

Legislation's Influence on Judicialization: Examining the effects of statutory structure and language on rates of court use in child welfare contexts

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Introduction

All provincial and territorial child welfare legislation throughout Canada envisions the possibility of court involvement in a number of different circumstances. Yet whether, when and for what purpose courts must or may be used in the administration of child welfare services varies from one statute to the next. This legislation also varies with respect to the extent to which child welfare matters can be managed through *extra-judicial* mechanisms. This paper aims to address whether and how the language and structure child welfare legislation in Canada actually affects the frequency and nature of court involvement – or “judicialization” – in child welfare matters. It is a question that remains unexplored in current literature. That is, existing research tells us very little about how legislation shapes the choices and conduct of child welfare workers, especially insofar as the referral of cases to court is concerned. This paper seeks to address this gap in the scholarship through an investigation into the way that statutory language and frameworks might influence judicialization rates. We focus here on three particular provinces: Quebec, Ontario and Alberta. These provinces vary broadly in terms of their respective legislative approaches to court involvement in child protection and we thus expected that their statutory differences would result in divergent judicialization rates.

This paper begins with a review of the literature relevant to the subject under consideration here. This discussion reveals the limited work that has been done to-date on factors affecting child welfare workers' decisions and conduct. Part II undertakes an analysis of the child welfare statutes in force in Quebec, Ontario and Alberta with a view to identifying wording and regimes in each that might prompt or deter the referral of cases to court. From this analysis we draw predictions about relative judicialization rates in each province. Part III discusses our methodology and explains the challenges encountered in deriving data for rates of court use for child welfare matters. Finally, in Part IV, we discuss our data findings. These findings in fact run counter to the predictions we formulated from our legislative analysis in Part II about judicialization rates in the three provinces we study. Our discussion here examines potential factors that might have affected our findings, and comments briefly on the significance of court involvement in child welfare cases.

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Ultimately, this paper uncovers more question than it does answers. Yet it achieves its objective in that it rigorously considers different statutory approaches to child welfare, so as to determine how influential legislative cues in fact are as to actual outcomes for children and families deemed to be at risk. Moreover, this paper exposes a multiplicity of factors that might shape judicial involvement in youth protection. Finally, this work serves as a launching pad for the pursuit of further pressing research oriented toward garnering a more robust appreciation of how courts can and should be implicated in the management and resolution of child welfare cases.

I. Literature Review

Our review of the social science and legal scholarship revealed that the particular issue we address in this paper, namely, the influence exerted by child welfare legislation over the rate of court use in child protection cases, has yet to be studied. Indeed, the interface between child welfare matters and use of judicial institutions has received very little attention by scholars. (Sedlak et al. 2005: 390) Having said this, we did locate articles addressing themes closely linked to our own focus. In particular, we found literature considering how various factors, including applicable child protection legislation, influence child welfare practice. While we did find a small number of studies identifying factors prompting judicialization, this work did not consider how legislation might affect court use.

A. Factors Influencing Child Welfare Decisions and Practice

Existing scholarship has identified an array of factors that shape decisions and conduct adopted by child protection workers. While legislation is frequently identified as bearing influence over child welfare practices and decisions, as discussed below, the literature identifies a series of additional factors that prompt child protection choices, interventions and outcomes.

- *Legislation*

The impact wielded by child protection legislation over child welfare workers' interactions, professional decisions and conduct has been broadly studied. Howe's (2001) analysis of Canada's federalist structure's effects on the administration of child welfare matters posits that different levels of intervention seen in child welfare practice across the country can be partly attributed to the wording of, and policies underling, provincial child welfare legislation. For example, the breadth of definitions found in statutes for terms like "child in need of protection", "physical abuse" or "emotional abuse" might affect the level of discretion held by child welfare workers vis-à-vis intervention. Child welfare interventions might also be influenced by a statute's mandatory reporting requirements, which vary across provinces. Moreover, where a statute identifies its primary purpose as the "best interests of the child" rather than "family preservation", greater levels of intervention might result. Howe's analysis thus provides a host of examples illuminating

how legislative framing and terminology might have “on the ground” repercussions for child protection issues.

Khoo et al.’s (2003) research also suggests the potential influence of legislation over child welfare practice. In their comparative study of child welfare practices in Ontario and Sweden, the authors anticipated that differences in statutory vocabulary would affect practical decision-making. This was confirmed pursuant to interviews with child welfare workers in both jurisdictions. The researchers found that their decisions in Ontario are largely governed by legislative guidelines and parameters, which in turn drive standardized risk assessment protocols that agencies must follow. This stood in contrast to procedures in place in Sweden, which were more decentralized and marked by greater professional autonomy.

The compelling influence of legislation over the conduct and decision of child welfare workers is further emphasized in studies examining the implementation of mandatory reporting requirements. This research emphasizes how a legislated duty to report affects social work practice, as well as child welfare outcomes. (Dokkum 1996; Ainsworth 2002)

Other research has been more equivocal about law’s role in shaping child welfare practice. According to one study, legal requirements do little to improve substantive outcomes, noting: “legal controls are ineffective at raising standards and even at ensuring fairness.” (Masson 1989: 51) Levine’s (1998) study also indicates that written legal “formulae” are unlikely to affect investigators’ decisions regarding the actual treatment of child protection cases. In a related vein, other research indicates that child protection workers retain discretion and agency even in the face of relatively strict standardized protocols. (Parada et al. 2007) Finally, a study by Kopels *et al.* (2003) examines factors underlying imperfect compliance with legislative requirements for child welfare practice, and suggests why this might in fact be acceptable.

Moreover, some literature has shown that even when legislation modifies child welfare practice, this will not necessarily translate into improved outcomes for children and families. It is argued that an increased emphasis on formal legal frameworks and institutions may result in child welfare workers aiming primarily to satisfy inflexible legal requirements rather than proactively seeking child-centered solutions tailored to the specific case at hand. For Anglin (2002) more beneficial child outcomes are thus possible through a move away from “reductionistic legal constructs” in the provision of child welfare services.

- *Other Factors*

A number of studies consider other factors, aside from the applicable legislative structure, shaping decisions and practices adopted in the field of child protection. These factors are encompassed by the following five themes: resource availability; perceptions of risk; parental involvement and roles; the perceived relevance of corroboration; and personal traits of the worker, caregivers and children.

- Resource availability

The scope of public resources allocated to child welfare in a given jurisdiction has been observed to influence professional practice. When governments curtail budgets for child welfare programs, agencies must focus on, and will only intervene in, crisis situations, whereas other families in need, though perhaps not in crisis situations, might not receive full services and support. (Howe 2001; McConnell et al. 2006; Jones et al. 2006) As noted below, resource allocation and availability also influence judicialization – or the propensity to turn to a court – in the child welfare context. (McConnell et al. 2006)

- Perceptions of risk

An additional dynamic identified as a determinant of child welfare workers' decision-making was a worker's analysis of the "problem". McConnell et al. (2006) indicate that the worker's perception of where the challenge is situated (i.e., with a parent, the family, or within a broader community or social context) will determine the nature and type of intervention exercised. Workers' perceptions vis-à-vis the severity of risk posed to a child also affects their decisions. This has been studied in the context of child welfare workers' assessments and referral of borderline cases (Platt 2006), as well as decisions regarding the pursuit of criminal charges in sexual and physical abuse cases. (Trocmé & Tourigny: 2000)

- Parental involvement and roles

The role assumed by parents in a child protection context can also affect how child welfare workers perceive and deal with a case. In particular, parental *cooperation* can shape workers' assessment of risk; where it exists, intervention is less likely. (Trocmé 2008; McConnell et al. 2006) In contrast, where parents are found *accountable* for the risk to which a child is exposed, this will result in a greater likelihood of an assessment and/or investigation. (Platt 2006)

- Perceived relevance of corroboration

The desire to ensure "success" if a case proceeds through formal (especially judicial) channels, and to avoid public criticism, can also influence child welfare workers' decisions and actions. As Poirier (1986: 233) notes: "nothing horrifies bureaucracy more than publicity; many internal rules are drafted especially to avoid any public outcry." The importance of collecting proper documentation and other evidence to corroborate findings of maltreatment has thus been emphasized. (McConnell et al. 2006) Corroboration has also been stressed as essential to child welfare workers' decision-making regarding whether and how to respond to a child welfare referral. (Platt 2006) And Trocmé's (2008) recent work found that a police referral and the presence of physical or emotional harm (especially multiple forms of harm) increase the likelihood that maltreatment would be classified as suspected rather than unsubstantiated. This finding also speaks to the relevance of corroboration in social work decision-making.

