

# The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox?

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## ABSTRACT

Non-evaluative Views of the Child Reports prepared by legal or mental health professionals are an increasingly popular means of involving children in the resolution of parenting disputes in parts of Canada, but there are no widely accepted standards and significant differences exist in how children are interviewed and how these reports are prepared. This article examines the methods by which children's views are obtained for use in court and non-court dispute resolution processes, reviews Canadian case law on Views of the Child Reports and presents the results of a survey of 65 legal and mental health professionals about their practice and experience preparing Views of the Child Reports. We discuss the benefits and limitations of these reports, the need for clear protocols and the factors that should be taken into account in establishing best practices, as well as the need for further research.

## I. INTRODUCTION

### 1. Views of the Child Reports

The use of Views of the Child Reports, also called Voice of the Child or Hear the Child Reports, to obtain the child's perspective in parenting disputes, is a relatively recent development in Canada. These reports provide information about children's perspectives on their lives and the matters at issue in the parenting dispute, based on one or more interviews with a legal or mental health professional. These reports are either evaluative, and include the interviewer's opinion on the strength and consistency of the child's views, or non-evaluative, and include no evaluation or commentary on the child's remarks. They provide less information than would be found in a full custody assessment, and offer less opportunity for children to directly influence outcomes than if they were represented by counsel. Although these reports clearly provide children with an opportunity to participate in the justice process, from the

child's perspective the nature of the participation provided may not be as empowering as meeting directly with the judge or mediator.

While interest in these reports is growing in this country, and they are increasingly used, there is significant variation in how they are prepared, and controversy remains about when and even whether they should be used. In the opinion of the authors, Views of the Child Reports have the potential to be a cost-effective, sensitive way to involve children in the dispute resolution process and ensure that their voices are heard. They are much less expensive to obtain than custody assessments and can be prepared quickly, usually without delaying the resolution of proceedings and sometimes on the same day they are requested. They may also be less intrusive for the child and parents than either a full custody assessment or the appointment of counsel for the child. However, there is a need for further research on these reports and greater consistency in their preparation and, although Views of the Child Reports may be used in conjunction with other methods of involving children, they will not be appropriate for all cases.

## 2. The Purpose and Nature of Views of the Child Reports

Views of the Child Reports are intended to describe children's views, perspectives, and wishes for consideration in negotiation, mediation, litigation, and other dispute resolution processes between separated parents. A significant feature of the process of preparation of these reports is that most, but not all, interviewers offer the child the opportunity to exclude some or all of the matters discussed from the final report; such assurances of confidentiality may encourage children to be more comfortable and candid, and permit some discussion between the interviewer and child about what will be said and how it will be phrased. Views of the Child Reports are usually non-evaluative and provide only a summary of the child's statements, without offering a conclusion or opinion from the interviewer about the reliability or significance of the statements made or providing a recommendation as to the appropriate resolution of the dispute. Views of the Child Reports that are evaluative in nature will also include the interviewer's opinion of the reliability or significance of the child's statements, but are not full assessments of the parties, the children, and the circumstances; this type of evaluative report is generally only prepared by mental health professionals.

Views of the Child Reports are a relatively speedy and inexpensive way of informing courts, lawyers, and parents about children's perspectives and promote children's right to participate in disputes that affect them as required by Article 12 of the United Nations Convention of the Rights of the Child.<sup>1</sup> However, unlike the extensive literature available on conducting child custody assessments (Stahl, 1994, 1999; Melton et al, 1997, 2007; Pezzot-Pearce and Pearce, 2004; AFCC, 2006; Birnbaum et al, 2008; Galatzer-Levy et al, 2009a, b), providing children with legal representation or advocacy through guardians *ad litem* (Bala, 2006; Guggenheim, 2009) or allowing a child to directly meet with the judge (Bala et al, 2015), there has been very little research published on the value and limitations of these reports or their impact on judicial and parental decision-making in the context of parenting disputes (Focus Consultants, 2007; Williams and Helland 2007). Further, there appears to be

no widely accepted protocols or standardized guides to the conduct and preparation of Views of the Child Reports in Canada or elsewhere.<sup>2</sup>

### 3. Purpose and Scope of this Study

Given the lack of research and writing about this innovative way of engaging children in the family justice process, Views of the Child Reports should be critically evaluated as one possible method of children's participation in parenting dispute resolution. This study is part of the authors' research agenda of advancing the collective discussion about the broader spectrum of mechanisms for involving children in post-separation decision-making. There is controversy that exists about how Views of the Child Reports should be prepared, and even whether Views of the Child Reports should be used at all (Korpach, 2013). As discussed in this article, the authors believe that these reports have significant potential value notwithstanding that the approach and value of these reports will vary by jurisdiction and, in particular, by the extent to which other family justice services such as child custody assessments, child legal representation, mediation and judicial interviews are available and accessible to families.

Section II of this article discusses the different methods by which children's views are obtained for the courts and children participate in dispute resolution. This discussion is intended to situate Views of the Child Reports in the broader context of the existing methods for involving children in dispute resolution; much of the discussion concerns the Canadian experience, including a review of the limited case law in this country on the Views of the Child Reports.

Section III describes the results of the authors' survey of 65 legal and mental health professionals from five Canadian provinces about their practice and experience preparing Views of the Child Reports and includes some data from our review of the available case law on these reports.

Section IV concludes this article with a discussion of the benefits and limitations of Views of the Child Reports as a means of providing children with a voice during family breakdown, and considers the factors to be taken into account in establishing best practices for professionals preparing Reports. This discussion includes recognition of the need for better training of all family justice professionals involved in interviewing children, clear protocols and guidelines, and further research about Views of the Child Reports.

