argues that the preferable interpretation is that "an equality or equity principle of the provincial *ius commune* supplemented or completed the

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[35] Nicholas Bala, "The *Charter of Rights* & Family Law in Canada: A New Era" (2001) 18 Can Fam LQ 373 at 427, cited in Leckey, *supra* note 25 at 73.

[36] Alison Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001) 80 Can Bar Rev 749 at 788, cited in Leckey, *supra* note 25 at 73.

[37] *Ibid* at 792, cited in Leckey, *supra* note 25 at 73–74.

[38] Leckey, *supra* note 25 at 74.

[39] *Ibid*.

[40] *Ibid* at 70, n 3.

[41] *Ibid*.

[42] *Ibid* at 87.

[43] *Ibid*.

[44] *Ibid*.

[45] *Ibid*.

federal enactment."[46] This term can be translated as the "common" or "general" law and its core meaning "relates to those general jural concepts and rules governing private law relationships in a given legal order."[47] Essentially, it functions as a type of "dictionary of private law terms to which legislatures are presumed to refer when they use its terms without stipulating an alternative definition"[48] and it will "implicitly be used to complete the regulatory scheme of any statute."[49]

Thus, Leckey's account not only describes how the private law, in the form of legislation, played a significant role in family law reform, it also shows how caselaw supporting the public law thesis can actually be viewed as a victory for the private law. Furthermore, he identifies issues with relying strictly on the *Charter* to advance social causes, which casts further doubt on the approach of Tempesta and Martinson when it comes to incorporating the voice of the child. First, he argues that, in an institutional sense, it "drives towards perceiving a preeminent role for the courts in the field of family law."[50] That is, it privileges the Supreme Court as the *Charter*'s "anointed interpreter."[51] This not only conflicts with the historical development of this area of law, in which legislatures played a vital role, it also leads to the second issue identified by Leckey: limiting potential options. Indeed, he argues that *Charter* litigation in family matters "typically adopt a binary logic in which exclusion of the claimant group from a statutory scheme is permissible or impermissible."[52] Where a court deems the exclusion permissible, the claimant loses, and the status quo continues.[53] Examples here include the exclusion of same-sex couples from a public pension regime; unmarried cohabitants from matrimonial property regimes; and former unmarried cohabitants from a benefit available to separated married spouses.[54] By comparison, where the exclusion is deemed impermissible, the court "mandates assimilation into the existing regime" (e.g., same-sex couples into the class of married persons).[55] As Leckey points out, this "binary logic discourages outcomes subtler than total exclusion or assimilation."[56] In illustrating the difficulties that this creates, he uses the example of non-conjugal long-term cohabitants, such as siblings:

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[46] *Ibid.*

[47] *Ibid* at 84.

[48] *Ibid*.

[49] Roderick A Macdonald, "Encoding *Canadian Civil Law*" in *Mélanges Paul-André Crépeau* (Cowansville, QC: Yvon Blais, 1997) at 597, n 16, cited in *ibid*.

[50] Leckey, *supra* note 25 at 76.

[51] *Ibid*.

[52] *Ibid* at 77.

[53] *Ibid*.

[54] *Ibid*.

[55] *Ibid* at 77–78.

[56] *Ibid* at 78.

> Such persons are unlikely to prove historical disadvantage suffered as members of a marginalized group, but they may well generate interdependence and reliance interests calling for legal recognition. Furthermore, the *Charter*'s binary logic renders unlikely regulation by a sliding scale, with mutual obligations intensifying as the relationship lengthens.[57]

A further difficulty is that, if the finest values at play in family law adjudication are determined to be *Charter* values, a conclusion that the status quo satisfies those values is likely to suggest the "optimal character of the rules in force."[58] Thus, as Leckey argues, taking the public law thesis seriously implies that where a certain rule of family law survives a *Charter* challenge, scrutinizing that rule in light of other potentially relevant values or considerations is unnecessary.[59]