- Personal traits

While the foregoing research identifies correlations between contextual factors and child welfare practice, other research has considered the way in which personal traits – in particular, those of the worker, the child and the caregiver – might influence child welfare interventions. Lazar's (2006) research in the Israeli context found that the severity of a child welfare worker's intervention was associated with the child's gender, the worker's gender and the worker's level of "authoritarianism." Workers were found to respond more severely where cases involved girls, where the worker charged with managing the case was male and where this worker displayed heightened levels of authoritarianism. Trocmé's (2008) study also indicates that the caregiver's ethno-racial status, as well as any risk factors to which the caregiver is subject (e.g., health concerns, domestic violence, alcohol or drug addiction) can influence decisions regarding substantiation.

B. Factors Influencing the Referral of Child Protection Cases to Courts

Although we did not uncover any study examining the specific relationship between legislation and rates of judicialization for child protection matters, we did locate three studies that identified other predictors of court use in the child protection context. (McConnell et al. 2006; Karski 1999; Sedlak et al. 2005) These studies identify a range of factors that might work in conjunction with legislative cues to prompt the referral of cases to court. According to McConnell et al., such factors include: the likelihood that outcomes will improve as a result of court involvement; the severity of the case relative to others managed simultaneously; the strength of the evidence; the extent to which child welfare workers felt they were making satisfactory progress without court involvement; and resource constraints. (McConnell et al. 2006: 234)

A second study based upon data from California (Karski 1999) enumerated four key predictors for court referral. These were: the extent to which families cooperate with (or at least remain neutral vis-à-vis) the child protection agency; the extent to which allegations of maltreatment are substantiated; confirmed drug use within the family; and the scope of support available to the family. A couple of overlaps with McConnell et al.'s conclusions regarding court use are noteworthy. A first is the finding that where a family has support – be it offered through the state or private channels – court referral is less likely. Second, an emphasis on substantiation as a predictor of judicialization emerges in both studies. This reflects "a strong legal-evidentiary approach to cases" (Karski 1999: 654) pursuant to which court referral is unlikely if the evidence regarding maltreatment is not compelling.

Sedlak et al.'s (2005) study reports on predictors for referral of cases to "dependency" courts (i.e., courts responsible for ordering the provision of services to a child/family/caretaker, or the removal or placement of a child), and to criminal courts. Their focus was on cases involving neglect or abuse so flagrant that criminal prosecutions were contemplated or pursued. The identified predictors for court referral pertained primarily to the personal characteristics of the perpetrator of the abuse/neglect and those of the child. This emphasis distinguished Sedlak et al.'s work from that of McConnell et

al. and Karski, which looked to situational and contextual factors likely to prompt court referral. Sedlak et al. identified numerous personal traits as predictors of dependency court use. These were: the perpetrator's age; the difference in age between perpetrator and victim; the perpetrator's sex; the perpetrator's racial/ethnic background; the presence of other, ongoing problems for the perpetrator (e.g., drug/alcohol abuse); the victim's age; the victim's sex; the victim's race and ethnicity; and prior victim impairment/disability. Sedlak et al. also noted other factors, not related to victim or perpetrator identity, which seemed to predict court use. These were: the type of abuse; the number of victims involved; the number of perpetrators involved; the relationship between perpetrator and victim and their living arrangement; and the case's point of entry into the system.

Although this existing research on factors prompting court use is instructive for our purposes, no study addresses the Canadian child welfare landscape, nor does the research consider how statutory requirements might operate to prompt or discourage court proceedings. We thus seek to add to this scholarship by examining the specific way in which legislative language and cues might influence rates of court use. In the discussion that follows we offer an analysis of three child welfare statutes, from which we draw expectations as to rates of judicialization in each province. These expectations are later compared to actual rates of court use for child protection matters in these provinces within a particular timeframe.

II. Legislative Analysis

For the purpose of identifying possible correlations between a province's child welfare legislation and its rate of court use for child welfare matters, we examined three statutes, focusing on indicators that might either prompt or deter reliance on courts. These statutes were: Quebec's *Youth Protection Act*,¹ Ontario's *Child and Family Services Act*,² and Alberta's *Child, Youth and Family Enhancement Act*.³ Through our analysis we identified four particular factors within each statute as the best predictors for the rate of court use for child protection issues in each province, namely:

- the presence of provisions that allow directors of child welfare services to rely on alternative dispute resolution (ADR) for child protection issues;
- the extent to which directors may enter into negotiated agreements with youth, their families and communities to develop child protection strategies;

¹ R.S.Q. c. P-34.1 [YPA]. It should be noted that while working on the research for this paper, Quebec's YPA was amended by Bill 125, *An Act to Amend the Youth Protection Act and other legislative provisions*, 1st Sess., 37th Leg., Quebec, 2005 (assented to 15 June 2006), S.Q. 2006, c.34]. This Bill is relevant to the objectives of this paper, in that it sought to encourage the active participation of children and parents in child welfare decision-making, and to reduce reliance on courts and tribunals. See Bill 125, Explanatory Notes, However, given that this legislative reform occurred in 2007 that is, after the time period that was our concern, our discussion of legislation in Quebec focuses primarily on the YPA as it stood prior to amendments. Nevertheless, at various points in this discussion we signal amendments that might have had an influence on the data collected.

² R.S.O. 1990, c. C-11 [CFSA].

³ R.S.A. 2000, c. C-12 [CYFEA].

- situations in which directors have no discretion but to use courts to pursue certain interventions; and
- the provision of community services designed to prevent the need for more intrusive interventions that require judicial authorization.

Our data regarding rates of court use derive from cases deciding appropriate measures for dealing with children and families who fell under the radar of public youth protection services in each province. Our legislative analysis thus does not explore statutory provisions that direct judicial involvement in procedural or administrative matters (e.g., acquisition of search or apprehension warrants, allowing public access to hearings, or allowing public identification of a child or family involved a youth protection proceeding). Our analysis also excludes consideration of the adoption provisions within child welfare statutes.

The discussion that follows sets out the statutory treatment of the four predictors just enumerated in Quebec, Ontario and Alberta. It seeks to assess how legislation in each province might channel the players in provincial child welfare systems through the courts, or conversely, how it might divert them from court use. The final part of this section sets out expectations created by the legislation as to the rate of court use for child welfare matters.

a) Contemplation of Alternative Dispute Resolution (ADR)

A key benefit of ADR methods (e.g., mediation, arbitration, family conferencing) lies in their ability to divert cases from overburdened judicial institutions bound to follow formal procedures that might limit parties' ability to voice freely their claims and concerns. ADR allows more direct involvement in the discussion, negotiation and decision-making processes by the parties to a case than is ordinarily permitted in formal litigation. Thus, because parties may appropriate a degree of ownership over – and responsibility for – outcomes, ADR is commonly associated with parties benefiting from more satisfaction with results and decisions than adjudication might yield. At the same time, and as discussed below, some literature is more tentative in its assessment of ADR's promise, especially where parties are vulnerable or lack equal bargaining stature.⁴

Of the three statutes we considered, both Ontario's CFSA and the Alberta CFYEA contemplate the use of ADR for resolving contentious issues related to child protection. **Quebec's** YPA does not integrate mediation or any other form of ADR as an explicit option for reaching outcomes in child protection matters, although as discussed below, the statute does facilitate the negotiation of outcomes with children and families in some circumstances.⁵

In 2006, a provision was added to the **Ontario** CFSA directing any agency designated as a Children's Aid Society ("CAS") in the province to consider whether ADR would

⁴ See Part IV, below, for a discussion of the potential benefits and drawbacks of ADR in the child welfare context.