## II. METHODS FOR ENGAGING CHILDREN AND THE ROLE OF THE VIEWS OF THE CHILD REPORT

Many scholars and advocates have written about the importance of hearing from children from the dual perspectives of recognition of children's rights and promotion of their best interests (Rodham, 1973; Eekelaar, 1992; Woodhouse, 1999; Bala et al, 2005; Birnbaum, 2009; O'Quigley, 2009). There are a number of ways that children can participate in family justice processes and a variety of means by which evidence of their views and preferences can be received. In court proceedings, parents frequently testify about what the child told them, with the parents' statements being admissible either through the state of mind exception to the hearsay rule<sup>3</sup> or on the basis that they are relevant to the best interests of the child,<sup>4</sup> but in contested cases

little or no weight is usually given to such evidence as a result of concerns about reliability and a wish to discourage parents from questioning and manipulating their children to improve their positions.<sup>5</sup> Courts are similarly resistant to receiving evidence of children's views through letters, affidavits, audio recordings, or video recordings submitted by parents because of concerns about reliability, the possibility of manipulation, and the potential such tangible evidence has to harm children and their relationships with their parents.<sup>6</sup>

In a few provinces, a court may direct or request that the government provide legal representation for a child in the context of a family law dispute; in other provinces, a court may require parents with means to pay for a lawyer for a child, although this occurs very rarely in practice. Varying approaches to the role of the child's lawyer have been adopted in different Canadian jurisdictions. Whether counsel are expected to act as a traditional advocate acting on the instructions of the child client or take a best-interests advocacy approach, they are always expected to ensure that the child's views and wishes are communicated to the parents and to the court (Bala et al, 2013). Children's lawyers in Canada generally respect children's requests to not disclose certain matters to their parents or to the court.

In practice, meeting with parents and promoting settlement is one of the primary roles of children's counsel, although they may also have important roles at trial. In a few provinces, children's lawyers are permitted to summarize the child's views for the court. In most provinces, however, there is an expectation that if a case goes to trial, children's lawyers will not themselves simply report on the views of the child, as such reports are not only hearsay but would also expose the lawyer to the possibility of being cross-examined on his or her report.<sup>7</sup> In the absence of other evidence of the child's views being available or agreement between the parents, counsel must instead arrange for a social worker or other mental health professional to interview the child and give evidence about the child's views and wishes.

There is no doubt that children's legal representation has considerable value for children, parents, and the court. Significant difficulties nevertheless arise with respect to the cost and availability of counsel. Government-funded programmes for child representation in family law disputes do not exist in most provinces, and in those provinces where counsel for a child is provided by the government, counsel can only be provided in a fraction of family law disputes over parenting arrangements. Further, in some higher conflict cases, such as where alienation is alleged, having counsel for the child may further implicate the child in the dispute and tend to harden the child's views.<sup>8</sup>

Until relatively recently in Canada, it was rare for judges to meet with children to ascertain their views, except in Québec where the Civil Code<sup>9</sup> provides that children who wish to meet with the judge have the right to do so (Bala et al, 2015). While the practice of judicial interviewing of children is becoming more common in Canada,<sup>10</sup> many judges are still very reluctant or are completely unwilling to meet with children. This reluctance in part reflects a lack of experience with the practice on the part of judges, but also uncertainty about whether and how to disclose to the parties what the child says to the judge in a private meeting.<sup>11</sup> While a few judges record the interview and tell the children that a transcript will be provided to the parents, many judges are concerned that doing so will either inhibit the child or may

affect the child's relationships with the parents. On the other hand, significant concerns about due process and fundamental justice will be raised in the event that a judge interviewing a child fails to fully disclose to the parents all that a child has said. In practice, most judges who interview children in Canada only provide parents with a summary of what the child said, although the interviews are recorded in the event of an appeal. Continuing concerns about the confidentiality and disclosure make many judges reluctant to interview children.

Perhaps the most common way that children's views are received in contested Canadian family law cases is through custody assessment or evaluation reports, prepared by mental health professionals appointed by the court usually with, but sometimes without, the consent of the parties. Assessors typically interview the child and the parents a number of times, often observe parent-child interactions, contact various collateral sources, review any available reports concerning the child and the family, and often conduct psychological testing of the parents and the child. The final report will include a summary of the child's stated views, the assessor's opinion about the reliability and significance of those views, and usually the expert's opinion about the parenting arrangements that are likely to be in the best interests of the child. Although custody assessments are fairly widely used, they are quite costly and can take anywhere from 3 to 12 months or more to complete. Custody assessments are government-funded in some provinces but are only available on a user-pay basis in most of Canada, and only a minority of separated parents can afford to pay for them.

Views of the Child Reports have evolved as a response to the limitations of the traditional ways that children are engaged with family justice processes. In 2002, an informal practice developed in one court in Kelowna, British Columbia in which the judge hearing a case would ask a lawyer with no connection to the matter to interview the child or children involved, and report back to the parents and the court about what the child said. In 2005, the International Institute for Child Rights and Development (IICRD), located in Victoria British Columbia, undertook a pilot project to expand and study the practice of neutral, non-evaluative child interviews. Family law lawyers and mental health professionals were recruited, and trained in a protocol developed by the IICRD, to conduct 'non-therapeutic interviews' with children between 8 and 18 years of age whose best interests were being determined in family proceedings, and report back to the court and the parties on the child's views.<sup>12</sup> An evaluation of the pilot project found that judges believed the reports to be useful and 'made their jobs easier'; all judges and lawyers surveyed said that the reports either shortened the length of trial or contributed to early settlement (Williams and Helland, 2007).