While the basis for Tempesta and Martinson's piece is no doubt admirable, in light of what has been discussed so far, there is reason to suspect the utility of their approach. First, by arguing that children should have the right to counsel in family law proceedings, they implicitly adopt the "binary logic" discussed by Leckey. The debate is then confined to only two potential outcomes: granting the right or refusing it. If it is not granted – and there are reasons to believe that *Charter* litigation in this area would be unsuccessful[60] – then the "silencing" of children in this area of law continues. However, even if it is granted, this does not necessarily mean that the best outcome is achieved, as there is reason to doubt the efficacy of child legal representation. For example, in a study examining attitudes towards judicial interviews of children, Rachel Birnbaum, Nicholas Bala, and Lorne Bertrand found that the majority of children's lawyers acted as "gatekeepers" rather than facilitators.[61] That is, they made discretionary choices as to what options they presented to their clients if those clients wanted to voice their opinion to the court.[62] This is especially the case when it comes to children being interviewed by judges, with one participant of the study stating that: "[t]here are so many ways to get the child's views before the court and judges should avail themselves of these methods before even attempting to interview children."[63] As the authors of the study point out, the majority of the comments recorded were against judges meeting with children for a variety of "adult" reasons and they wonder whether they ever present the option to their clients, given the lack of support.[64]

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[57] *Ibid* at 78.

[58] *Ibid* at 80.

[59] *Ibid*.

[60] Litigation in this area would likely involve section 7 in some form, though as indicated in note 20, above, the "best interests of the child" is not a principle of fundamental justice. However, even if it was, there is also the problem that family law proceedings do not invoke the "liberty" interest to the same extent as criminal proceedings.

[61] Rachel Birnbaum, Nicholas Bala & Lorne Bertrand, "Judicial Interviews with Children: Attitudes and Practices of Children's Lawyers in Canada" (2013) Special Issue NZLR 465 at 465.

[62] *Ibid* at 475, n 37.

[63] *Ibid* at 480.

[64] *Ibid*.

There are also, of course, doubts regarding how a new paradigm of family law that includes the right to legal representation will be implemented, especially given fiscal constraints. For example, in Ontario, the Office of the Children's Lawyer ("OCL") can only become involved in approximately half of the domestic cases in which a request is made due to a limited budget.[65] While successful *Charter* litigation would ultimately force governments to provide the necessary funding, would that money come from other areas of the family justice system? Would it be taken from the budget of government social services workers and psychologists who are trained to extract the views of the children in determining their best interests and given to lawyers who, as we have seen, often do not present the full picture to their clients? The fact that this "gatekeeping" occurs suggests that there may also be issues of competency, even if funding were in place. Indeed, as Birnbaum, Bala, and Bertrand put it:

> Lawyers receive in law school neither formal training about interviewing children, nor exposure to the changing landscape of the sociology of childhood that occurred over the last several decades. While lawyers who represent children, at least in Alberta and Ontario, receive some limited education about their work, the knowledge base of organizations that fund representation about children's perceptions and experiences in the family justice system are limited, and there must be more training and accountability for those who represent these most vulnerable clients.[66]

While there is no doubt that the voice of the child needs to be incorporated into family law proceedings, these remarks suggest that there are simply too many difficulties, both theoretical and practical, for a right to legal representation to be a viable option. The question then becomes: what is the alternative to this demonstrably true issue? As the next section will show, given what has been said thus far, it is perhaps the private law that is in the best position to vindicate the interests of children.

3. The Private Law and Judicial Interviews

As noted previously, this paper adopts the definition of "private law" provided by Robert Leckey. It encompasses rules and principles regulating relations between private individuals and, crucially, includes family law. With that said, the particular solution to the "silencing" of children proposed here has already been mentioned in passing: judicial interviews. This is certainly not a novel method of determining the views of children in these types of proceedings, though, as will be seen, it is in need of private law modifications to improve its effectiveness in Canada.

Before discussing what improvements can be made by the private law, however, it is important to get a general sense of judicial interviews. Though likely

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[65] *ACB v RB*, 2010 ONCA 714 at para 5, cited in Nicholas Bala, Rachel Birnbaum & Lorne Bertrand, "Controversy About the Role of Children's Lawyers: Advocate or Best Interests Guardian? Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers" (2013) 51:4 Fam L Rev 681 at 685.