⁵ See discussion in Part (b), *infra* notes 12-17.

promote the resolution of issues arising where a child is in need of protection.⁶ A CAS is required to consider ADR as a possible option in these circumstances, but is not bound to follow this course.⁷ If the child concerned is Aboriginal, the CAS must consult with her “band or native community” to determine whether an ADR process established by the band or community, or some other prescribed process, would assist in resolving the issues raised.⁸ The Aboriginal child’s band or community also has a right to receive notice of any proposal to proceed through ADR in a child welfare matter.⁹

In addition, an Ontario court might refer any matter associated with a child welfare proceeding before it to ADR after an adjournment. This is only possible, however, where such adjournment is consistent with the child’s best interests and if the parties to the proceeding consent.¹⁰

The **Alberta** CYFEA entered into force in November 2004 as legislation oriented toward the prevention and provision of support and services to “at risk” families, with a view to averting situations of crisis. To this end, the statute explicitly envisions the possibility of parties’ reliance on ADR to reach outcomes related to child welfare. Section 3.1 allows the child, her guardian or a person with “a significant connection” to her, or the Director of Children’s Services to reach an agreement to enter ADR proceedings regarding any decision affecting the child.¹¹ Thus, unlike the Ontario model, which generally directs – except where a case involves an Aboriginal child – the CAS to determine unilaterally whether ADR is appropriate, the Alberta legislation anticipates direct involvement from the child and her family in making this decision.

b) Opportunities for Child Welfare Workers to Negotiate Outcomes Directly with Youth, Families and Communities

All three statutes envisage possibilities for youth, families, and sometimes even community members, to negotiate intervention strategies with workers and agencies. Permitting such involvement in reaching outcomes for children and youth can allow the relevant actors to exercise agency in the process of ensuring the security and development of children considered at risk. This presents an opportunity to voice interests and to have these represented in the outcomes achieved. We posit that the greater the breadth of such opportunities, the greater the satisfaction there will be with solutions developed for children and youth, and the less likely parties will be to turn to courts to settle matters.

In **Quebec**, the involvement of families and youth in negotiating methods for ensuring a child’s security and development is witnessed through the “voluntary measures” regime.

⁶ See Bill 210, *The Child and Family Services Statute Law Amendment Act*, 2nd Sess., 38th Leg., Ontario, 2006 (assented to March 28th 2006) S.O. 2006, c.5

⁷ Section 20.2(1) CFSA.

⁸ Section 20.2(2) CFSA.

⁹ Section 20.2(4) CFSA.

¹⁰ Section 51.1 CFSA.

¹¹ See specifically s.3.1(1). Subsections 3.1(2)-(4) CYFEA also integrate measures to ensure that the confidentiality of the proceedings is protected.

The YPA stipulates that where the Director of Youth Protection finds that a child's security or development is endangered, he may either propose the application of "voluntary measures" or refer the matter to a court.¹² Yet, such voluntary measures can only be implemented if the child's parents, and the child herself if aged 14 or older, agree to their application.¹³ Where these parties do consent to pursue voluntary measures, they are bound to make a written agreement with the Director incorporating measures that seek to "put an end to and prevent the recurrence of the situation in which the security or development of the child is in danger."¹⁴ The Director may propose, and the parties may agree to, a spectrum of voluntary measures that vary in terms of their level of severity and intrusiveness into family life.¹⁵

Although the YPA casts the Director, the child, and her family as bearing primary responsibility for designing and applying voluntary measures, the obligation also seems to extend beyond these players to the broader community. For example, the Director must, where possible, "call upon persons or bodies active in the community where the child lives" for the purpose of implementing voluntary measures.¹⁶ Furthermore, the statute charges "every institution and every educational body" with the duty of contributing, to the extent of their means, to the implementation of these measures.¹⁷

This expansive accountability for applying voluntary measures in Quebec does not preclude judicial involvement even where such measures initially are pursued. If parties fail to settle on the particular voluntary measures that will be applied within 10 days and the child's security or development remains in danger, the Director must refer the matter to a court.¹⁸ Moreover, if a child aged 14 or over, or a parent who is a party to the agreement, withdraws from this agreement and the child's security or development

¹² Section 51 YPA.

¹³ Section 52 para. 1 YPA. Note that generally, agreements for the application of voluntary measures are made between the Director and both of a child's parents. However, the YPA recognizes that there may be circumstances in which such an agreement should be formed with just one of a child's parents. See sections 52.1 and 32 para. 2.

¹⁴ Section 52 para. 2 YPA.

¹⁵ Pursuant to section 54 YPA, the Director may propose as a voluntary measure: (a) that the child remain with her family and that parents report periodically to him on measures they apply in their own regard or in their child's regard to put an end to the situation in which the child's security or development is in danger; (b) that the child and the child's parents undertake to take an active part in the application of the measures; (c) that the parents ensure that the child not come into contact with certain persons or that certain persons not come into contact with the child; (d) that the child undertake not to come into contact with certain persons; (e) that the parents entrust the child to other persons; (f) that a person working for an institution or body provide aid, counseling or assistance to the child and her family; (g) that the parents entrust the child to an institution operating a hospital centre or a local community service centre or to another body so that she may receive necessary care and assistance; (h) that the child or her parents report in person, at regular intervals, to the director to inform him of the current situation; (i) that the parents ensure that the child receive required health services; (j) that the parents entrust the child for a fixed period to an institution operating a rehabilitation centre or to a foster family, chosen by the institution operating a child and youth protection centre; (k) that the parents ensure that the child attend a place of learning other than a school and that the child undertake to do so.

¹⁶ Section 54 para. 2 YPA.

¹⁷ Section 55 YPA.

¹⁸ See section 52 para. 3 YPA.

remains in danger, the Director is again required to proceed to court.¹⁹ And given that agreements for voluntary measures have fixed terms, if upon their expiry a child's security or development is still considered to be in danger, the situation must at that point be referred to a court.²⁰ Thus, while voluntary measures could serve to divert child welfare matters in Quebec from formal judicial processes, the YPA nonetheless envisions courts as the final arbiter where agreements cannot be reached, break down, or fail to protect a child's security and development.²¹

The **Ontario** CFSA also clearly imagines possibilities for involving youth and families in negotiating outcomes. Aside from its explicit integration of ADR as a mechanism for resolving matters related to child welfare,²² the statute includes other provisions that direct participation by youth, families and even communities in designing strategies to assist children in need of protection. This is evident even in the CFSA's statement of purpose, which requires children's services to be provided in a manner that "includes the participation of a child, his or her parents and relatives and the members of the child's extended family and community, where appropriate."²³ The statute goes on to define members a child's community, identifying them as persons with "ethnic, cultural or religious ties in common with the child or with a parent, sibling or relative of the child" or those with "a beneficial and meaningful relationships with the child or a parent, sibling or relative of the child."²⁴

In keeping with its goal of providing child welfare assistance "on the basis of mutual consent" where possible,²⁵ the CFSA contemplates situations in which children and families must be consulted about, or must consent to, the provision of services. Thus, a child aged twelve or more must consent to the provision of counseling services,²⁶ and all other child protection services can be provided to a person aged 16 or older only with that person's consent or with a court order.²⁷ In addition, the provision or cessation of

¹⁹ Section 53.1 para. 1 YPA.

²⁰ Section 53.1 para. 3 YPA.

²¹ The YPA also stipulates that a child and her parents are entitled to be informed by the Director of all circumstances that require him to refer a matter initially channeled through voluntary measures to a tribunal. See section 53.1 para. 2.