In 2009, a group of lawyers and mental health professionals, following up on the IICRD's successful pilot project, established the British Columbia Hear the Child Society (BCHCS) to promote children's participation in justice processes, develop best practice guidelines, and recruit a roster of trained child interviewers across the province.<sup>13</sup> This organization has established a roster of trained professionals, primarily lawyers but also including mental health professionals and mediators, who are willing to interview children and prepare non-evaluative reports for the use of parents, the court, or mediators.<sup>14</sup> The BCHCS has provided professional education for its roster members and is now in the process of identifying best practices, but does

not at present have a standard protocol for interviews or reports. The practice of preparing Views of the Child Reports has spread in Canada, and is now fairly common in Alberta and Saskatchewan. In Manitoba, Newfoundland, and New Brunswick, a court may direct the preparation of such reports by mental health professionals, who are generally paid for by parents although financial subsidies are available for lower income litigants.

In Ontario, there are three reported decisions in which the court has ordered the preparation of Views of the Child Report, in two cases by a lawyer<sup>15</sup> and in the other by a social worker,<sup>16</sup> with the parents being required to pay for these services in only the latter. The practice is still rare in Ontario, perhaps in part because government-paid services for legal representation for children and investigative reports from the Office of the Children's Lawyer are fairly accessible. However, a pilot programme is being established in Ontario that will allow these reports to be prepared in a limited number of cases, without cost to the parents; the pilot project will include an evaluation of the perceptions of lawyers, judges, parents, and children of the utility of these reports, as well as determining the concerns that might arise from their preparation.<sup>17</sup>

Although all provinces have legislation that requires the court to take account of the views and preferences of children when making decisions about their best interests,<sup>18</sup> no jurisdiction has legislation making specific reference to Views of the Child Reports. All provinces, however, have legislation, regulations, or rules of court allowing for the preparation of custody assessments or social work investigation reports which could be used to make the more focused orders for the preparation of Views of the Child Reports. Similarly, Views of the Child Reports can also assist in identifying the need for a more in depth assessment. Views of the Child Reports are prepared with the consent of both parties in the vast majority of cases where they are ordered, and as a result there is relatively little jurisprudence on when or how these reports are to be prepared.<sup>19</sup> The courts generally seem to appreciate that the views of the child may be a significant consideration when making orders affecting the child's interests and that, in the absence of other independent evidence, the preparation of a Views of the Child Report may be an expeditious and relatively inexpensive way of obtaining evidence of the child's views and preferences, an acceptable means of complying with the courts' obligations under Article 12 of the Convention<sup>20</sup> and an alternative to judicial interviews.<sup>21</sup>

In the 2012 custody case of *K.L.S. v J.G.M.*<sup>22</sup> Allan J. explained that

The purpose of getting a View of the Child Report is to allow a child to speak frankly to a qualified third party without the child being pressured to say things that the parent wants to hear.

The judge accepted a report prepared by a clinical counsellor as accurately reflecting the views of the 13-year-old child and made an order consistent with those views, rejecting a claim by the mother based on her pre-trial questioning of the girl that she was disavowing the report. In the 2013 case of *K.R.D. v C.K.K.*, Baird J. commented on the utility of this type of report, saying:<sup>23</sup>

The majority of judges who routinely practice in the family division courts prefer to have the Voice of the Child Assessment conducted by social workers, counsellors, or other such professionals who have training in this area, have had expertise in performing these assessments, and are better equipped in how to approach children for this purpose.

Although Voice of the Child Assessments are not binding on trial judges . . . they are a useful tool in assisting the court, and they shed a spotlight as it were, on the child's perspective. . . .

Although there is no hard and fast rule with respect to the age of the child at the time of the interview, most judges are of the belief that a child ten years and older, or a mature eight or nine year old, can be interviewed.

The judge then endorsed a checklist of circumstances that should be considered in assessing the weight to be given the child's expressed wishes:<sup>24</sup>

1. whether both parents are able to provide adequate care;
2. how clear and ambivalent the child's wishes are;
3. how informed the expression is;
4. the age of the child;
5. the maturity level of the child;
6. the strength of the wishes of the child;
7. the length of time over which the preference has been expressed;
8. practicality of the child's preferences;
9. the influence of the parents on the child's expressed wishes or preferences;
10. the overall contact; and,
11. the circumstances of the preference from the child's point of view.

In this case, Baird J. adopted the 10-year-old boy's stated preference as a basis for altering his schedule of visits, so that he spent somewhat more time with his primary care-giving father and did not have to experience a mid-week change in care, which the boy found disruptive.

### 1. When to Use Views of the Child Report

Views of the Child Report may be especially valuable when the child is older and the issue before the court is focused, as might be the case in a dispute about a child's education or extracurricular activities, a change in a parenting schedule, or an application to relocate. Other factors supporting use of such a report include cases where parents lack the financial means to obtain an independent assessment, or ordering an assessment will create unreasonable delay. As noted earlier, they are often ordered with the consent of the parties involved in litigation. The authors are also aware of cases in which both parents have consented to a Views of the Child Report while engaged in mediation/arbitration, and in other dispute resolution methods outside of the formal court process.

Some judges have observed that while these reports do not provide as much information as a full custody assessment, they may have the same potential for drawing

children into their parents' dispute. In the 2010 case of *Walton v Sommerville*, for example, the court rejected the father's pre-trial request that a social worker interview the two boys and report to the court as the parties lacked the resources to provide an update on a full custody assessment undertaken by a psychologist two years earlier.<sup>25</sup> In rejecting this request, Corbett J. observed that the father's proposal:

... sounds very much like an 'assessment-light' that may generate more heat than illumination. As I have indicated, at least part of the boys' distress is likely located in the continuing acrimony between the parents. A solution to that dynamic would require an understanding and assessment of its nature. No doubt interviewing the boys would be an important part of the process, but it is not clear to me that it would be sufficient to draw meaningful conclusions.<sup>26</sup>

While not infrequently placing significant weight on views of the child as expressed in such a report, the courts also recognize that in high conflict cases any process which seeks to solicit the children's views may result in pressure being applied to the children by one of both parents, and that it may be inappropriate to place any weight on the child's expressed preferences. Further, in some cases children may express genuine ambivalence making it impossible to determine the child's actual wishes. For example, in the 2011 relocation case of *King v King*, a nine-year-old girl made inconsistent statements to the lawyer preparing a voice of the child report, including: 'I want to go ... and I want to stay here but I'm just not sure.'<sup>27</sup> The judge observed:

