



THE LEGISLATED FUNCTIONS OF THE REPRESENTATIVE CAN'T BE PHASED OUT: THE RIGHTS AND INTERESTS OF BRITISH COLUMBIA CHILDREN AND YOUTH DEPEND ON IT

**Brief submitted by UNICEF Canada
to the British Columbia Select Standing Committee on Children and
Youth as part of the Five-Year Review of the *Representative for
Children and Youth Act***

9 February 2017

INTRODUCTION

The Select Standing Committee on Children and Youth ('Standing Committee'), an all-party Committee of the British Columbia Legislative Assembly is engaging in its second 5-year review of British Columbia's *Representative for Children and Youth Act* ('RCY Act') and has graciously extended an invitation to UNICEF Canada to make a submission, as part of its general call for submissions.

On November 25, 2011, UNICEF Canada filed a written submission with the Standing Committee as part of the first 5-year review of the *RCY Act*. That submission was titled *Children's Rights Can't Be Phased Out: Bringing British Columbia's Legislation Up To International Standards*, and is available at http://www.unicef.ca/sites/default/files/imce_uploads/TAKE%20ACTION/ADVOCATE/DOCS/unicef_canada_submission_bc_5_year_review.pdf. Our current submission is intended to address the most pressing issues related to the Representative's legislative mandate during this 5-year cycle. However, our current submission should not be seen as abandoning any of our previous analysis or recommendations, except to the extent that the same subject matter is now addressed in an amended or updated manner. A list of those earlier recommendations, which should be viewed as potential incremental steps in the natural evolution of the Representative's Office, can be found at Appendix 'A'.

The *RCY Act* confers upon the Representative for Children and Youth ('the Representative'), an independent officer of the British Columbia Legislative Assembly, a three-part mandate in section 6, consisting of advocacy for children, youth and families - section 6(1)(a); monitoring of

the child and youth serving system – section 6(1)(b); and investigations and reports of critical injuries and deaths of children – s. 6(1)(c).

In May, 2012, the Standing Committee recommended that all three of the Representative's legislated functions should be preserved, subject to the requirement that there be a review of the Representative's monitoring function, as set out in section 6(1)(b) of the *RCY Act*, by April 1, 2015, and that there be a comprehensive review of the *RCY Act* or a review of portions of the *Act* every 5 years. These recommendations were then incorporated into an amended section 30 of the *RCY Act*, which now governs the current review process.

In 2015, the Standing Committee conducted a review of the s. 6(1)(b) monitoring function and recommended that the *RCY Act* not be amended at that time, while noting that there would be an opportunity to review the section during the next statutory review of the *RCY Act*, which must be undertaken prior to April 1, 2017.

In December 2015, Mr. Bob Plecas, a former Deputy Minister, released a controversial report calling on the Ministry of Children and Family Development to take on the "oversight function" performed by the Representative, which he anticipated would take a period of approximately two years.

In April 2016, Ms. Turpel Lafond, the former Representative, tabled a Special Report, challenging the methodology used by Mr. Plecas and his team and disputing the recommendations affecting her Office's legislative mandate.

ABOUT UNICEF

As a UN agency, UNICEF is active in 190 countries and we have saved more children's lives than any other humanitarian organization. UNICEF Canada is a Canadian non-governmental organization (NGO) established 60 years ago and is the representative of UNICEF in Canada.

We work tirelessly as part of the global UNICEF family to do whatever it takes to ensure that children and young people survive and thrive, and have every opportunity to reach their full potential. Our global reach, unparalleled influence with policymakers, and diverse partnerships make us an instrumental force in shaping a world where the rights of all children are realized.

UNICEF Canada builds awareness, raises funds, and mobilizes Canadians across the country to help save and protect the world's most vulnerable children. We promote public policy and practices in the best interests of children, informed by our global experience and international best practice, to contribute to the fulfillment of children's rights in Canada and around the world.

UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by the United Nations *Convention on the Rights of the Child* and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. The only organization named in the United Nations *Convention on the Rights of the Child* as a source of expertise for governments, UNICEF has exceptional access to those whose decisions impact children's survival and quality of life. We are the world's advocate for children and their rights. For more information about UNICEF, please visit www.unicef.ca

OVERVIEW OF UNICEF CANADA'S POSITION

UNICEF Canada submits that all three functions of the Representative, as set out in section 6 of the *RCY Act*, should be maintained as permanent features of its legislated mandate as a minimum floor. In our view, section 30 of the *RCY Act* must be interpreted in the context of Canada's and British Columbia's international obligations, having regard to the United Nations *Convention on the Rights of the Child*, and the guidance provided by the United Nations General Assembly in its *Paris Principles* and by the United Nations Committee on the Rights of the Child in its General Comments and Concluding Observations.

While UNICEF Canada appreciates the particular circumstances giving rise to the evolution of the Office of the Representative, we are of the view that it is necessary to look beyond the evolving capacity of the provincial child welfare system and the relationship of the day between the Representative's Office and senior government officials. In other words, we would encourage the Standing Committee to take a broader perspective - and one that is based on internationally accepted and sustainable standards and norms for independent children's human rights institutions. In UNICEF's global study of independent human rights institutions for children, *Championing Children's Rights*, there is commentary, at page 299, on the evolution from rights-based child welfare advocacy to broader child rights promotion:

*Because of the strong initial emphasis on children in state care, custody and other institutional settings, the work of independent human rights institutions for children in the countries in this group [Canada, Australia, New Zealand and the United States] often has a focus on particular groups of children who are overrepresented within these systems...As a result, the work of many child institutions in this grouping has a strong focus on improving the status of indigenous children and their marginalized groups. **However, independent human rights institutions for children are increasingly carrying out activities under a broader child rights framework, seeking to protect and promote children's rights both inside and beyond the child welfare system. (Bolding is added for emphasis.)***

It is noteworthy that the *RCY Act* makes no explicit mention of children's rights, or the UN *Convention on the Rights of the Child*, or of the central purpose of children's human rights institutions – such as the Office of the Representative – which is to promote and protect children's human rights. Instead, the Office of the Representative seems to be viewed, in many respects, as principally a mechanism to prop up the provincial government's child welfare infrastructure on a situational basis. This latter approach represents a dangerous hypothesis, since all children and youth, and particularly those who are vulnerable, deserve a strong Office to promote and protect their rights and interests. It is a fiction to think that the best interests of children and youth can be achieved by addressing their problems and concerns through independent oversight in only one or two service sectors. Many such children and youth have complex needs and cross over multiple sectors – and thus deserve a 'full service Office' that has the capacity to use a complete array of powers and skill sets to achieve positive and durable outcomes.