Note should be made here of recent amendments to the YPA that, while not affecting rates of court use during the timeframe under consideration here, remain interesting given their likely future influence on judicialization in child welfare matters. These amendments explicitly encourage child and family involvement in negotiating outcomes with youth protection workers. See e.g., section 2 Bill 125 (amending s. 2.3 YPA), which provides that child welfare interventions must favour means that allow children and their parents to "take an active part in making decisions and choosing measures that concern them"; and section 3 of Bill 125 (amending s. 4 YPA) which directs the involvement of the child, parents and the community in all decisions affecting youth protection. Insofar as voluntary measures are concerned, see section 20 Bill 125 (amending s. 51 YPA), which states that before such measures are proposed or before the matter is referred to a tribunal, the director must "recommend a consensual approach, where the situation allows it, to encourage the active participation of the child and the child's parents."

²² Section 20.2 CFSA.

²³ Section 1(2)3(iv) CFSA.

²⁴ Section 3(3) CFSA.

²⁵ Section 1(2)1 CFSA.

²⁶ Section 28 CFSA.

²⁷ Section 27(1) CFSA.

residential services – whereby the young person is removed from her regular home or the home of her parents – generally requires parental consent where the child is younger than 16 years old.²⁸ Although the child’s consent in these cases is not required, her wishes, if ascertainable, must be taken into account.²⁹

In other contexts, a child or family’s involvement in determining child welfare outcomes is facilitated by provisions allowing them to reach agreements with a CAS. For example, a person with custody of a child may agree to place her in the temporary care of a CAS.³⁰ Similarly, a person having custody of a child with special needs might obtain services for that child or agree to entrust responsibility for her supervision or her care and custody to a CAS or the Minister of Community and Social Services.³¹

Last, the CFSA lists as one of its goals the provision of services in a way that recognizes “that Indian and native people should be entitled to provide, wherever possible, *their own child and family services*, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the *concept of the extended family*.”³² Thus, while the statute’s provisions permitting family involvement in negotiating outcomes apply in cases involving Aboriginal children, the significance of such participation, and the idea of communities directing processes and outcomes, is underscored in these contexts.

Like Ontario’s CFSA, the **Alberta** CYFEA’s contemplation of family involvement in negotiating child welfare solutions is illuminated through its explicit integration of ADR.³³ Aside from this, the statute envisages possibilities for the Director of Child Welfare to enter various agreements with families to ensure a child’s security and well-being. *Family enhancement agreements*, for example, are designed to provide services in a way that allows children in need of protection to remain in their usual homes. These agreements may be reached between the Director and a child’s guardian or custodian where the Director finds a child in need of intervention and where the services provided pursuant to the agreement would adequately protect the child’s “survival, security or development”.³⁴ The Director may also make *custody agreements* and *permanent guardianship agreements* with a child’s guardian. Custody agreements result in the child’s placement with someone other than her usual guardian for a set period of time (not more than six months), whereas a permanent guardianship agreement involves the Director’s assumption of sole guardianship of the child for all purposes.³⁵ Finally, where

²⁸ Section 27(2), (4) CFSA. The same is also true of a transfer of a child’s residential placement. See section 27(5) CFSA.

²⁹ Section 27(6) CFSA.

³⁰ Section 29 CFSA.

³¹ Section 30 CFSA. It is also possible for the young person with a special need aged 16 or 17 to make such an agreement for her own care and the services provided to her. See section 31 CFSA.

³² Section 1(2)5 (emphasis added).

³³ Section 3 CYFEA.

³⁴ Section 8 CYFEA.

³⁵ See sections 9-10 CYFEA, which set out the terms of a custody agreement, and s. 11 which sets out the requirements of a permanent guardianship agreement. Note that if reaching an agreement is impossible, the Director may seek temporary or permanent guardianship of a child through a court application. See sections 17-18 CYFEA.

a court renders a temporary guardianship order,³⁶ the Director is authorized to make agreements permitting access to the child by her guardian or any person having a significant relationship with her.³⁷

While the foregoing arrangements in the CYFEA envisage the conclusion of agreements between the Director and guardians, the statute also foresees possibilities for youth to become directly involved in negotiations with child welfare workers. That is, where a young person aged 16 or older is considered to be in need of intervention, she may agree with the Director to receive child welfare services, or to be placed in the Director's exclusive custody. The legislation requires such agreements to include a plan preparing the youth's for "the transition to independence and adulthood."³⁸

Finally, similar to the Ontario CFSA model, the CYFEA suggests that communities might also have a role to play in negotiating child welfare outcomes, particularly where Aboriginal child welfare issues arise. The statute sets out circumstances in which the Director of Child Welfare is bound to consult and work with a designated member of a child's band council in planning for the services that a child receives.³⁹ It is anticipated that such involvement will facilitate the child's retention of her culture, identity, language, history and connection to her community.⁴⁰

c) Situations in which directors must use courts to pursue certain actions

A third factor that we interpreted as potentially influencing rates of court use was the extent to which a statute compelled judicial authorization for certain interventions. We predicted that legislation requiring such authorization more frequently would contribute to a higher overall rate of judicialization. We note, however, that the statutory provisions we discuss here are only those where a Director's discretion in pursuing an intervention is limited and he *must* proceed before a court. We do not consider the many provisions in each statute that permit (but do not require) applications to be made to a court.

In **Quebec** the YPA's urgent measures regime⁴¹ requires judicial involvement regardless of whether parents and children agree to its application. These measures might involve the Director's immediate removal of a child from his present environment, and the entrusting of this child to an institution, a foster family or any other "appropriate body."⁴²

³⁶ Temporary guardianship orders are issued by a court where intervention is needed and the child's survival, security or development cannot be adequately protected if she remains with her usual guardian, even though it is anticipated that she can be returned to the custody of her guardian within a reasonable time, or that – if she is over 16 years of age – she will be able to live independently. See s. 17 CYFEA.

³⁷ Section 14 CYFEA.

³⁸ Section 57.2 CYFEA.

³⁹ Section 107 CYFEA.

⁴⁰ Alberta Child and Youth Services "Overview of Changes to the Child, Youth, and Family Enhancement Act" (August 2004) online: www.child.gov.ab.ca/whatwedo/enhancementact/pdf/CS%20Overview%20%20low.pdf

⁴¹ Pursuant to July 2007 amendments to the YPA, these measures are now termed "immediate protective measures".

⁴² Section 46 YPA.

While the child and her parents must generally be consulted,⁴³ they need not consent to the application of urgent measures. Rather, where a child or parent objects, the Director is entitled to compel consent, but must submit the matter to a tribunal “with the least possible delay”.⁴⁴ Furthermore, the Director can never apply urgent measures for more than 24 hours without a judicial order.⁴⁵ Finally, it is also important to recall that while the YPA integrates a “voluntary measures” regime allowing the Director to reach agreements with families extra-judicially, this framework also envisions compulsory court use in some circumstances.⁴⁶

The **Ontario** CFSA includes provisions that compel judicial intervention in certain contexts. In particular, where prior consensual arrangements expire but a CAS still deems a child to require protection, the matter must be referred to a court.⁴⁷ Moreover, if a child protection worker has apprehended a child without judicial authorization, the matter must proceed before a court for a child protection hearing “as soon as practicable” and within five days after the child is brought to a place of safety.⁴⁸ If a child has been brought to a place of safety that is a place of open temporary detention, the matter must be brought to the court within 24 hours.⁴⁹

Furthermore, where a court deems a child to be in need of protection and orders either that she be placed under CAS supervision or named a ward of a CAS,⁵⁰ the CAS in question must appear before the court to review the child’s status before the original order for supervision or wardship expires.⁵¹ In the event that a court conducts a status review and finds that the child’s best interests are served by placing her in the care and custody of a particular person (and possibly again subject to CAS supervision),⁵² the CAS is bound to seek status review before a court once more under the same terms.⁵³

Like its counterparts in Quebec and Ontario, the **Alberta** CYFEA mandates court use where the Director seeks to invoke the most intrusive child welfare measures. The apprehension of a child thus requires a court application if the child is not returned to the

⁴³ Section 47 para. 1 YPA.

⁴⁴ Section 47 para. 2 YPA. The necessity of judicial intervention where urgent measures are applied against the will of a family is underscored by section 74 YPA, which provides: “The director shall refer the matter to the tribunal where the parents or the child are opposed to the application of an urgent measure.”