I do not place any reliance on what the child has told the lawyer of her wishes. I am satisfied from all the evidence that she is conflicted. Either or both parents have made her aware of the situation and she is uncertain what to say as she is uncertain in her own mind as to what she wants to do.<sup>28</sup>

While the courts are generally appreciative of the information provided in Views of the Child Reports, there are a number of cases in which judges have expressed concern that the author of the report may also be providing their own opinions along with a summary of the child's views. For example, in a 2012 case the court ruled that although the mental professional who prepared a Views of the Child Report 'had the necessary skill (by education, training and/or experience) to interview and draw out children's views and preferences, the *raison d'être* of the court ordered report', the professional should not have expressed an opinion on the child's views and preferences:

Actually, whether anyone authoring a 'Voice of the Child' should be entitled to express so-called expert opinion in any area of a court ordered report, without a particular opinion having been sought by the court, is of some serious question. After all, what is actually being authorized by a 'Voice of the Child' is the formal collection of hearsay evidence (if offered for the truth of the assertion) because it is necessary (i.e. to avoid children becoming more directly exposed to custody disputes and because, where feasible, children's views and

preferences need to be considered). From a principled evidentiary perspective, what a court is obviously seeking is the most accurate rendition, i.e. an account that meets a threshold of reasonable reliability. Of course, the determination of the accuracy and ultimate reliability of that evidence is for the judge, as is the weight to be accorded to the views and preferences expressed, whether based specifically on the age and maturity of the child or globally, in the context of the child's circumstances as a whole.<sup>29</sup>

It is not surprising that in the absence of clear, widely accepted protocols for Views of the Child Reports, there is some confusion among professionals preparing these reports about what is expected of them. The uncertainty may be greater for mental health professionals as they may also regularly undertake full custody assessments, where their opinions are generally expected.

### III. THE SURVEY RESULTS

In late 2014, the authors sent an email request to participate in an online survey<sup>30</sup> to family justice professionals in British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario<sup>31</sup> through provincial colleges and associations of social workers, provincial government ministries, the BCHCS, and the Alberta and Ontario chapters of the Association of Family and Conciliation Courts. The cover email and survey indicated that the survey was only intended to be completed by professionals who prepare reports based solely on interviews with children in family law cases, not by those professionals who only do the more traditional work of child legal representation or custody assessments.<sup>32</sup>

There were 37 questions in total, including:

1. demographic questions;
2. questions about experiences with evaluative and non-evaluative reports in last 5 years;
3. questions about typical practices, including pre-interview preparation, use of protocols and numbers of interviews with the children;
4. questions about professional practice issues, including related to recording of interviews, confidentiality, and reporting; and,
5. questions about administrative practices, including fees normally charged.

#### 1. Demographic Information

There were 65 valid responses provided by 11 men and 54 women,<sup>33</sup> of whom 16 were lawyers, 24 were social workers, 6 were psychologists, 3 were clinical counsellors, 5 were court counsellors, and 10 identified as 'other'.<sup>34</sup> The largest number of respondents, about one-third, was from British Columbia. For analytical purposes, in the discussion that follows all non-lawyer respondents are treated as mental health professionals. A significant number of respondents (42 per cent) had over 15 years of practice experience in family law dispute resolution, and only about one-quarter of respondents had five or fewer years of experience. A majority of lawyer respondents who prepare Views of the Child Reports indicated that they had prepared 1–10 such reports in the previous five years, and only 2 of 16 reported that they had completed

more than 15 reports in that period. Mental health professionals reported doing significantly more of this type of work, with close to a third doing more than 15 such reports in the previous five years.

## **2. Types of Reports**

Most of the lawyer respondents (13) reported that they only prepare non-evaluative Views of the Child Reports on interviews with children, with no assessment of whether child's statements reflect true preferences or are consistent with interests of the child; only two lawyers reported that their reports had an evaluative component. A majority of respondents who were mental health professionals reported that they prepare both evaluative and non-evaluative reports of their interviews with children.

## **3. How Were They Retained**

The vast majority of respondents reported that they were most often retained to prepare these reports by court order or parties' agreement; only 15 per cent of respondents reported that they had experience in being retained to prepare such a report at the request of only one party, without an agreement or court order.

## **4. Cost and Payment**

The vast majority of respondents indicated that all of their reports were paid for by the parties to the family law dispute. Interestingly, there did not seem to be a significant variation in fees charged by profession, but regional variations were evident with the cost for a report on the views of one child ranging from \$250 to \$1,250 in British Columbia, Alberta, and Saskatchewan, and from \$750 to \$1,500 or more in Ontario.

## **5. Ages of Children Interviewed**

In the reported case law, Views of the Child Reports were prepared in respect of children from 2 to 19 years of age, with most of the reports dealing with children between the ages of 9 and 12. In the survey, less than one-quarter of respondents indicated that they had prepared a Views of the Child Reports for children 7 years of age or younger in the previous five years, and more than half indicated that their experience with these reports was limited to children 13 years of age or older. Mental health professionals had somewhat more experience with the younger age children than lawyers.