[66] Birnbaum, Bala & Bertrand, *supra* note 61 at 481.

self-explanatory, the term "judicial interview" denotes the process by which a judge speaks with a child in chambers in order to ascertain their viewpoint on a family law dispute. In jurisdictions where such meetings are common, most lawyers and judges view them in a positive light and consider them a substantial aid to their decision-making.[67] In a survey performed with an international group of legal professionals at the World Congress on Family Law and Children's Rights in 2009, over half of respondents believed that judicial interviews with children are a good way to hear their views.[68] According to judges who routinely meet with children, there are several benefits to doing so, including: the child is an important source of information; the judge can determine the child's wishes and feelings first hand; different options can be explored; information about the child is up-to-date and in the "here-and-now"; meeting with the child shows respect; and the conversation can be an important step in reaching a settlement.[69] In Ontario and Ohio, Rachel Birnbaum interviewed 32 children, 16 of whom had spoken to a judge in a family law proceeding.[70] All 16 indicated that they felt anxious prior to the meeting but did not report any distress afterwards.[71] Furthermore, all of the children reported some degree of satisfaction with the meeting, even if the judge did not follow their wishes.[72] Of the 16 children who were not offered a meeting, 6 of them indicated that they would have liked to have met the judge if they had known it was an option.[73]

In keeping with research on the importance of incorporating the voice of the child, section 64 of Ontario's *Children's Law Reform Act*[74] provides judges with wide latitude to decide whether to conduct interviews with children:

> *Child entitled to be heard*
> 64 (1) In considering an application under this Part, a court where possible shall take into consideration the views and preference of the child to the extent that the child is able to express them.

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[67] Lorne D Bertrand et al, "Hearing the Voices of Children in Alberta Family Proceedings: The Role of Children's Lawyers and Judicial Interviews" (Canadian Research Institute for Law and the Family, 2012) (2012 CanLIIDocs 76) at 3.

[68] Joanne Paetsch et al, *Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children's Rights* (Ottawa: Department of Justice Canada, 2009), cited in *ibid* at 3–4.

[69] Miriam Aroni Krinsky and Jennifer Rodriguez, "Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings" (2006) 6 Nevada L Rev 1302, cited in Paetsch et al, *supra* note 68 at 4.

[70] Rachel Birnbaum, Nicholas Bala & Francine Cyr, "Children's Experiences with Family Justice Professionals in Ontario and Ohio" (2011) 25 Intl JL Pol'y & Fam 398, cited in Nicola Taylor and John Caldwell, "Judicial Meetings with Children: Documenting Practice Within the New Zealand Family Court" (2013) 4 NZLR 445 at 452.

[71] *Ibid*.

[72] Birnbaum, Bala & Cyr, *supra* note 70 at 413.

[73] *Ibid* at 411.

[74] RSO 1990, c C.12, ss 63(1)–(4), cited in Birnbaum and Bala, *supra* note 1 at 306–07.

> *Interview by court*
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> (2) The court may interview the child to determine the views and preferences of the child.

As Birnbaum and Bala point out, this legislation has been interpreted as giving a trial judge wide discretion to determine whether to interview a child.[75] Interestingly, a frequently cited case in this regard is *LEG v AG*[76] where Justice Martinson, who, as discussed earlier, is a proponent of the child legal representation model, held that a court has discretionary jurisdiction to interview children, even in the absence of parental consent.[77] Despite this discretion, however, the reported caselaw suggests that this power is rarely used by Ontario judges.[78] In a frequently cited case from the province, *Stefureak v Chambers*,[79] Quinn J reviewed various methods of incorporating the views of children, and, after going over problems associated with judicial interviews, held that it should only be used as a last resort.[80] A more preferable approach, he argued, was having a mental health professional interview the child and then testify to the child's preferences.[81] But even in cases where one party requests that a child be interviewed, judges will usually decline to do so,[82] especially if they consider the child to be too young, immature, or simply unable to express their views.[83] In *Ward v Swan*,[84] however, one of the parties to the proceeding requested that the judge meet with a 15-year-old girl in order to sort out conflicting evidence on certain contested matters that occurred during access visits.[85] Despite her age, the judge ultimately declined to perform an interview, holding that:

> [I]t is not proper to use the judicial interview process in order to contest evidence that may be disputed. The prejudice to the litigants far outweighs any potential probative value. These children have already been excessively involved in this litigation. The care givers have talked to them and, in some cases, involved them in this litigation. They have already talked to […] their lawyers and a social worker on numerous occasions. I will not place Sarah in a position where, through questioning by the judge, where she will be at the centre of a storm that may go further to destroy future family

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[75] James G McLeod, *Child Custody, Law and Practice* (Scarborough, ON: Carswell, 1992) at 4(11), cited in Birnbaum and Bala, *supra* note 1 at 307.

[76] 2002 BCSC 1455, cited in Birnbaum and Bala, *supra* note 1 at 307.

[77] *Ibid* at para 4, cited in Birnbaum and Bala, *supra* note 1 at 307.