⁴⁵ *Ibid.*

⁴⁶ See *supra* notes 18-21 and accompanying text.

⁴⁷ This occurs at the end of special needs agreements (see section 33(3)(b) CFSA), and where temporary care agreements expire or are set to expire (see section 33(5)(b) CFSA)

⁴⁸ Section 46(1)(a) CFSA.

⁴⁹ Section 46(2) CFSA.

⁵⁰ See section 57 CFSA.

⁵¹ Section 64(2)(b) CFSA, this is unless the order expired because the child reached the age of majority or married. See section 71(1) CFSA. Note, however, that if the CAS has removed a child from the care of the person named as the child’s custodian pursuant to the original supervisory order, the CAS must appear before the court for status review within five days of such removal. See section 64(2)(c) CFSA

⁵² See sections 65.2(1)(a) and (b) CFSA.

⁵³ That is, before expiry of the order, or within five days if the child was removed from the care of the person with whom she was placed pursuant to a supervisory or custody order. See sections 65.1(2)(b) and (c) CFSA.

custody of the guardian within two days of her removal.⁵⁴ Moreover, if the Director seeks a temporary or permanent guardianship order, he must seek a judicial order placing the child in his custody until the main application is withdrawn or decided.⁵⁵ Finally, if the Director confines a child pursuant to a secure services certificate,⁵⁶ he must appear before a court within three days to justify the need for this intervention.⁵⁷

A court appearance is also necessary where the guardian of an apprehended child refuses essential medical, surgical or dental treatment for that child; in these cases treatment can only follow a court order authorizing it.⁵⁸ The same requirement exists where a child subject to a temporary or permanent guardianship order refuses essential treatment.⁵⁹

d) Provision of community-based services

As a final indicator, we considered provisions that directed the use of community services for youth and families considered “at risk”. We hypothesized that the inclusion of such provisions in legislation could serve to avert crisis situations that would trigger the need for more interventionist measures typically ordered through court processes.

Quebec’s YPA requires both the provision of information about community-based resources to help families, as well as actual community services, in various contexts. Where a child’s security or development is found to be in danger, the Director must provide her and her family with information about community services, and conditions for accessing them.⁶⁰ The same information must be provided where the Director decides to end an intervention involving a child.⁶¹

Actual community-based services must also be offered pursuant to the YPA. The statute signals a child’s general entitlement to “receive adequate health services, social services and educational services, on all scientific, human and social levels, continuously and according to his personal requirements.”⁶² The provision of such resources could be viewed as a method for preempting blunt interventions that would trigger court

⁵⁴ Section 21(1) CYFEA. In disposing of such an application, the court may issue one of the following orders: supervision order, temporary or permanent guardianship order, an order returning the child to the guardian’s custody, or an order placing the child with child welfare authorities in another province.

⁵⁵ Section 21.1(1) CYFEA.

⁵⁶ A “secure services certificate” is issued as a last resort measure where the Director has reasonable and probable grounds to believe that the child presents an immediate danger to herself or others that can only be reduced by confining the child to “stabilize and assess” her. See section 43.1(1) CYFEA.

⁵⁷ Section 43.1(3)(a) CYFEA.

⁵⁸ Section 22.1(2) of the CYFEA.

⁵⁹ Section 22.2(1) CYFEA. *Cf* Quebec YPA, section 48 para. 2, which allows the Director to authorize necessary medical services and other care without consent or a judicial order where “urgent measures” (now “immediate protective measures”, see *supra* note 41) are applied.

⁶⁰ Section 50 para. 2 YPA.

⁶¹ Section 57.2 YPA para. 1.

⁶² Section 8 YPA. Note that the wording of this amendment is altered to some extent by s. 5 of Bill 125 which extended the right to receive adequate health services to the child’s parents, and changed the standard for extending services from those necessary “according to his personal requirements” to those that “are appropriate from a scientific, human and social standpoint.”

involvement. In addition, community services must be provided where voluntary measures are applied and the Director calls upon community actors to facilitate their application.⁶³ And where the Director reviews cases involving children taken into his charge or placed in foster care, a need to consider community services again might arise since this review might result in a proposal for measures to assist parents, which might involve community-based resources.⁶⁴

Although **Ontario**'s CFSA includes within the definition of "services" offered to children and families "community support services",⁶⁵ this statute is not explicit as to when community-based services should be offered in lieu of more formal arrangements. There are, however, some indications that child welfare workers should attempt to alleviate situations of risk for children through community-based measures where possible. For example, temporary care agreements (which result in the transfer of the child's care and custody to a CAS) can only be made where it is found that "no less disruptive action" – especially the provision of care in the child's own home – would be appropriate.⁶⁶ Special needs agreements also foresee the provision of services to meet a child's needs where the person(s) ordinarily having custody are unable to do so,⁶⁷ or where a child aged 16 or older and no longer in parental care requires this assistance.⁶⁸

Finally, the CFSA integrates a "homemaker" or "personal support worker" regime designed to allow individuals in need of support to receive necessary services in their homes and communities. A child welfare agency in Ontario may thus decide that a child in need of care or supervision can remain in her ordinary residence with the placement of a homemaker on the premises. This person may be authorized to enter and live in the residence with the child, provide housekeeping activities associated with the child's care, and exercise "reasonable control and discipline" over the child.⁶⁹ In this way, the model facilitates the provision of care and support to children and families while avoiding apprehension. It is also noteworthy that judicial involvement is not required for establishing homemaker services.

Alberta's focus on community outreach services is communicated by its "differential response" model which privileges family supports and intervention suited to the distinct needs of each child.⁷⁰ While this model is not defined explicitly in the CYFEA, it is

⁶³ Section 54 para. 2 YPA. See also s. 55 YPA and discussion *supra* notes 16-17. Note that the voluntary measures might themselves require children and their families to access and make use of community-based services and resources. See e.g., s. 54(f) YPA which would require that the family receive aid, counseling or assistance from "a person working for an institution or body"; s.54(g), which would compel parents to entrust their child to health or community services centre or to "another body" for the provision of necessary care and support; and s.54(k), which requires the child to attend a place of learning other than a school.

⁶⁴ Sections 57.1 and 57.2 YPA.

⁶⁵ See section 3 CFSA.

⁶⁶ Section 29(4)(b) CFSA.

⁶⁷ Section 30 CFSA.

⁶⁸ Section 31 CFSA.

⁶⁹ Section 78 CFSA.

⁷⁰ Alberta Children and Youth Services, "Overview of Significant Changes in the Child, Youth and Family Enhancement Act" (August 2004) at 8

explained at length in the policy documents that accompanied the enactment of this statute in 2004.⁷¹ A key element of the differential response model is the concept of the family enhancement agreement which, as described above,⁷² allows the Director of Child Services to reach agreements with families for the provision of support and services at home and in the community.⁷³ The statute requires the Director to pursue such agreements where a child is found to be in need of intervention, provided that this would effectively meet the child's needs.⁷⁴ This model reflects the CYFEA's explicit emphasis on avoiding, where possible, interventions that disrupt or dismantle the family unit, in particular through the removal of a child from the family home.⁷⁵

Overview

In some respects, the statutory frameworks we considered revealed similarities. This was especially evident when considering the legislative provisions that compelled court use in particular circumstances. Child welfare statutes in Quebec, Ontario and Alberta all require court involvement where more intrusive interventions are pursued, such as apprehending a child and entrusting her care to a person or institution other than her usual custodian or guardian. While there is some variation as to other situations that might trigger mandatory judicial involvement (e.g., the forced provision of health services over a child or parent's objections; the review of a child's status; and upon the expiry or breakdown of a consensual arrangement), the differences here were not so stark that they would suggest any obvious difference in rates of court use.

Other parallels in the legislative schemes were also apparent. For example, all three statutes envision possibilities for the Director of child welfare services or child welfare workers to try to reach consensual arrangements with children and families, possibly even with community involvement. All three statutes further refer to the provision of community services for ensuring child welfare as falling within the purview of child welfare workers and administrators.