Respondents were asked to comment on whether they had any age limits on interviewing children. Some respondents suggested that it was only appropriate to prepare Views of the Child Reports in respect of children age 12 years and older:

I prefer to interview children who are 12 years and older but the courts have often referred children much younger. [Mental health professional]

I believe that children at the age of 12 are old enough to determine and provide opinions on matters that surround them . . . this is typically the age recognized for being able to stay at home alone and to start babysitting. [Mental health professional]

I find it ethically challenging when referrals are sent to canvass the wishes of children under the age of 12. The information can be unreliable and it worries me that decisions could potentially be made based on the information. Younger children often don't share a lot, or can change their view from day to day. [Mental health professional]

Other respondents, however, felt comfortable interviewing with much younger children:

Not under 4. I ask children to draw pictures in answer to ideas and questions and to identify feelings from faces. I don't have confidence that I am competent with children younger than 4. [Lawyer]

To date, I have been of the view that I would be most comfortable interviewing children enrolled in Grade 1 (ie. age 6 years) and older . . . if for example it were a relocation matter, then children should be a little older than the minimum age; while if it were about parenting time then the input of younger children can be quite useful. [Mental health professional]

Some of the comments of lawyer respondents suggested that they would prefer to have further training in child interviewing before preparing reports in respect of younger children:

I have not interviewed children under the age of 10 years. I would be open to the possibility of interviewing younger children, but do not feel that I have sufficient training at this time to do so. [Lawyer]

## 6. Process Issues in Preparing Views of the Child Reports

Most of the survey participants said that they respond to requests for Views of the Child Reports by contacting the lawyers involved to clarify what is expected. It is rare for the respondents to contact the judge involved. In response to questions about interviewing the parents or guardians in addition to the child, mental health professionals, and lawyers overwhelmingly reported that they communicate with the child's guardians or parents, usually in writing, to explain the process, arrange meetings, and allow for preparation of the child, but they rarely interview them separately. Obtaining some general information from counsel or from the parents themselves before meeting the child assists in identifying issues and forming an initial impression of the child.

A majority of respondents indicated that they do not review court documents such as pleadings and affidavits before beginning to prepare a report. A minority said that they regularly read court documents to orient themselves to the case. Respondents, who are mental health professionals preparing an evaluative report, commonly contact collateral sources, like teachers and therapists, as part of their process in preparing Views of the Child Reports. Lawyer respondents almost never contact collateral sources.

## 7. Conducting Interviews

More than two-thirds of respondents who prepare non-evaluative Views of the Child Reports said that they meet each child more than once; those who prepare evaluative reports indicate that they always meet children more than once to prepare these reports. A substantial majority of respondents use some type of questionnaire to help guide the interviews; however the questionnaires used are ones that they have developed themselves rather than received from a governing body or professional association.

## 8. Confidentiality of Children's Statements

All of the lawyers who prepare Views of the Child Reports said that they *often* or *always* raise the issue of confidentiality with the child, and tell the child that they will not include in their reports statements that the child does not wish to be repeated. Slightly less than half of lawyers indicated that children *rarely* or *never* request that statements be withheld, but a slim majority of the lawyers reported that children *sometimes* or *often* request that statements be withheld from the court or their parents, with children expressing somewhat more concern about disclosure to their parents. By way of contrast, almost half of mental health professionals who prepare these reports indicate that they *rarely* or *never* raise the issue of confidentiality with a child. As with lawyers, a slim majority of mental health professionals indicated that children *sometimes* or *often* request that statements be withheld from the court or their parents, again with children expressing somewhat more concern about disclosure to their parents.

All lawyer respondents indicated that they respect children's request that statements be withheld, with a typical comment being:

The children are my clients and therefore I take the same approach to solicitor-client confidentiality as I would in any other file, subject to making it clear to them that I cannot allow them to be in an unsafe situation. I believe that children must be treated with honesty and candour and that they will feel that their views are being respected in that manner. [Lawyer]

A significant portion (25 per cent) of mental health professionals indicated that they might disclose information in their reports, even if the child requested that it not be disclosed, with one observing:

... it is my understanding that only guardians and the court have access to the reports or information about the content of the interviews. [Mental health professional]

It is notable that issues related to confidentiality and keeping the child's secrets vary significantly by profession. This may reflect a different understanding of respondents' legal and ethical obligations to the child and to the court as well as the different culture of each profession. Lawyers generally place greater emphasis on respect for children's wishes related to non-disclosure, though some mental health professionals share this approach.

### 9. Requirement to Testify

A substantial majority of survey respondents indicated that they had *never* been called upon to testify about their written Views of the Child Reports. Of the rest, most indicated that they were *rarely* called to testify about their reports. No respondents said that they *often* or *always* testified about their reports, and only three, all mental health professionals, indicated that they *sometimes* testify about their reports. While a review of the reported case law indicated that in the most highly contested cases that get to trial the interviewer who prepares the report may be called as a witness (9 of 42 cases, where it was clear from decision), the survey indicates that relatively few interviewers have been required to testify about their reports. It seems likely that many of the cases where a report is prepared settle without a trial or that the report is accepted as evidence of the child's views without controversy.

### 10. Perceptions of the Value of Views of the Child Reports for Judges, Lawyers, and Parents

Respondents were asked for their impressions of how judges, lawyers for parents, parents, and children perceived their reports, and were invited to offer more general comments. Lawyer respondents generally believe that their reports are valued by judges, as reflected in the following comments:

Very well received. Have been told that my reports [were] very helpful to the court.

Tend to rely strongly on my comments and particularly on my ability to navigate/troubleshoot settlement proposals prepared by parents in the context of Settlement Conferences.

Given the pure nature of the child's views, the report often gives them a higher profile in the court proceedings.

[Judges are] very receptive to the reports and consider them to be a real value in making decisions.

I think that they are very useful and should be more widely used and available.

Respondents who were mental health professionals also generally believe that their reports are valuable, though they also recognize their limitations:

I feel that at times children wishes are used as a 'tie breaker' of sorts.

I like them because they respect a child's right to be heard. It is also a relatively quick and efficient means to share valuable information about the family with the court.

Limited in reliability/validity. I attach a caveat to the report [so that] judges understand the limitations.

One lawyer commented on the importance for those who requesting a report to provide clear direction of what is at issue:

I assumed a lawyer didn't like a report I prepared (the format, etc.) and so I followed up with that lawyer. It was useful. The lawyers had given me no direction at all as to why the child was seeing me and so the interview was completely child led. The feedback from counsel was useful.