[78] McLeod, *supra* note 75 at 4(11), cited in Birnbaum and Bala, *supra* note 1 at 307.

[79] 2004 CarswellOnt 4244, [2004] WDFL 628 [*Stefureak*], cited in Birnbaum and Bala, *supra* note 1 at 307.

[80] Birnbaum and Bala, *supra* note 1 at 307–08.

[81] *Ibid* at 308.

[82] See, for example, *Stefureak*, *supra* note 79 at para 70, cited in *ibid* at 309.

[83] Birnbaum and Bala, *supra* note 1 at 309.

[84] [2009] OJ No 2107, 71 RFL (6th) 384 (Sup Ct J) [*Ward*], cited in *ibid* at 310.

[85] Birnbaum and Bala, *supra* note 1 at 310.

> relationships rather than preserve the potential of necessary familial re-integration.[86]

One cannot fault the judge for being concerned about the fairness to the parties in allowing a child to be interviewed, particularly if it would take place in chambers without them being present. By contrast, the latter half of the passage suggests that the judge is concerned about the possible effects of the interview on the child. As discussed earlier, however, there appears to be many benefits to this method, and children who have been interviewed about their experience with it seem satisfied overall, even if their opinion did not sway the judge in their case.

The question, then, is why are so few judges engaging in this practice? An answer to this question perhaps lies with the above-mentioned study performed by Birnbaum and Bala in which they compared experiences with judicial interviews in Ontario and Ohio. As noted above, the Ontario legislation grants wide discretion to judges to decide whether to speak with children. While it is rare, even when they do decide to exercise this option there is a lack of guidance in the law, which has resulted in significant variation in how the interviews are conducted.[87] Indeed, the only statutory requirements are that the interview is to be recorded and the child is entitled to have a lawyer present.[88] By contrast, the Ohio provision dealing with judicial interviews is considerably more detailed and instructional.[89] It requires an interview if it is requested by any party, subject to capacity, and specifies where it is to take place and who may attend.[90] Furthermore, it actually indicates some preference for an interview as a means of ascertaining the child's views by stating that the court "shall not" consider written or recorded statements or affidavits that specify the same.[91] In fact, due to the "directory nature" of the legislation, failing to conduct an interview when requested by a parent is a basis for reversing the decision of a trial judge and "remanding the case for a new hearing."[92] For example, in the 1997 case of *Badgett v Badgett*,[93] the Ohio Court of Appeals held that a new trial must be ordered if a judge neglects to interview a child after a request no matter how careful they were in weighing all of the evidence presented.[94] As Birnbaum and Bala point out, it is significant that no trial decision in Ohio has been reversed on appeal because the judge conducted an interview unnecessarily, but only for the failure to have an interview when required by statute.[95]

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[86] *Ward*, *supra* note 84 at para 25, cited in *ibid*.

[87] Birnbaum and Bala, *supra* note 1 at 310.

[88] *Ibid*.

[89] *Ibid* at 312.

[90] *Ibid*.

[91] *Ibid.*

[92] *Ibid* at 313.

[93] (1997), 120 Ohio App (3d) 448, 698 NE (2d) 84 [*Badgett*], cited in *ibid*.

[94] *Badgett*, *supra* note 93, cited in Birnbaum and Bala, *supra* note 1 at 313.

[95] Birnbaum and Bala, *supra* note 1 at 315.

Thus, one reason why judges so infrequently utilize the judicial interview method seems to be that they are not statutorily required to do so. A necessary first step, then, is to revise provincial and federal legislation and mandate that they do occur. This would be subject, of course, to the residual discretion of the judge to decline an interview based on the capacity or refusal of the child. At the same time, even if an interview is required, this does not necessarily mean that it will be beneficial, especially if there is little procedural guidance. For example, concerns voiced by Ontario judges included the lack of a "child-friendly" place in a courthouse and the need for more time to properly interview a child.[96] While these types of concerns were remedied in Ohio through the initiatives of individual judges (e.g., some reported that if a child needed more time to feel comfortable in an interview, they would meet with them on more than one occasion),[97] if judicial interviews are not currently mandated in a given province, official guidelines would be necessary. Perhaps the most serious concern expressed by Ontario judges, though, was that they lacked the necessary training and qualifications to interview children.[98]