Having said this, some important features of the legislation rendered each distinct. These characteristics led us to expect that **Alberta** would have the lowest rate of court use for determining outcomes in child welfare cases, with Quebec having the highest rate and Ontario falling somewhere between the two, but likely closer to the Albertan rate. We drew this inference on the basis of various factors. The most salient was the Alberta CYFEA's emergence from a differential response model that emphasizes home and community services and youth and family participation in devising child welfare strategies. This orientation signaled that more intrusive measures requiring court intervention (e.g., apprehension and secure services certificates) would only be used where home- and community-based services were deemed inappropriate. The legislation

⁷¹ Alberta Children and Youth Services, "Alberta Enhancement Act Policy Manual" [rev. March 2007] See also Waldfoegel (1998:137ff) for a description of the differential response model.

⁷² See *supra* note 34..

⁷³ Section 8 CYFEA.

⁷⁴ Section 6(2) and (3) CYFEA.

⁷⁵ Section 2(e)(i) CYFEA.

also underscores the significance of community consultation and participation where the children in question are of Aboriginal heritage.

Alberta's CYFEA further stands out for explicit reference to ADR as a method for reaching outcomes affecting children and their families, especially since it is to be pursued upon agreement among the relevant parties, rather than following a unilateral decision by the Director. The statute also integrates families and youth in reaching various types of child welfare agreements (family enhancement agreements, custody agreements and permanent guardianship agreements). That these agreements can be reached extra-judicially suggests a reduced need to turn to courts in this jurisdiction.

While **Ontario's** CFSA bears many features similar to the Alberta CYFEA, some are less pronounced. We therefore anticipated that rates of court use for determining child welfare matters would be somewhat higher in this province. For example, even though Ontario directs the consideration of ADR in child protection cases, the relevant CFSA provisions are quite recent (having been added through amendment only in 2006), and thus would have had a minimal impact on rates of court use for child welfare matters during the time period studied here. Nevertheless, the CFSA's statement of purpose emphasizes the participation and, where possible, the consent of children, families and communities in reaching child welfare solutions. This objective is manifest in CFSA provisions requiring family and youth consultation and consent for certain interventions, as well as provisions permitting agreements with a CAS about particular interventions. Such measures could prompt voluntary extra-judicial solutions over court use in a number of settings.

Similar to Alberta, an emphasis on home- and community-based services for child welfare also emerges in the CFSA, especially through the homemaker regime. But while the Alberta CYFEA is clear that these services should be considered before more intrusive measures are pursued, the Ontario CFSA does not signal when community resources should be offered as an alternative to formal proceedings. Finally, it is noteworthy that the CFSA underscores the role of communities in pursuing child welfare strategies in contexts involving Aboriginal youth.

In contrast to the CYFEA and the CFSA, **Quebec's** YPA includes fewer explicit measures likely to reduce the judicialization of child welfare matters. For example, there is no reference in the YPA to ADR or any other formal method for reaching solutions with families and children extra-judicially. A possible exception to this is the voluntary measures regime, but Quebec's Director of Youth Protection is not bound to apply this regime, which appears to be an option that only co-exists with the possibility of referring a case to court. Furthermore, even when voluntary measures are applied, a number of situations could result in the case still proceeding before a court.

Additionally, although community-based services, and information about them, must be provided to children and families in Quebec in certain circumstances, the YPA places less emphasis than the CYFEA and the CFSA on providing home- and community-based resources to children at risk. There is nothing in the YPA that compares to the family enhancement services delivered under the auspices of Alberta's differential response

model. Nor is there anything akin to the homemaker model developed in Ontario's CFSA. Finally, unlike the Alberta and Ontario statutes, the YPA does not include explicit measures to integrate community participation or to avoid judicialization in cases involving Aboriginal youth and families. For all these reasons, we expected Quebec to have the highest rates of court use for child welfare cases⁷⁶.

III. Methodology

More than two decades ago, Poirier (1986: 227) noted in a study focusing on the move toward increased voluntary arrangements and reduced court use in child welfare contexts: "It is not easy to gather statistics from every year comparing the number of cases diverted from the courts through voluntary agreements with the number that actually went through the court." Our experience was no different. It remains extremely difficult to isolate or categorize child protection cases, with a view to identifying how many proceed before a court, versus how many are managed extra-judicially.

Our own research sought to identify figures representing rates of court use in each province, with a view to juxtaposing these rates against our predictions about court use that we drew from our legislative analysis. Initially, we set out to uncover rates of court referral in every Canadian province and territory. However, the way in which child protection data is collected, defined, and organized varies widely from one Canadian jurisdiction to the next, making a national study of this kind impossible with the resources at our disposal. We therefore narrowed our focus to examine legislation and court referral rates in three provinces: Quebec, Ontario, and Alberta. We selected these provinces because their respective child welfare statutes differed in important aspects that could potentially lead to diverse child welfare responses. Our view was thus that results generated from this initial research could illuminate the way in which legislation might affect judicialization throughout all of Canada. Having said this, ours is a preliminary study and its results should not be generalized or extrapolated to other provinces before national data is collected and analyzed. This paper is thus seen as a point of departure for a broader pan-Canadian study.

We began our research by analyzing features in the relevant Quebec, Ontario and Alberta statutes that might prompt child welfare workers to rely either on courts or extra-judicial methods in managing their cases. As discussed in the preceding section, this legislative analysis led us to anticipate that Quebec would be the leader in terms of judicialization rates, followed by Ontario, and then by Alberta.

⁷⁶ Note, however, that Quebec has the lowest rate of child welfare investigations involving Aboriginal children. In other Canadian jurisdictions, an average of 15 percent of cases of substantiated maltreatment involve children of Aboriginal heritage (Canadian Incidence Study 2003). Interestingly, studies have found that in Quebec only five percent of children who are the object of child protection investigations are Aboriginal (see *Etude sur l'incidence et les caractéristiques de la maltraitance signalée à la Direction de la protection de la jeunesse au Québec* 2003). However, Aboriginal children often receive different treatment from child protection services in Quebec, with 25 percent of cases involving Aboriginal youth resulting in the child being taken into custody compared to only 14 percent of cases involving non-Aboriginal children (Tourigny et al. 2007).

We proceeded to collect data on actual rates of court use in child welfare cases in these three provinces for the year 2006. We chose 2006 as a focal year because data from 2007 was not as readily available in every province. However, we ensured that for each province we had data for at least one additional year, which served as a point of reference to support the accuracy of our findings for 2006.⁷⁷

Relevant data was collected through detailed communication, extending over a two-year period, with provincial government workers responsible for gathering child welfare information. From these exchanges, we were able to discern how many children in each province saw their cases proceed before a child welfare court. In order to avoid counting a child “in the system” more than just once in our data, we did not include status reviews (i.e., reviews by the court of a case in which a decision or order had already been made) in our numbers.

Our largest challenge in accumulating the relevant data was ensuring its comparability. Given the different ways in which information about court use for child welfare cases is collected and organized in each province, we devoted extensive consideration to developing a methodological approach that would yield figures for each jurisdiction that could be meaningfully compared. Thus, for each province, we sought to identify means that would allow us to count only those cases for which court proceedings had been initiated in a given year. That is, our focus was the *point of entry* into the court system for cases in each jurisdiction.

For Quebec, we relied on the “*nombres d’orientations judiciairisées pour chaque problématique*” as compiled in the provincial chart “*Indicateurs Repères 1998-1999 à 2006-2007*”⁷⁸. This data served as the best indicator of the number of individual children brought before child welfare courts given that it reveals the number of cases for which court processes have been initiated in a given year. Relying on this number allowed us to avoid duplication in the data since each child whose case is judicialized must pass through this “*orientation*” stage and this normally occurs just one time.