It is also a concern that when the spotlight is focused principally on child welfare, there is a tendency for many of those working in that sector to feel that they are being unfairly targeted for public criticism when something negative happens to a child or young person. If the Representative were to have broad oversight authority across all government services provided to children and youth, there would be a stronger sense that there is a collective responsibility on all government services and the community-at-large to ensure that children are safe and are having their rights respected at all times.

By ratifying the *Convention on the Rights of the Child* on December 13, 1991, Canada and its sub-national governments in the provinces and territories have assumed the obligation to implement the *Convention* fully, including the general measures of implementation, which include the establishment of children's human rights institutions at the national level and in all

ten provinces and three territories, with the broad remit to promote and protect children's human rights.

We have a serious concern that section 30 of the *RCY Act* has the potential to serve as a sunset provision for some of the Representative's powers. We believe that such a direction would be retrogressive and tantamount to bartering away the fundamental rights and entitlements of the children and youth of British Columbia. In this context, it is important to understand that the *Convention on the Rights of the Child*, which has been ratified by 196 nations, reaffirms that children's rights cannot be negotiated away or phased out.

UNICEF Canada acknowledges the concerns raised by the former Representative in response to the Plecas Report, as set out in her Special Report which was tabled in April 2016. Of particular importance is the reference to the backtracking of Mr. Plecas in his predictive analysis as to the timing when the Ministry would be able to undertake its own oversight functions – which, in our view, would naturally suffer from a lack of independence, impartiality and objectivity.

While we applaud the efforts of the Ministry of Children and Family Development to improve its quality assurance and public reporting functions, that is an insufficient salvo and substitute for impartial and balanced oversight by an independent human rights office for children and youth. To set up these two streams as oppositional, rather than as complementary functions, is to confuse the issue.

Finally, we would encourage the Standing Committee to duly consider our earlier recommendations for specific amendments to the *RCY Act*, listed at Appendix 'A' to this submission, in order to incrementally strengthen over time the Representative's role and capacity as a world-class independent children's human rights institution.

SUMMARY OF RECOMMENDATIONS SUBMITTED BY UNICEF CANADA

Recommendation #1: That all powers of the Representative, as set out in section 6(1)(a), (1)(b) and (1)(c) of the *RCY Act* be retained as a minimum floor.

Recommendation #2: That section 6 of the *RCY Act* be amended to make it clear that the Representative's jurisdiction in all of its functions extends to all children and youth in receipt of services from any ministry or agency of the provincial government.

Recommendation #3: That section 6 of the *RCY Act* be amended to provide that one of the functions of the Representative is to ensure that the rights and interests of children and youth are protected and advanced and that their views are heard and considered in accordance with the principles set out in the United Nations *Convention on the Rights of the Child*.

Recommendation #4: That the powers of investigation of the Representative, as set out in section 6 and Part 4 of the *RCY Act*, be preserved, but expanded beyond circumstances of child death and critical injury to encompass any matter determined by the Representative to be relevant to the promotion or protection of children's rights.

Recommendation #5: That section 2(3) of the *RCY Act* be amended to provide for the appointment of the Representative to a single non-renewable term of seven years.

Recommendation #6: That section 30 of the *RCY Act* be amended to provide for periodic reviews of that *Act* – preferably at regular 5 year intervals - accompanied by public notification, consultation and reporting, without requiring an examination of the continuing need for any or all of the Representative's legislated functions.

CHILDREN'S HUMAN RIGHTS INSTITUTIONS – AN OVERVIEW OF INTERNATIONAL STANDARDS

A) GENERAL

It is impossible to define the proper scope of the functions of the Representative without considering the international norms and standards that apply to children's human rights institutions or offices.

Globally, there are several types of children's human rights institutions – sometimes referred to as advocates, representatives or ombudspersons for children or as children's commissioners. Most such offices or institutions – close to 200 worldwide in 70 countries - were established by national and sub-national governments after ratifying the United Nations *Convention on the Rights of the Child*, and so have a broad-based mandate for the promotion and protection of comprehensive children's human rights. Following the international adoption of the Convention in 1989, further international guidance has been provided by the United Nations Committee on the Rights of the Child as to the optimal scope and mandate of such Offices.

By ratifying the United Nations Convention on the Rights of the Child on December 13, 1991, federal, provincial and territorial governments have assumed the obligation to implement the

Convention fully, including the general measures of implementation, which include the establishment of independent children's human rights institutions at the national level and in all ten provinces and three territories, with a broad remit to promote and protect children's human rights. Article 4 of the *Convention on the Rights of the Child* states:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention...

In our estimation, the provinces of Saskatchewan, Newfoundland and New Brunswick, and the territory of Nunavut have been most successful in creating model Child and Youth Advocate legislation in conformity with Canada's international human rights obligations (although New Brunswick has recently regressed by adding seniors and adults with disabilities to the legislative mandate of the Office of the Child and Youth Advocate).