Arguably, then, the most important contribution that can be provided by the private law to this issue is legislation that both mandates training for family court judges and provides detailed guidelines on how to interview children. Fortunately, there is literature that addresses both of these concerns. For example, in 2011 the Advocates' Society and Association of Family and Conciliation Courts (Ontario chapter) sponsored a joint committee to analyze the issue of judicial interviews in custody and access cases and to create a set of guidelines and considerations about them.[99] Apart from suggesting that meetings should be statutorily mandated, the committee pointed out that "[s]ignificant judicial education on the topics of both child development and interviewing skills specifically for children is of critical importance. A judge who has insufficient or no training or is uncomfortable with the prospect of conducting a meeting or interview, should decline to do so."[100] They also make a variety of helpful procedural suggestions, including: not interviewing children alone, except in special circumstances (e.g., have court staff or a court reporter present); record interviews and provide summaries to each party; the judge should consider whether or not to wear robes, depending on the maturity of the child and purpose of the interaction; a judge should be alive to the concern that children will say different things on different occasions and, as a result, multiple interviews may be required; if a child discloses potential abuse or neglect, the court must ensure that a report is made to the relevant Children's Aid Society; and if siblings are involved in the proceeding, the judge should consider whether to interview the children together, separately, or

[96] *Ibid* at 320.

[97] *Ibid*.

[98] *Ibid*.

[99] Dan L Goldberg et al, *Guidelines for Judicial Interviews and Meeting with Children in Custody & Access Cases in Ontario* (Association of Family and Conciliation Courts – Ontario Chapter & The Advocates' Society, 2013) at 4.

[100] *Ibid* at 15.

both.[101] For their part, Birnbaum and Bala suggest that, first, the judge should explain the purpose of the meeting to the child and remind them that, while their views and preferences will be taken into consideration, they will not be determinative.[102] Second, the judge should use vocabulary and sentence structure that is appropriate based on the child's age and development.[103] Third, judges should set aside enough time for the meeting to ensure that the child will not feel rushed (the meeting should also take place at a time when the child is likely to be alert).[104] Finally, they suggest that the judge should make a decision about the extent to which the parents will be informed about the interview before it is held and that this should be communicated to the parents and the child prior to the meeting.[105]

While no list can be exhaustive, based on what has been discussed it is possible to identify some important principles that should be included in any legislation dealing with family law at the provincial or federal level. In particular, it is vitally important that legislation mandates the occurrence of judicial interviews, subject to capacity or refusal, and that only judges who have the necessary training engage in the practice. This training could incorporate a number of topics and disciplines, including child development, psychology, neuroscience, social work, sociology, and Indigenous studies. Of course, these are topics that cannot be fully grasped in a simple weekend course or seminar, so there may be some necessary delay in equipping judges with the proper conceptual tools. Beyond this, it is important to specify where the interviews will take place, how much time will be devoted to them, and to offer the option of subsequent or follow-up interviews. There should also be provisions dealing with who will be permitted to attend the interview, though, as mentioned, it is advisable that the meeting always be recorded and that copies of transcripts be provided to each party. Beyond this, one of the benefits of statutorily requiring judge training is that they will be able to adapt their approach to the needs of each individual child and fill any necessary gaps in the legislation. They can also supplement their assessments of children's views and preferences with evaluations performed by social workers or psychologists. Perhaps most importantly, they can be more confident in their final decisions knowing that they had personal interaction with the child rather than relying on second-hand insights from lawyers and parents.

4. Conclusion

The *Charter* is an important tool in advancing social justice. Of this there can be no doubt. Yet it does not necessarily follow that any legal problem that potentially impacts the rights, however they are defined, of an identifiable group is adequately addressed through the public law. Indeed, as has been shown, when it comes to the "silencing" of children in family law disputes, immediate recourse to constitutional

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[101] *Ibid* at 13–15.

[102] Birnbaum and Bala, *supra* note 1 at 328.

[103] *Ibid* at 329.

[104] *Ibid*.

[105] *Ibid* at 328.

rights, or the potential expansion of those rights, does not always lead to positive outcomes. In particular, mandating legal representation entails not only financial difficulties, but also the "gatekeeping" tendency of lawyers, which limits the incorporation of the voices of children in these types of proceedings. By contrast, judicial interviews provide an alternative means of ascertaining views and preferences – one that is supported by those who have participated in them. At the same time, the private law has the ability to supplement this method by mandating its wider use, determining who can participate, and specifying how it is to be carried out. As Robert Leckey forcefully argues, family law is fundamentally private law, and in seeing how the use of judicial interviews can vindicate the interests of children, it appears that this statement remains valid.