Court rates in Ontario were determined with reference to two automatic collection systems in place since 2006: FRANK and SUSTAIN.⁷⁹ This data derives from both the Ontario Court of Justice and the Family Court branch of the Ontario Superior Court of Justice and represented the number of judicialized cases opened in a particular year. Although Ontario has no process similar to Quebec’s “*orientation*” stage, we felt the data provided for Ontario was comparable, seeing as its indicated how many cases proceeded to court were opened (i.e., initiated) in a given year. Yet, unlike data in Quebec and Alberta which indicates numbers of individual *children* involved in court proceedings, this information collected in Ontario reflects the number of child protection *proceedings*.

⁷⁷ Although not published here, court referral rates for Quebec, Ontario and Alberta in other years are on file with the authors.

⁷⁸ Document provided by Carole Lessard, Services des Jeunes et des Familles, Ministère de la Santé et des Services Sociaux. Unpublished, on file with authors.

⁷⁹ Data released through Brandon Parlette, Counsel at the Court Services Division of the Civil Policy and Programs Branch, Ministry of the Attorney General

Because more than one child might be involved in a given proceeding, it was necessary to reconfigure the data so as to identify how many individual children were involved in cases referred to court. This would render the Ontario data comparable to that in the two other provinces considered. The assessment of the Ontario data thus involved combining the number of proceedings from both Ontario courts, and multiplying this sum by 1.25, a figure representing the average number of children per family brought before the courts for each family proceeding.⁸⁰ In addition, and as discussed below in Part IV, the Ontario data proved to be somewhat difficult to harmonize with that of Quebec and Alberta as it captured all cases proceeding to court in a given year, regardless of the stage at which a case was judicialized. In contrast, data in the two other provinces captured only those cases judicialized at their initial point of orientation or classification.

Data from Alberta was released to us via Information and Management and Information Strategies, Alberta Children and Youth Services,⁸¹ which sent us records from the 2006 fiscal year indicating the number of individual children who had been the subject of a child protection order in that year. We assured that the Alberta data captured cases at their point of entry into the court system by focusing only on judicialized cases that were “opened” (i.e., initiated) in the year 2006.

The number of individual children whose cases were brought before the courts in 2006 in each province was then compared to the relevant province’s total child population in this year to determine rates-per-thousand. The relevant child population was determined by the way in which “child” is defined in each province. For example, in Ontario, children aged 0-15 can be the subject of child welfare interventions, whereas data from Quebec and Alberta included children aged 0-17, based on the statutory definition in these provinces of a child as being anyone less than 18 years of age.⁸²

IV. Findings and Discussion

Our findings (displayed in Table 1) contradicted expectations generated by our statutory analysis. The highest judicialization rate for child welfare matters in 2006 was found to be Ontario (4.44 per 1000), whereas Quebec’s rate was the lowest (3.34 per 1000), and Alberta’s rate fell between the two (4.27 per 1000). These rates were similar to those that we collected for other years in each province

⁸⁰ 1.25 is the average number of child proceedings per family proceeding in Quebec and Alberta as determined by the *Etude sur l’incidence et les caractéristiques de la maltraitance signalée à la Direction de la protection de la jeunesse au Québec* 2003, as well as administrative information from Alberta Children Services. We used these sources for the 1.25 multiplier because similar administrative numbers on the average number of children per family going to court were not available from Ontario,

⁸¹ Marilyn Greig-Gaudette, Information Management and Information Strategies, Ministry Support Services, Alberta’s Children Services. Data unpublished, on file with authors.

⁸² Although the definition of a “child” in the Ontario CFSA includes a person up to (but not including) age 18, Ontario’s provision of child welfare services is limited to children aged 0-15, whereas the relevant age range in Quebec and Alberta is 0-17. See also Trocmé et al, “Canadian Incidence Study of Reported Child and Neglect (2003)” Minister of Public Works and Government Services.

While the disparities in results appear rather slight, a couple of factual and practical points must be underscored, given that they suggest a larger variance in actual rates of judicialization within the three provinces under study. First, Quebec’s statutory definition of a child whose security or development may be “in danger” is broader than corresponding definitions in the Ontarian and Albertan legislation.⁸³ By including children with “serious behavioural disturbances”, Quebec casts a larger net in terms of the scope of children investigated and thus, likely also in terms of the number of cases that move before the courts. Were Ontario and Alberta to include this category within their respective statutes, it is very possible that their judicialization rates would be considerably higher, resulting in an even greater breadth in data outcomes.

Second, because of the way that court data is collected and organized in Ontario, our judicialization numbers for that province are probably higher than they should be, when compared with those of Quebec and Alberta. More specifically, Ontario tracks all child welfare cases that proceed to court during a calendar year, regardless of court proceedings occurred at the outset of a file or whether it occurred only after other, non-judicial steps were taken to offer child welfare services. However, in Quebec and Alberta, cases only appear as being judicialized in the data if court involvement occurred at the *initial or “orientation” stages* of a file. Thus, if non-judicial means were used to deal with a case at its outset, but upon review and at a later point in the same year that case proceeds to court, the file would not appear in either the Quebec or Alberta data as being judicialized. While there were no means for us to harmonize the data to render it more comparable, we emphasize that differences in provincial approaches to tracking child welfare cases could have wielded a considerable influence over the results yielded by our study. In particular these differences likely resulted in numbers for Ontario that are higher than they would have been had data been uniformly produced.

As our findings bely our expectations, we conferred with colleagues in the relevant provincial ministries, and we inquired with them about our data and methods of calculation. Though some concern was expressed about the potential for duplication in the data,⁸⁴ our colleagues agreed that our findings provide a reliable measure of court use in their respective jurisdictions.

⁸³ Unlike Ontario and Alberta, children are “in need of protection” in Quebec not only when subject to circumstances of neglect or abuse, but also upon exhibiting “serious behavioural disturbances”, a term defined at s.38(f) YPA as a “situation in which a child behaves in such a way as to repeatedly or seriously undermine the child’s or others’ physical or psychological integrity, and the child’s parents fail to take the necessary steps to put an end to the situation or, if the child is 14 or over, the child objects to such steps.”. The definitions of children “in danger”, “in need of protection”, and “in need of intervention” are set out at ss. 38.1 YPA, 37(2) CFSA and s.1(2), (2.1) and (3) CYFEA respectively.

⁸⁴ In particular, our contact from the Ontario Ministry of Child and Youth Services noted that a child might be counted twice if an application to the court was commenced, discontinued, and a new application started. Also, a case transferred from one jurisdiction to another would be counted as “new” to the second location and thus counted twice. However, these numbers would be very small and would not impact significantly on the findings.

Table 1: Rates of Court Use for Child Welfare Cases (2006)

	Age range covered by child protection statutes	Child population for age range ⁸⁵	Protection proceedings initiated in 2006	Proceedings per 1000 children
Alberta	0-17	775,175	3,313	4.27
Ontario	0-15	2,382,050	10,575	4.44
Quebec	0-17	1,549,205	5,176	3.34

This data set bears several implications. The most obvious of these is that legislation, by itself, will not alter, prompt or dissuade particular child welfare decisions and practices, particularly those related to the referral of cases to court. Should policymakers deem that child welfare outcomes would improve either by increasing or decreasing the frequency of court referrals in this area, amending the applicable child welfare legislation will not suffice. Rather, achieving the desired result would require reform through multiple axes, targeting the range of factors that might shape child welfare practice.

Moreover, the data we derive through this project offer only aggregate numbers, and do not reveal any qualitative information about the families or children appearing before child welfare courts in Alberta, Quebec and Ontario. More work is needed to learn about the identities of the youth and families who move through these courts, so as to determine whether judicial institutions are equipped to manage their cases effectively. For example, suppose that a large percentage of families appearing before child welfare courts are impoverished, or of ethno-linguistic minority background. Accessibility to legal representation and to adequate translation services will be essential. This paper thus calls for heightened attention to be given to the identities of children and families involved in child welfare proceedings, so as to mitigate the alienation and trepidation that they might experience in their encounters with judicial institutions and formal rules.