Some mental health professionals involved expressed concern about the lack of appreciation by parents' counsel of the value and limitations of this type of report, and the tendency of lawyers to use these reports for adversarial purposes rather than advancing the interests of the children involved:

Some say it's helpful, but they want specific recommendations on custody decisions/ schedules and specifically what child wants to see. But – we don't give recommendations on custody/schedules – just overall emotional health of child and reactions.

I also wonder what the lawyers use from my report and if anything is ever used against or for one party.

If anything they typically want to dispute the "facts" about something a child has said rather than accept it as a perspective.

A lawyer also expressed concern about how counsel for parents sometimes uses these reports as part of an adversarial process:

I am concerned and saddened that some lawyers are using the reports not as a means to ensure that children have a voice in the family justice process which affects them but rather as a means of gathering evidence against the other parent.

The comments of lawyer respondents about the reaction of parents reflect the reality that this type of report may help parents who truly want to understand their children, but may also simply inflame those who are entrenched in high conflict litigation:

... I can immediately tell whether or not a parent is truly litigating because of their concerns for the children based upon their reaction to my disclosure of the children's views and preferences.

I believe most parents receive them well, but I have had one report that was not received well, and I was asked to testify in court to verify why I believed the report was non-evaluative. The mother did not like what I reported the child had said about spending more time with his dad.

Mental health professionals indicated that their reports can help some parents to better understand the perspectives and needs of their children, as reflected in the comment of one respondent who said that 'the report can assist parents in being child focused'. Mental health professionals also recognized that some parents are deeply entrenched in their positions and are not really interested in learning about their children's perspectives:

Parents often feel the child's views are influenced by the other parent.

Parents are often angry, saying one of the following: 1. The child was coached by the other parent. 2. Had they known the child was going to say what he did, they would not have allowed the interview to take place. 3. They should not have allowed the other parent to bring the children to the interview. 4. Information given by the child is incorrect and I need to make some revisions to the report. Sometimes the parents are angry at the child.

Important for the children and parents to understand that this is a 'voice' and not a 'choice' but that for some children the two of 'voice and choice' start to become in concert with each other (age).

Some of respondents' comments reflected a desire to learn more about how to best prepare these reports, and improve their utility for the courts and for parents:

I just wonder if there is anything I should be improving on, how to make it known that I offer this service (outside of being on the Hear the Child Roster) and whether or not I am charging enough for my time. [Mental health professional]

#### IV. FUTURE DIRECTIONS FOR POLICY AND RESEARCH

While there are limitations to our case law review and survey,<sup>35</sup> this study of Views of the Child Reports in Canada reveals that there is significant professional interest in this practice in some jurisdictions, and use of these reports varies greatly across the country. In particular, the survey and review of case law suggest that in some parts of the country, including Ontario, Canada's most populous province, these reports have hardly been used at all.

##### 1. Development of Policy and Practice Standards

The practices of interviewers identified in this article reveal a range of different approaches. Although some of the variation in practice may reflect differences in the professional orientation and background of interviewers, in particular the differences between lawyers and mental health professionals, protocols or policies should be developed to provide consistency and quality assurance; more education and training, and ultimately some methods of ensuring compliance with accepted practice standards, would also clearly be desirable. While some degree of professional discretion and flexibility is essential in family justice processes, the total absence of practice standards has the potential to produce confusion and inefficiency in family justice processes and raises concern that some children and parents may not be receiving appropriate services, particularly when domestic violence may be an issue. An appreciation of the principles of due process and fundamental justice, and knowledge of child development, should inform the development of policies that would better and more consistently meet the needs of children, their parents, and the justice system. Factors such as the children's age, maturity, communication capacities, and mental

health, including the presence of conditions such as foetal alcohol syndrome, autism spectrum disorders and other neurodevelopmental disorders, geography, and the nature of the matters at issue will all affect how interviews are conducted.

Clarity of expectations should be a key aspect of any policy about Views of the Child Reports, and of orders presently being made for their preparation. Interviewers, lawyers, judges, and mediators, as well as parents, all need to understand the nature of these reports, the nature of their limitations and how they will be prepared. It would appear that at present in Canada the most common, but by no means universal, expectation is that Views of the Child Reports will simply state what the child was asked and how the child responded, without evaluation, opinion, or recommendations as to parenting arrangements. The expectation that there will be no evaluative comments makes the Views of the Child Reports highly focused and relatively easy and inexpensive to prepare, whether the professional involved is a lawyer or a mental health professional. However, it may also be appropriate for these reports to include some relatively simple observations about the child's emotional state, apparent understanding of questions, any obvious use of age-inappropriate language, and any obvious indications of pressure from a parent; the latter issue can be addressed by asking the child about parents' communication about the interview.

If there are expectations that a report will provide evaluative comments or that the interviewer will be expected to contact persons other than the parents or their lawyers, this should be made clear when the report is requested and the report should be prepared by a mental health professional trained in the preparation of custody assessments. There is a general expectation that the preparation of non-evaluative reports will not involve collecting a lot of information prior to meeting the child, as doing so can both taint the interview process and create further delay and unnecessary expense.

Policies should be developed to establish a more consistent response to requests or orders for Views of the Child Reports and methodologies for their completion. It will normally be appropriate, for example, for interviewers to briefly communicate with the lawyers and parents, perhaps by an email, telephone conference call, or joint letter, confirming the arrangements and expectations for their report, and to canvass administrative issues such as payment, disclosure expectations, scheduling of interviews, and due date. It may be appropriate for interviewers to conduct two interviews and seeing siblings briefly together but separately when discussing their circumstances, views, and wishes. It may also be appropriate for each party to bring the child to one interview and have some time with the child before the interview, or to arrange for a mutually agreed third party to bring the child to the interviews. It is always preferable to have in-person meetings with children, although with children in remote areas it may be necessary to speak by telephone or internet communication tools such as Skype and FaceTime. Both parents should get the same, clear instructions prior to the commencement of the process; they should be warned not to pressure or coach their child before the meeting, or to 'debrief' the child afterwards, and should be instructed on how to prepare their children for the meeting and explain why the meeting is taking place.