B) CONCLUDING OBSERVATIONS OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD DIRECTED TO CANADA IN RELATION TO STATUTORY CHILDREN'S RIGHTS INSTITUTIONS (2003)

In 2003, the United Nations Committee on the Rights of the Child delivered its Concluding Observations to Canada, and considered the importance of independent monitoring at the provincial/territorial levels, as well at the federal level. It found that many of the mandates of these provincial/territorial Child and Youth Advocate Offices were incomplete and should be re-examined in light of the international children's human rights standards and norms set out in the *Paris Principles for Independent Human Rights Institutions* and the United Nations Committee on the Rights of the Child's General Comment No. 2:

Independent monitoring

14. *The Committee notes that eight Canadian provinces have an Ombudsman¹ for Children but is concerned that not all of them are adequately empowered to exercise their tasks as fully independent national human rights institutions in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles, General Assembly resolution 48/134 of 20 December 1993, annex). Furthermore, the Committee regrets*

¹ The Committee employs the term "Ombudsman" to generally include various titles for independent offices for children, which include Advocates, Representatives and Commissioners.

that such an institution at the federal level has not been established. (Bolding is added for emphasis.)

15. *The Committee recommends that the State party establish at the federal level an ombudsman's office responsible for children's rights and ensure appropriate funding for its effective functioning. It recommends that such offices be established in the provinces that have not done so, as well as in the three territories where a high proportion of vulnerable children live. **In this respect, the Committee recommends that the State party take fully into account the Paris Principles and the Committee's general comment No. 2 on the role of national human rights institutions.** (Bolding is added for emphasis.)*

C) CONCLUDING OBSERVATIONS OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD DIRECTED TO CANADA IN RELATION TO STATUTORY CHILDREN'S RIGHTS INSTITUTIONS (2012)

In 2012, the United Nations Committee on the Rights of the Child reiterated its concern that the mandates of the provincial/territorial Child and Youth Advocate Offices were limited and that there was insufficient awareness of the complaints procedures within those Offices.

Independent monitoring

22. *While noting that most Canadian provinces have an Ombudsman for Children, the Committee reiterates its concern (CRC/C/15/Add.215, para. 14, 2003) about the absence of an independent Ombudsman for Children at the federal level. **Furthermore, the Committee is concerned that their [provincial] mandates are limited and that not all children may be aware of the complaints procedure.** While noting that the Canadian Human Rights Commission operates at the federal level and has the mandate to receive complaints, the Committee regrets that the Commission only hears complaints based on discrimination and therefore does not afford all children the possibility to pursue meaningful remedies for breaches of all rights under the Convention. (Bolding is added for emphasis.)*

23. *The Committee recommends that the State party take the necessary measures to establish a federal Children's Ombudsman in full accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles), to ensure comprehensive and systematic monitoring of all children's rights at the federal level. **Furthermore, the Committee encourages the State party to raise awareness among children concerning the existing children's Ombudsman in their respective provinces and territories.** Drawing attention to its general comment No. 2 (2002), the Committee also calls upon the State party to ensure*

that this national mechanism is provided with the necessary human, technical and financial resources in order to secure its independence and efficacy. (Bolding is added for emphasis.)

D) PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (PARIS PRINCIPLES) (1993)

The *Paris Principles* (referred to in the Concluding Observations of the United Nations Committee on the Rights of the Child) regarding National Institutions for the Promotion and Protection of Human Rights were adopted by the UN General Assembly by way of Resolution 48/134 in 1993. The *Paris Principles* set out a comprehensive series of recommendations relating to the status, role, functioning and composition of such national institutions for the protection and promotion of human rights (NHRI's).

The *Paris Principles* list a number of responsibilities that national institutions could undertake, which fall under five broad categories. First, the institution should have a monitoring function on any situation related to the violation of human rights which it decides to take up. Second, the institution should have an advisory role with respect to government, the parliament and any other competent body on specific violations, on issues related to legislation, and on general compliance and implementation of international human rights instruments. Third, the institution should relate to regional and international organizations. Fourth, the institution should have a mandate to educate and inform the public in the field of human rights. Fifth, the institution should be given quasi-judicial competence. Each of these five categories requires a high level of independence to work effectively.

E) GENERAL COMMENT NO. 2 OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD (2002)

Building on the recommendations set out in the *Paris Principles*, the UN Committee on the Rights of the Child, in its General Comment No. 2 (2002) on *The role of independent national human rights institutions in the promotion and protection of the rights of the child* states that such institutions are “an important mechanism to promote and ensure the implementation of the Convention [on the Rights of the Child]” and calls upon States Parties to establish such institutions underlining its “principal concern” that the institution, whatever its form, should be able, “independently and effectively”, to promote and protect children’s rights.

General Comment No. 2 envisions that children's human rights institutions will have a broad mandate that includes advocacy, investigations, auditing and monitoring, public education and public reporting. It also sets out, in paragraph 5, a series of reasons as to why the human rights of children need special attention and require separate human rights institutions to protect and promote their human rights:

...children's developmental state make them particularly vulnerable to human rights violations; their opinions are still rarely taken into account; most children have no vote and cannot play a meaningful role in the political process that determines Governments' response to human rights; children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights; and children's access to organizations that may protect their rights is generally limited.

In its General Comment No. 5 (2003) on *The General measures of implementation of the Convention on the Rights of the Child*, the Committee, at paragraph 65, reiterates that it "considers the establishment of such bodies to fall within the commitment made by States parties upon ratification to ensure the implementation of the Convention and advance the universal realization of children's rights" and reaffirms that "Independent human rights institutions are complementary to effective government structures for children," with the essential element being independence. It also restates that the role of such children's human rights institutions is "to monitor independently the State's compliance and progress towards implementation and to do all it can to ensure full respect for children's rights."

As to the Representative's monitoring authority pursuant to section 6(1)(b) of the *RCY Act*, General Comment No. 2 also includes this as a necessary function for an independent human rights institution for children and youth:

19(s) In accordance with article 3 of the Convention which obliges States parties to 'ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision', undertake visits to juvenile homes (and all places where children are detained for reform or punishment) and care institutions to report on the situation and to make recommendations for improvement.

19(d) Keep under review the adequacy and effectiveness of law and practice relating to the protection of children's rights.

19(g) Review and report on the Government's implementation and monitoring of the state of children's rights, seeking to ensure that statistics are appropriately disaggregated and other information collected on a regular basis in order to determine what must be done to realize children's rights.

19(m) In accordance with article 42 of the Convention which obligates State parties to 'make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike' sensitize Government, public agencies and the general public to the provisions of the Convention and monitor ways in which the State is meeting its obligations in this regard.

Recommendation #1: That all powers of the Representative, as set out in section 6(1)(a), (1)(b) and (1)(c) of the RCY Act be retained as a minimum floor.

A MORE COMPREHENSIVE MANDATE FOR THE REPRESENTATIVE TO PROTECT AND PROMOTE CHILDREN'S HUMAN RIGHTS WITH REFERENCE TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Paragraph 1 of the *Paris Principles* states that human rights institutions "shall be vested with competence to promote and protect human rights." Paragraph 2 of these Principles goes on to state that such human rights institutions "shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence".

The Committee on the Rights of the Child's General Comment No. 2 provides further guidance at paragraph 8:

[Human rights institutions] should, if possible, be constitutionally entrenched and must be at least legislatively mandated. It is the view of the Committee that their mandate should include as broad a mandate as possible for promoting and protecting human rights, incorporating the Convention on the Rights of the Child, its optional Protocols and other relevant international human rights instruments – thus effectively covering children's human rights, in particular their civil, political, economic, social and cultural rights. The legislation should include provisions setting out specific functions, powers and duties relating to children linked to the Convention on the Rights of the Child and its Optional Protocols.

In keeping with these international norms for children's human rights institutions, we would encourage the Standing Committee to expand the scope of the Representative's mandate,

rather than curtailing it or simply maintaining the status quo. This would include the ability to receive complaints, advocate, investigate, review, monitor, audit, conduct research and engage in public education in respect of all services provided to children and youth by any ministry or agency of the provincial government.

The limitation of advocacy, monitoring, reviewing, auditing and research functions to 'designated services' and investigation functions to 'reviewable services' seems to reflect an artificial structure that is not consistent with the objective of promoting and protecting the interdependent human rights of all children, including those in receipt of services from the provincial government.

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Professor Brian Howe has examined the factors affecting the impact of Child and Youth Advocate Offices in Canada and summarizes his findings in the following way:

International interest in children's rights and in official child advocacy agencies responsible for promoting the rights and voices of children is increasing...In line with conventional wisdom, the findings show that, in general, a higher level of impact is associated with offices that are independent from government, exclusively focused on children, accessible to children, and that have a wide mandate, strong statutory powers, and a broad advocacy function...

In Saskatchewan, Newfoundland, New Brunswick and Nunavut, there is broad-based authority to carry out advocacy, investigation, monitoring, and investigation powers in relation to the provision of all government services. For example, section 14(2)(b) of Saskatchewan's *Advocate for Children and Youth Advocate Act* sets out a very broad mandate in the following terms:

(2) The Advocate shall:

(b) receive and investigate any matter that comes to his or her attention from any source concerning:

(i) a child or youth who receives services from any ministry, agency of the government or publicly-funded health entity;

(ii) a group of children or youths who receive services from any ministry, agency of the government or publicly-funded health entity; and

(iii) services to a child, group of children, youth or group of youths by any ministry, agency of the government or publicly-funded health entity.

In many other jurisdictions, the role of the Child and Youth Advocate is mandated to advocate for the rights and interests of children and youth. For example, in Newfoundland, there is a reference in subsection 3(a) of the *Child and Youth Advocate Act* to the Office being established to, among other things, “ensure that the rights and interests of children and youth are protected and advanced and their views are heard and considered.” A similar provision exists in section 2(a) of New Brunswick’s *Child and Youth Advocate Act*, but subsection 2(e) of that legislation goes even further and provides that another responsibility of the Child and Youth Advocate is “acting as an advocate for the rights and interests of children and youth generally.”

In the Yukon, Ontario and Nunavut legislation, there are explicit references to the United Nations *Convention on the Rights of the Child*. For example, Section 17(1)(b) of the Yukon *Child and Youth Advocate Act* directs the Advocate, in carrying out his/her functions and duties under the *Act*, to “take into account the provisions of the United Nations *Convention on the Rights of the Child*.”

In Ontario, section 2(3) of the *Provincial Advocate for Children and Youth Act* makes explicit reference to the United Nations *Convention on the Rights of the Child* and states that “in interpreting and applying this Act, regard shall be had to ...[t]he principles expressed in the United Nations *Convention on the Rights of the Child*...”

In Nunavut’s *Representative for Children and Youth Act*, the Preamble states, among other things, that “Affirming Nunavut’s commitment to ensuring that the rights and interests of children and youth are recognized and protected and that their views are heard and considered by the Government of Nunavut and by those who provide services to children and youth.” As well, section 3(a) of that *Act* stipulates as one of the Representative’s duties “to ensure that the rights and interests of children and youth, individually and collectively, are protected and advanced and that their views are heard and considered in matters affecting them by government departments and designated authorities.”

In Nunavut, the Preamble explicitly refers to the United Nations *Convention on the Rights of the Child* in further stating “Affirming Nunavut’s commitment to the implementation of the United Nations *Convention on the Rights of the Child*, adopted by the General Assembly of the United Nations on November 20, 1989 and ratified by Canada on December 13, 1991.”

Recommendation #2: That section 6 of the *RCY Act* be amended to make it clear that the Representative's jurisdiction in all of its functions extends to all children and youth in receipt of services from any ministry or agency of the provincial government.

Recommendation #3: That section 6 of the *RCY Act* be amended to provide that one of the functions of the Representative is to ensure that the rights and interests of children and youth are protected and advanced and that their views are heard and considered in accordance with the principles set out in the United Nations *Convention on the Rights of the Child*.