Policies should also be developed to address issues related to confidentiality as practices now vary widely and in particular between lawyers and mental health

professionals. Children, parents, and interviewers need to be aware of the extent and limitations of any confidentiality that will be extended to the interview and the preparation of the interviewer's report at the start of the process. The authors believe it is preferable to offer the child the choice about what will be included in the final report, subject to any child protection legislation requiring reporting of abuse or neglect. Protecting the confidentiality of the children's statements to interviewers is likely to encourage positive and frank dialogue and will allow children to participate in the crafting of language on sensitive issues. Further, disclosure of information contrary to a child's expressed wishes may harm a child's relationship with a parent and cause the child to lose trust in authority figures.

## 2. Future Research

The survey and case law discussed in this article have limitations and the further research is clearly required. Not only do more of the professionals who prepare Views of the Child Reports need to be engaged in a study, but the perspectives and experiences of lawyers, judges, mediators, parents, and, above all, children with these reports need to be studied.

While there is a clear need for further research and professional dialogue, the authors are broadly supportive of increased use of non-evaluative Views of the Child Reports. These Reports can be a useful and expeditious way of engaging children in justice processes, allowing their perspectives to be shared with parents, dispute resolution professionals, including lawyers, mediators, and judges, and satisfying the courts' obligations under Article 12 of the Convention. These reports are much less expensive than either child legal representation or full custody assessments, and hence should be considered by lawyers, judges, and mediators in appropriate cases. Further, for lower income litigants and especially those who are self-represented, use of these reports may be a cost-effective deployment of limited government resources.

There must, however, also be awareness of the intrinsic limitations of these reports. Views of the Child Reports may not reveal the true opinions and preferences of children who are subject to parental pressure or manipulation, or whose views may be changing, and in some cases may actually mislead. Further, these reports should not be used as a substitute for a more thorough child custody assessment, especially when alienation, domestic violence, or other forms of child abuse or neglect are alleged and require more thorough investigation. It should also be appreciated that for high conflict cases, these reports may be less likely to encourage settlement than a custody assessment or the involvement of a lawyer for the child.

The protection of children's needs and advancement of their best interests are the primary goals of family justice processes in all Canadian jurisdictions. Views of the Child Reports have a place in the continuum of services provided to children and families and are an effective means of ensuring their voices are heard in family law disputes. However, given the recent emergence of these reports and the limited research prepared to date about their use and impact, further, collaborative discussion needs to take place with government, judges, lawyers, mental health professionals, and regulatory bodies so that children's participation can be truly meaningful to them, to their parents and to the courts.

## NOTES

- 1 Convention of the Rights of the Child, 1577 U.N.T.S. 3 (1990), Can T.S. 1992 No. 3 (the ‘Convention’). In force in Canada on 12 January 1992.
- 2 In Australia and elsewhere there is some limited use of child-inclusive mediation, a practice whereby a mental health professional interviews the child and reports to the parents and a mediator (McIntosh, 2000). However, most of the writing about this practice has focussed on the value of ‘child-inclusive mediation’ value as opposed to ‘child-focussed’ mediation, and the Australian literature has not directly explored issues related to how these interviews are to be conducted or about the nature of reports to parents and mediators. Also, see, Rudd et al (2015) that describe the outcomes of these two approaches to incorporating children’s views in mediation. In England and Wales, the previous government made significant commitment to ensuring that the ‘voice of the child’ is heard in mediation (United Kingdom, Ministry of Justice, 2015). However, it is unclear whether and how the present Conservative government will honour that commitment. See [www.gov.uk/government/publications/voice-of-the-child-government-response-to-dispute-resolution-advisory-group-report](http://www.gov.uk/government/publications/voice-of-the-child-government-response-to-dispute-resolution-advisory-group-report) (accessed 25 July 2015); and Ewing et al (2015) who argue that if these changes occur a significant investment in training and accreditation of family justice professionals would also need to follow.
- 3 For example, see: *Ward v Swan et al* (2009), 95 O.R. (3d) 475 (OSCJ); *Catholic Children’s Aid Society of Toronto v M.R.M.*, 2012 ONCJ 497; and, *Children’s Aid Society of Ottawa v S.E.*, 2005 CanLII 25949 (ONSC).
- 4 See: *Moreau v Moreau* (1997), 46 B.C.L.R. (3d) 178 (BCSC); *Foote v Foote* (1986), 6 B.C.L.R. (2d) 237 (BCSC); and, *P.V. v D.B.*, 2007 BCSC 237.
- 5 See: *Children’s Aid Society of Renfrew Country v P.L.*, 1991 CanLII 6913 (ONCJ); *Patterson v Patterson*, 1995 CanLII 10072 (ONCJ); and, *Dougherty v Leach-Dougherty*, 2004 SKQB 195.
- 6 See *Patterson v Patterson*, supra; *T. v D.*, 2007 BCPC 282; and, *L.M.B. v K.A.V.*, 2012 BCPC 334.
- 7 See *Strobridge v Strobridge* (1994), 4 R.F.L. (4th) 169 (OCA); and, *S.(J.) v M.(R.)*, 2013 ABCA 441.
- 8 See for example, *R.Q. v M.B.-W.*, 2014 NLTD(F) 29, in which a custody assessment substantiated the father’s concerns about the mother’s alienating conduct. The trial judge refused the mother’s request to appoint counsel for the child, instead ordering that a non-evaluative view of the child report be prepared by a government-paid social worker.
- 9 Civil Code of Québec, CQLR c. C-1991
- 10 In *B.J.G. v D.L.G.*, 2010 YKSC 44, Martinson J. expressed her strong support for the practice of affording children the right to meet the judge, citing Article 12 of the *Convention*, and stating that:
 

... all children have these legal rights to be heard, without discrimination. [The *Convention*] does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children’s participation.
- 11 See the decision of Martinson J. in *L.E.G. v A.G.*, 2002 BCSC 1455, which provides a summary of common judicial concerns about interviewing children at paras 25–32.
- 12 The findings from the pilot project contributed significantly to the IICRD’s report *Meaningful Child Participation in Family Justice Processes*, which identified problems that children faced in having their voices heard in the family justice process as well as promising emerging practices (Williams, 2006).
- 13 The third author of this article (Boyd) was one of the founders of the BCHCS.