THE EXPANSION OF THE INVESTIGATION POWERS OF THE REPRESENTATIVE

In our view, the limitation of the scope of the Representative's powers of investigation to critical injuries and deaths of children and only in respect of 'reviewable services' suggests an inability to investigate (in the fullest sense of that term) a broad range of services that have not resulted in a child death or critical injury. Although the monitoring role under s. 6(1)(b) of the *RCY Act* would still allow the Representative to review and report on any matter relating to 'designated services', this is once again limited to a particular range of services pursuant to s. 1 of the *Act*, without the full scope of investigation powers that would include the jurisdiction to compel persons to answer questions and to order disclosure of documents pursuant to s. 14 of the *Act*.

Within the broad mandate contemplated for national human rights institutions to promote and protect human rights, paragraph 3(3)(b) of the *Paris Principles* contemplates the investigative function of such institutions and the accompanying power to "[h]ear any person and obtain any information and any documents necessary for assessing situations falling within its competence."

The Committee on the Rights of the Child's in its General Comment No. 2 clearly contemplates broad investigative powers for children's human rights institutions in paragraph 13:

[Human Rights Institutions] must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children. In order to be able to carry out such investigations, they must have the powers to compel and question witnesses, access relevant documentary evidence

The Saskatchewan, Newfoundland and New Brunswick statutes all provide broad powers of investigation with corresponding subpoena powers, which in Saskatchewan and New Brunswick

includes the authority to convene an investigation on the Child and Youth Advocate's own motion.

The power of investigation is a necessary part of a continuum of powers and duties of an independent Child and Youth Advocate - both on an individual and systemic basis. This is evidenced in subsection 13(1)(h) of the New Brunswick *Child and Youth Advocate Act*, where the Advocate is conferred with the authority to investigate on behalf of a child, youth or group of children or youth "if advocacy, mediation, or other dispute resolution process has not resulted in an outcome the Advocate considers satisfactory."

While a government ministry or agency may be improving its services and instituting quality assurance processes, as being reported by the Ministry of Children and Family Development, that improvement should not be viewed as a sufficient justification for dissolving an independent body's jurisdiction over such vital matters.

In Saskatchewan, where the author of this submission had such broad powers of investigation, we developed 5 different classifications of investigations – 1) child death investigations; 2) critical injury investigations; 3) fairness investigations; 4) program and service investigations; and 5) mandatory investigations (upon referral by a Committee of the Saskatchewan Legislature or the Lieutenant Governor in Council). Regardless of the type of investigation, the fundamental purposes remained the same:

- 1) To recommend changes in government legislation, policy and/or practice that could prevent future harm to children and youth;
- 2) To improve the quality of services provided by child protection and other child-serving systems; and
- 3) To promote greater public accountability.

Recommendation #4: That the powers of investigation of the Representative, as set out in section 6 and Part 4 of the *RCY Act*, be preserved, but expanded beyond circumstances of child death and critical injury to encompass any matter determined by the Representative to be relevant to the promotion or protection of children's rights.

THE PLECAS REVIEW

A) THE PLECAS REVIEW REPORT – PLECAS REVIEW, PART ONE: DECISION TIME

In July 2015, the British Columbia provincial government announced that Bob Plecas, a former deputy minister, had been appointed to conduct an independent review of ministry practice into matters arising from the reasons of the British Columbia Supreme Court in the case of *J.P. v. British Columbia (Children and Family Development)*.

...

On December 14, 2015, the provincial government publicly released its report, called *Plecas Review, Part One: Decision Time*. Even though it was the *J.P.* case that led to this review, the Plecas report does not address the *J.P.* case in any material respect. Instead, the Plecas report sets out its rationale for immediately launching into a wider review of the child welfare system:

Part of my mandate is to examine the conformance to policy in the J.P. case. Until my team conducts a review of the case itself – which, as I have noted, cannot occur until the spring due to previously mentioned legal and procedural delays – I believe the most helpful thing I can do is to understand and explain the circumstances under which such a case could occur.

In his report, Mr. Plecas sets out a far-reaching commentary and series of recommendations on many aspects of the provincial child welfare system. Of particular relevance is the recommendation that the Ministry eventually assume the oversight function currently exercised by the Representative, once the Ministry's quality assurance and public reporting capabilities are sufficiently developed, leaving the Representative with the singular advocacy function, which is set out in section 6(1)(a) of the *RCY Act*. At page 40, Mr. Plecas speaks to the winding down of the Representative's monitoring and child death/critical injury investigation functions:

External oversight should end when the Ministry is capable of carrying out these functions, and the Representative's role should become one focused on advocacy.

Obviously, the Representative will continue to investigate cases and issues, and whomever is the new Representative would likewise continue. This is essential work. But as Ted Hughes recommended and this report endorses, the time will come when the Ministry itself picks up this work as well as provides a first rate public information service.

At page 49, Mr. Plecas sets out his recommendations for the Legislature to consider in respect of the Representative:

- *New appointees should only serve one term;*
- *The term should be extended to six years to ensure enough time is provided to settle in and become productive;*
- *MCFD should be given a period of time (perhaps two years) to put in place a sophisticated Quality Assurance, audit, and complaints process that includes feedback to the front line, and with appropriate training provided to ensure learning from findings of the Quality Assurance program;*
- *A sophisticated public reporting program should be in place within 18 months of the new fiscal year starting, fulfilling the two conditions in the Hughes Report to transfer the case review function back to the Ministry;*
- *The Ministry should rely on the advice of the Representative and others to implement appropriate Quality Assurance and information programs. Until MCFD is ready for the transfer, as recommended by the Standing Committee, the Representative should continue fulfilling the role of the Quality Assurance reviewer; and*
- *During this transition period it will be business as usual in terms of advocacy and investigations/reports for the Representative's office*

B) THE FORMER REPRESENTATIVE'S RESPONSE TO THE PLECAS REPORT – SPECIAL REPORT: IMPLEMENTATION OF THE PLECAS REVIEW, PART ONE: DECISION TIME

Ms. Turpel-Lafond, the former Representative, provided a detailed response to the Plecas Review Report in April 2016, when she tabled a Special Report, *Implementation of the Plecas Review, Part One: Decision Time*. In that Special Report, she expressed a number of concerns. One such concern had to do with Mr. Plecas proceeding “to offer wide-ranging commentary, perspectives and recommendations on various aspects of the ministry, its staffing and organization, its funding, its operations and its expectations of staff” even though he had not investigated the particular *J.P.* case, which provided the rationale for launching the review in the first place.

In her report, Ms. Turpel-Lafond stressed the lack of inclusive consultation on a number of fronts:

A core concern has been the fact that, to my knowledge, Aboriginal groups, stakeholders, my Office and other communities of interest that could have provided valuable information were not consulted or interviewed during the development of the report...

I also have had considerable concerns about the fact that the Plecas report made recommendations concerning the Office of the Representative for Children and Youth without meaningfully consulting my Office. Further, the Plecas report was issued without the correction of several factual inaccuracies that Mr. Plecas had full notice of, as I had pointed them out when I was given an opportunity to review the report very shortly before its public release.

Ms. Turpel-Lafond pointed out that “a key foundation of effective systemic reform involves extensive and diverse public and stakeholder consultation”, as was the norm in many earlier reviews. She also noted that “it is almost unheard of for any contemporary review not to include the involvement of a wide range of people” and that “extensive public input is considered the current national and international standard for reviews of this nature, even in circumstances in which there is a short reporting timeframe.”

Another important aspect of Ms. Turpel-Lafond's response was the disclosure of a letter (never previously made public) that Mr. Plecas had written to the Ministry on December 18, 2015, in which he appears to retreat from his earlier time projections concerning the Ministry's capacity to take on the oversight functions of the Representative:

Minister, I have learned over the years that there are times when one should be prepared to engage in “serious second thought” and the reaction to my report has resulted in me doing just that in relation to the mandate question.

While I might be optimistic that threshold necessary for a change in mandate could be achieved within two years, it is now clear to me that much more will need to be done to strengthen public confidence in the Ministry before that evolution can be considered. As a result, I have to concede that the two-year timeline suggested in my report is too ambitious. It will be for the Standing Committee to determine when they will wish to consider the matter pursuant to the statutory responsibilities assigned to them...

C) UNICEF CANADA'S RESPONSE TO THE PLECAS REVIEW REPORT

UNICEF Canada opposes the majority of the recommendations advanced by Mr. Plecas and considers the concerns expressed by the former Representative to be well-reasoned, fairly stated and legitimate. As previously submitted, we do not agree with the premise that children's

rights can be phased out over time or that the independent institutions that protect and promote children's human rights can have some of their necessary functions incrementally dissolved. It is noteworthy that Mr. Plecas, in a private communication to the Ministry on December 18, 2015, retreated from his original recommendations regarding the phasing out of the Representative's oversight functions.

The only recommendation that we support in the Plecas Review Report is that "new appointees should only serve only one term." As to his recommendation that "the term should be extended to six years to ensure enough time is provided to settle in and become productive", we would propose a period of seven years, as opposed to simply adding on one additional year.

Given that there is the potential for the Representative to be distracted during the latter stages of his or her first term, particularly where there has been no decision made as to his or her reappointment, it is recommended that the Committee seriously consider the possibility of a single extended non-renewable term of appointment. This approach would serve to enhance public confidence and dispel any perception that the Representative may be compromising his/her independence and best judgement by placating government officials in order to secure a reappointment. It would also avoid a sense of unsettling instability for the staff of the Representative's Office that is naturally occasioned by an extended period of uncertainty as to the ongoing leadership of the Office.

The New Brunswick *Child and Youth Advocate Act* is instructive on this issue, as it provides for appointment to a single non-renewable seven year term, subject to a 12 month extension, ostensibly in contemplation of exceptional circumstances:

3(2) Subject to subsection (3), the Advocate shall be appointed for a term of seven years and is not eligible for reappointment.

3(3) The Lieutenant-Governor in Council may extend the term of the Advocate for a period of not more than 12 months.

In the independent review of the English Children's Commissioner's Office conducted by Dr. John Dunford, it was recommended that the Children's Commissioner be appointed for a single seven-year term, as a safeguard against concerns that the Commissioner's "independence may be influenced by a desire for reappointment." He also noted that the Commissioner for Wales is appointed for a seven-year term and that Scotland is also considering moving to a seven-year term of office.

In our view, the New Brunswick 7-year non-renewable term model makes a great deal of sense because it not only safeguards the independence of the Office against the reappointment process, but also allows a sufficient period of tenure for the Advocate to delve into important matters and complete activities and reports that he or she has already initiated.

Recommendation #5: That section 2(3) of the *RCY Act* be amended to provide for the appointment of the Representative to a single non-renewable term of seven years.

PERIODIC REVIEW OF *RCY ACT*

It is noteworthy that section 30 of the *RCY Act*, as currently worded, does not simply call for periodic reviews of the statute, but is an anomalous provision that has the potential to serve as a sunset provision for some of the Representative's powers. It states that:

Review of the Act

30 (1) To determine whether the functions of the representative described in section 6 are still required to ensure that the needs of children, and young adults as defined in that section, are met, the standing committee, before April 1, 2017, and at least once every 5 years after that, must undertake a comprehensive review of this Act or a review of portions of this Act.

(2) In addition to the comprehensive review required under subsection (1), the standing committee must also complete, by April 1, 2015, an assessment of the effectiveness of section 6 (1) (b) in ensuring that the needs of children are met.