- 14 Responses to the authors' survey revealed that there is some use of Views of the Child Reports in mediation in Canada; no questions directly addressed issues related to their use in mediation.
- 15 *B.T.O. v A.A.*, 2013 ONCJ 708, per Sherr J; *Violo v Munro*, ONCJ640, per Jones, P.J.
- 16 *Svirsky v Svirsky*, 2013 ONSC 5564, per Kitley J.
- 17 R.B. has received funding from the Law Foundation of Ontario for a pilot project to have mental health professionals prepare Views of the Child Reports with N.B. as a collaborator on the evaluation of this project. This is a unique collaboration between the Ontario Court of Justice, the Superior Court of Justice, the Office of the Children's Lawyer, and academia to pilot and test ways to enhance children's participation in family justice decision-making.
- 18 Section 37 of British Columbia's Family Law Act, SBC 2011, c. 25, for example, provides that in determining what is in the best interests of a child, the court must consider 'the child's views, unless it would be inappropriate to consider them', and Alberta's Family Law Act, SA 2003, c. F-4.5 provides that in determining the best interests of a child, the court shall consider 'the child's views and preferences, to the extent that it is appropriate to ascertain them'.
- 19 The authors undertook a search on Westlaw Canada and Quicklaw, and found 68 reported cases, primarily from British Columbia and New Brunswick, in the decade between 2005 to 2014 that used the phrases 'views of the child report', 'voice of the child report', or 'hear the child report'. Most of the reported cases discussed the content of the report, but did not discuss issues related to its preparation. In about a third of the cases it was clear that the outcome that the court reached was consistent with the child's views, in a third of the cases it was clear that the outcome that the court reached was not consistent with the child's views, and in a third if the cases, it was not clear from the decision whether the child had expressed views or how the child's views related to the court outcome.
- 20 *Stav v Stav*, 2012 BCCA 154.
- 21 See *B.T.R. v U.A.*, 2014 BCSC 1012, where the court ordered a 'Hear the Child Report' to be prepared by the third author (Boyd) was ordered in lieu of a judicial interview.
- 22 *K.L.S. v J.G.M.*, [2012] B.C.J. 282 (BCSC).
- 23 *K.R.D. v C.K.K.* [2013] N.B.J. 332 (QB), at para 137-40.
- 24 *Ibid* at para 142. Justice Baird endorsed this list, proposed in Bala et al (2005).
- 25 *Walton v Sommerville*, 2010 ONSC 2765
- 26 *Ibid* at para 29.
- 27 *King v King*, 2011 BCSC 781, at para 59.
- 28 *Ibid* at para 60.
- 29 *M.A.S. v J.S.S.*, [2012] N.B.J. 350 (NBQB), at para 37, per Walsh J.
- 30 The participants were advised that the authors would be presenting the results at various conferences and for future publications. The authors are most grateful to all of the participants who responded and to the government ministries, regulatory social work colleges, and associations who kindly distributed our online survey across Canada. The survey was approved by the Research Ethics Committee, King's University College, Western University, London, Ontario. The authors are most grateful to Lorne Bertrand, Senior Research Associate at the Canadian Research Institute for Law and the Family in Calgary, Alberta for his assistance with data cleaning and analysis.
- 31 At the time of commencing this survey, the authors had not yet undertaken a case law review and were unaware of the frequency of use of Voice of the Child Reports in New Brunswick. Future research should clearly survey professionals in that jurisdiction, and in Canada's other provinces as well.
- 32 We are not reporting on the responses to all of the survey questions. For a more detailed review of the survey responses, please contact the R.B. at [rbirnbaum@uwo.ca](mailto:rbirnbaum@uwo.ca). In 2015, the BC Hear the Child Society undertook a survey of its members that used some of the same

- questions as in our survey. Since an unknown number of individuals responded to both surveys, we do not discuss the results of the Society's survey here.
- 33 Not all figures provided sum to 65 or 100 per cent, as not all questions were answered by each participant. There is no central professional body that identifies all the professionals who conduct Views of the Child Reports. Therefore, there is no way to ascertain the total number of professionals across Canada who received our survey link. In fact, 15 responses were duplicates as the respondents had received the survey link from more than one organization of which they were members, and did not read the instructions carefully enough to realize that they were answering the same survey twice; these were only counted once. There were an additional 72 respondents who completed the demographic portion but then indicated that they did not prepare Views of the Child Reports but represented children or undertook brief or full assessments; the fact that these respondents apparently did not understand the focus of the survey, which was clearly set out in cover documents, illustrates the continuing confusion about these reports across by many professionals in Canada. These respondents are also not included in response numbers. There were further 23 people who 'peeked' at the survey but did not complete it; they are also not included in the response numbers.
  - 34 'Other' included childcare workers, clinical social workers, marriage and family therapists, parenting coordinators, a university professor, and a respondent who was identified as a mediator, arbitrator, and parenting coordinator.
  - 35 Important limitations include a non-representative sample, small sample size, missing data, and cannot be generalized to all professionals involved in Views of Child Reports.

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