As previously stated, it is our view that all of the powers vested in the Representative in the current legislation are essential to any children's human rights institution and should not be downgraded or terminated as of a certain target date.

A proper interpretation of section 30 of the *RCY Act* must, by necessity, take into account international human rights standards and norms for independent human rights offices for children and youth, such as the United Nations *Convention on the Rights of the Child*, and the guidance provided by the United Nations General Assembly in its *Paris Principles* and by the United Nations Committee on the Rights of the Child in its General Comments and Concluding Observations.

To ensure that the *RCY Act* remains effective in serving the rights, interests and well-being of children and youth, there should, in our view, be a general requirement for periodic reviews of the *Act* so that necessary corrections or adjustments can be made in a timely manner. Such a provision would also provide an opportunity for the Representative to identify what amendments are required to allow him or her to carry out the mandate of the Office in the most effective manner.

Any such periodic review should not be directed to an examination as to whether the mandated functions of the Representative “are still required to ensure that the needs of children and young adults...are met.” The current criteria for the review are counter-productive and should not be left to continue beyond this current review.

For example, the Nunavut *Representative for Children and Youth Act* contemplates periodic reviews of that *Act* and defines the scope of the review in an open-ended way without suggesting a potential reduction of the Representative’s functions. Although that provision calls for periodic reviews at 7-year intervals, we are proposing that the current expectation in British Columbia of regular 5-year reviews continue as the appropriate benchmark.

Review within five years

40. (1) Within five years of the day this Act comes into force and every seven years thereafter, the Legislative Assembly or one of its committees shall review the provisions and operation of this Act, and such other related legislation, policies, guidelines, plans or directives as the Legislative Assembly or the committee may direct.

Scope of review

(2) The review must include an examination of the administration and implementation of this Act and the effectiveness of its provisions and may include recommendations for changes to this Act.

Recommendation #6: That section 30 of the *RCY Act* be amended to provide for periodic reviews of that *Act* – preferably at regular 5 year intervals - accompanied by public notification, consultation and reporting, without requiring an examination of the continuing need for any or all of the Representative’s legislated functions.

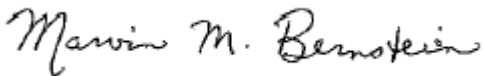
SUMMARY

The 5-year review of the *RCY Act* provides an excellent opportunity to stand back and take stock of the legislation before charting a future path for the Office of the Representative and the children and youth of British Columbia. We encourage the Standing Committee to consider the obligation of the British Columbia government to ensure that the role, mandate and functions of the Office of the Representative are based on internationally accepted and sustainable standards and norms for children's human rights institutions. Such an approach will, in our submission, allow the British Columbia government to take the next step towards establishing a world-class Office of the Representative and ensuring that every British Columbia child/youth in receipt of provincial government services has the best chance to develop to his/her fullest potential and have his/her human rights and dignity respected.

It would, in our view, be a step backwards to see the Office of the Representative as simply a mechanism to prop up the child welfare system and to allow the dissolution of many of the powers currently vested in the Representative, which are necessary to promote and protect the rights and interests of the children and youth who rely upon the current mandate of that Office.

The 5-year review is an opportunity to consider the natural evolution of the Office of the Representative and ensure that children have an independent Representative for all their rights – and not merely those rights engaged by the child welfare system. While government ministries and agencies may be successful in their desire to introduce stronger internal quality assurance and public information processes, those improvements will not be sufficient to produce the level of public accountability and reassurance that can only be achieved through external and impartial oversight by an independent human rights institution for children and youth, such as exists in the Office of the Representative.

Respectfully submitted on behalf of UNICEF Canada by:

A handwritten signature in dark ink that reads "Marvin M. Bernstein".

Marvin M. Bernstein, B.A., J.D., LL.M.
Chief Policy Advisor
UNICEF Canada

APPENDIX 'A' – LIST OF RECOMMENDATIONS FROM UNICEF CANADA'S PREVIOUS SUBMISSION TO THE B.C. SELECT STANDING COMMITTEE ON CHILDREN AND YOUTH (NOVEMBER 25, 2011) – *CHILDREN'S RIGHTS CAN'T BE PHASED OUT: BRINGING BRITISH COLUMBIA'S LEGISLATION UP TO INTERNATIONAL STANDARDS*

Recommendation 1: That a new provision be added to the *RCY Act* to make it clear that the Representative's jurisdiction extends to all children and youth in receipt of services from a ministry or agency of the provincial government in order to promote and protect their human rights, as set out in the United Nations Convention on the Rights of the Child and its Optional Protocols, and their other interests.

Recommendation 2: That all powers of the Representative to advocate, monitor, review, audit, conduct research, make recommendations and report publicly, as set out in section 6 of the *RCY Act*, be preserved.

Recommendation 3: That all references to 'designated services' in the *RCY Act* be repealed.

Recommendation 4: That the powers of investigation of the Representative, as set out in section 6 and Part 4 of the *RCY Act*, be preserved, but expanded beyond circumstances of child death and critical injury to encompass any matter determined by the Representative to be relevant to the protection or provision of children's rights.

Recommendation 5: That all references to 'reviewable services' in the *RCY Act* be repealed.

Recommendation 6: That the mandate of the Representative, as set out in section 6 of the *RCY Act*, be expanded to include the power to conduct systemic advocacy, reviews and investigations.

Recommendation 7: That the mandate of the Representative, as set out in section 6 of the *RCY Act*, be expanded to include the receipt, review and hearing of complaints and the use of informal processes to resolve complaints and disputes.

Recommendation 8: That the mandate of the Representative, as set out in section 6 of the *RCY Act*, be expanded to include public education respecting the promotion and protection of children's rights as a core function.

Recommendation 9: That a subsection be added to section 9 of the *RCY Act* making it clear that the bar to the Representative acting as legal counsel does not in any way

preclude her/his authority to seek intervenor or amicus curiae status in a proceeding before a court or tribunal.

Recommendation 10: That a new provision be added to the *RCY Act* to make it clear that the Representative has the right to receive advance and timely notification of proposed legislation and policy that may have a significant impact upon children and youth.

Recommendation 11: That a new provision be added to the *RCY Act* vesting the Representative with the power to undertake and/or facilitate assessments of the impact on children of new policies or proposed legislation.

Recommendation 12: That a new provision be added to the *RCY Act* to make it clear that the Representative's has a right of entry to premises occupied by a provincial government ministry or agency in connection with a lawful review or investigation.

Recommendation 13: That a new subsection be added to s. 26 of the *RCY Act* to place an obligation on every facility, caregiver's home, group home or other home or place in which a child is placed under an Act of the province, the *Criminal Code* or the *Youth Criminal Justice Act* (Canada) to inform children and youth, in language suitable to their understanding, of the existence and role of the Representative; of how the Representative may be contacted; and of their right to have private contact with the Representative without delay.

Recommendation 14: That serious consideration be given to amending subsection 2(2) of the *RCY Act* to provide for the appointment of the Representative to a single non-renewable term of not less than five years and not more than ten years. In the alternative, a further subsection should be added to section 2 of the *RCY Act*, requiring that reasonable efforts be made to notify the Representative of a reappointment decision no less than three months before the expiry date of the Representative's first term.

Recommendation 15: That section 30 of the *RCY Act* be repealed and replaced by a provision that calls for a periodic review of that legislation at intervals that do not exceed five years and requires public notification, consultation and reporting.

REFERENCES AND SELECTED BIBLIOGRAPHY

Legislation

British Columbia: The *Representative for Children and Youth Act*, S.B.C. 2006, c. 29.

New Brunswick: The *Child and Youth Advocate Act*, S.N.B. 2007, c. C-2.7.

Newfoundland: The *Child and Youth Advocate Act*, S.NL. 2001, c. C-12.01.

Nunavut: The *Representative for Children and Youth Act*, S. Nu. 2013, c. 27.

Ontario: The *Provincial Advocate for Children and Youth Act*, S.O. 2007, c. 9.

Saskatchewan: The *Advocate for Children and Youth Act*, S.S. 2012, c. A-5.4, as amended.

Yukon: The *Child and Youth Advocate Act*, SY 2009, c.1.

United Nations Conventions/Committee on the Rights of the Child Concluding Observations and General Comments/Other Conventions and Parliamentary Reports

United Nations Convention on the Rights of the Child, A/RES/44/25, United Nations, New York, November 20, 1989 (ratified by Canada on December 13, 1991), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

United Nations General Assembly, *Principles relating to the status of national institutions for the promotion and protection of human rights* ("The Paris Principles"), Resolution 48/134 of 20 December 1993, annex, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions>.

Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under article 44 of the Convention, Concluding Observations: Canada*, Document CRC/C/15/Add.215, October 27, 2003, available at <http://www.refworld.org/publisher,CRC,CONC OBSERVATIONS,CAN,403>.

Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under article 44 of the Convention, Concluding Observations: Canada*, Document CRC/C/CAN/CO/3-4, December 6, 2012, available at http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-CAN-CO-3-4_en.pdf.

Committee on the Rights of the Child, *General Comment No.2, The Role of Independent National Human Rights Institutions in the promotion and protection of the rights of the child*, Document CRC/GC/2002/2, November 15, 2002, available at <http://www.refworld.org/docid/4538834e4.html>

Committee on the Rights of the Child, *General Comment No.5, General Measures of Implementation of the Convention*, Doc. CRC/GC/2003/5, November 27, 2003, available at <http://www.refworld.org/docid/4538834f11.html>

Senate of Canada, Senate Standing Committee on Human Rights, *Children: The Silenced Citizens: Effective Implementation of Canada's International Obligations with respect to the Rights of Children – Final Report*. Senate of Canada, Ottawa, April 2007, available at <http://sencanada.ca/content/sen/Committee/391/huma/rep/rep10apr07-e.pdf>.

UNICEF Reports/Submissions

UNICEF, *Children's Rights Can't Be Phased Out: Bringing British Columbia's Legislation Up To International Standards*, Brief submitted to the Select Standing Committee on Children and Youth, November 25, 2011, available at http://www.unicef.ca/sites/default/files/imce_uploads/TAKE%20ACTION/ADVOCATE/DOCS/unicef_canada_submission_bc_5_year_review.pdf.

UNICEF (2012), *Championing Children's Rights: A global study of independent human rights institutions for children – summary report*, UNICEF Office of Research - Innocenti, Florence, available at https://www.unicef-irc.org/publications/pdf/championing2_eng.pdf

UNICEF (2013), *Championing Children's Rights: A global study of independent human rights institutions for children – full report*, UNICEF Office of Research - Innocenti, Florence, available at https://www.unicef-irc.org/publications/pdf/c950_ccrbook_130903web_noblanks.pdf

Articles

R.B. Howe, *Factors Affecting the Impact of Child Advocacy Offices in Canada*, Canadian Review of Social Policy, (2009) No. 62, 17-33, available at <http://crsp.journals.yorku.ca/index.php/crsp/article/view/34282/0>.

R. MacLean and R.B. Howe, *Brief report on Canadian provincial children and youth advocacy offices: Highlights of functions and recent activities*, Children's Rights Centre, Cape Breton University, August 2009, 1-9, available at https://www.researchgate.net/publication/268415933_Brief_report_on_Canadian_provincial_children_and_youth_advocacy_offices_Highlights_of_functions_and_recent_activities.

Documents/Sources

U.K. Department for Education, Dunford, John, *Review of the Office of the Children's Commissioner (England)*, December 2010, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/176457/Cm-7981.pdf.

British Columbia, Office of the Representative for Children and Youth, *Backgrounder: Review of the Representative for Children and Youth Act* (2011), available at https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/rcya_5yearreview_backgrounde.