Other Factors Potentially Influencing Our Findings

Our data suggests that the structure and wording of child welfare legislation has little impact on child welfare practice, in particular, on decisions regarding whether to refer a case to court. However, a more profound consideration of the issue reveals two factors that might explain more fully the reasons underlying the contradiction between our initial expectations and the data we uncovered: first, our exclusion of status reviews within our calculations; and second, the role of informal rules (deriving, for example, from policies and guidelines) that influence child welfare decisions and practices.

- *Exclusion of Status Reviews*

⁸⁵ Stats Can (97-551-XCB2006009)

To avoid a repeated counting of the same case in determining the rates-per-thousand of children whose cases were judicialized, we excluded status reviews, that is, proceedings in which a court is called upon to review an initial decision or order in light of new facts. Had these reviews been included, our findings would have been much closer to our hypothesis regarding court use. More specifically, Quebec had the highest number of status reviews in both 2006 and 2007 (23, 483 and 22, 942 respectively), followed by Ontario (8041 and 8106),⁸⁶ with Alberta having the lowest number (5499 and 5172).⁸⁷

- *Informal Normative Forces*

As this study reveals, child welfare practice is motivated by more than just formal law. Factors such as lessons learned from past experiences, and the customs, habits and expectations of the work environment can bear considerable influence over workers' decisions. (Glad 2006) Moreover, even when legislative requirements mandate specific conduct, child welfare workers might still conserve discretion (Levine 1998; Parada et al. 2007; Kopels et al. 2003; Poirier 1986), the exercise of which might be subject to informal standards and the culture of the relevant agency.

As such, the rates of judicialization that we derived might be best explained through a broader analysis of the wide array of normative forces shaping child welfare practice, particularly with respect to judicialization. If the discourse and culture within an agency is such that reliance on the courts is a habitual or trusted course of conduct, this might explain higher rates of court involvement. Furthermore, the culture, habits and expectations within the agency might bear an influence on the nature and scope of child welfare investigations. Factors prompting a lower threshold for investigation might in turn result in fewer cases coming under the scrutiny of state child welfare authorities, and thus, a diminished likelihood of proceeding before a court.

Having said this, we note that the correlation between informal professional standards and child welfare practice has yet to be comprehensively studied. (Poirier 1986: 233) We suggest that this is a topic ripe for consideration. Although legislation may wield considerable influence over child welfare decisions made “on the ground”, further exploration as to how this influence compares to that exerted by “soft laws”, such as agency guidelines or policies, is needed. The latter might be used for training purposes, are often framed in more accessible language than a statute, and might be referred to more often within intra-agency communications. An empirical study examining child welfare workers' perceptions of the normative weight of policies and guidelines, particularly in contrast to that of formal law, would thus have important academic and practical relevance. In particular, it would illuminate where the core motivators of child welfare practice lie, and the instruments that would require modification in the event that

⁸⁶ The data indicates that there were 4964 status review proceedings in Ontario in 2006 and 5004 in 2007. However, because Ontario data tracks proceedings, which can encompass more than one child, we multiplied these numbers by 1.62 to arrive at the number of children whose cases were reviewed. According to our calculations 1.62 is the average number of children brought before the court per family proceeding in Ontario in 2003.

⁸⁷ Data released through Merrilyn Greig-Gaudette, Information Management and Information Strategies, Ministry Support Services, Alberta's Children Services. Unpublished, on file with authors.

policymakers and legislators sought to redirect child welfare practices with a view to improving outcomes.

Finally, it should be noted that a number of more specific factors may be encompassed by child welfare standards and guidelines, which might also influence professional decisions and conduct. Such factors, discussed in the literature reviewed above, include: the resources with which an agency must work; perceptions regarding the importance of evidence, the substantiation of claims of mistreatment and abuse; the emphasis placed upon parental and familial consultation and cooperation; and concerns regarding the public's opinion of, and trust in, the operative child welfare system. These factors might explain our data findings, although again, it is worth exploring further the way in which Canadian child welfare workers perceive these as forces shaping their professional decisions and conduct, particularly vis-à-vis the referral of cases to court.

The Role of Courts in Child Welfare Contexts

Before concluding, it is important to include a brief qualitative statement on the role of courts in child protection matters. Our discussion so far has not communicated any normative statement in this regard, and this paper thus should not be interpreted as taking a particular stance on the benefits or drawbacks of using formal proceedings to manage or settle child protection issues. At the same time, it remains important to highlight this issue as one meriting further attention.

The potential promise and pitfalls of relying on courts to settle legal disputes has been explored in considerable depth. Discussions on this issue that occur within family and child welfare contexts frequently culminate in a recommendation promoting mediation or other forms of alternate dispute resolution, provided proper conditions for such measures exist. (McNeilly 1997; Crush 2005; Crush 2007; Bernstein 1998; Palmer 1989; Flatters 2003) This position is taken given how difficult court proceedings can be for families and young people, as a result of: the intimidation and sense of disengagement, submersion and alienation that results from the formality and rigidity of the proceedings; the risk of "secondary victimization" (Sedlak et al. 2005) for children asked to testify; the cost and time involved (Dumbrill 2006); and the power imbalance between families and child welfare workers, (Maresca 1995) the latter often viewed as bearing unlimited resources and more familiarity with judicial processes (Dumbrill 2006). In this connection, the funneling of cases through adversarial court procedures has been observed to trigger breakdowns in communications with child welfare agencies, (Maresca 1995; Palmer 1989) and an inability to address the complexities of cases due to the inflexibility of legal rules applied in judicial contexts. (Flatters 2003) Moreover, courts are not always perceived as impartial arbiters, and have been cast as serving to "rubber-stamp social work decisions." (Masson 1989: 45)

On the other hand, families and children might find some reassurance in seeing their cases proceed before a court. Judicialization offers a setting in which procedural guarantees are followed and parents might view this as operating to set checks and balances on child welfare workers' discretion and power, which is broad and might be

subject to abuse (Poirier 1986). Families thus may have greater security in terms of respect for their rights and privileges in conventional legal contexts. (Poirier 1986; Dumbrill 2006)

Our project thus does not seek to predict outcomes for children and families based on rates of court use in a given jurisdiction. Rather, we have committed ourselves to determining rates of court use – from data which is not easily discernable – and we have explored how these rates compare with our hypothesis regarding judicialization based upon a legislative analysis. A more normative angle to this project might involve making recommendations about how to encourage or discourage the use of courts. Yet before this is possible, a rigorous evaluation of formal and informal dispute resolution mechanisms for addressing child protection issues is required. This analysis would benefit enormously from additional empirical work that considers the perspectives and experiences of families, young people, child welfare workers, as well as judges in mediators engaged in child welfare systems across Canada.

Conclusion

In weighing the implications of our findings it should be remembered that we tracked a very specific kind of court use, namely first-time visits. In reality children must often appear numerous times before courts to have their case or status reviewed. Looking at rates of status review could therefore arguably give a better sense of the everyday use of judicial resources. Yet our findings remain instructive given that they convey a sense of how often children affected by child welfare issues come into contact with the courts. Our study also provides an indication of the propensity of child welfare workers to choose judicial mechanisms over extra-judicial options.

The data uncovered through this project demonstrates that legislation does not, on its own, drive child welfare workers' decisions about whether to refer a case to court. The fact that jurisdictions with legislative predictors indicating less reliance on judicial mechanisms nonetheless have a relatively large number of children being brought before the courts suggests that other factors are at play. Further research is therefore needed on the way child welfare workers perceive their decision-making process, as well as empirical research investigating how child protection workers understand child welfare legislation as influencing their day-to-day work.

Additional scholarship is also needed on the subject of whether the use of courts in child protection matters is beneficial or harmful to families and children. We refrained from making any normative statement on the issue in this article but it is a pressing question that needs to be addressed. Ideally, such research would have an empirical component to explore the experiences of each of the “players” in the child welfare court system (children, families, judges, and mediators). Similarly, the characteristics of families and children who go to court need to be uncovered in order to determine whether the judicial system can manage their cases effectively.

References

Legislation

- Youth Protection Act*, R.S.Q. 1979, c. P-34.1.
Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12.
Child and Family Services Act, R.S.O. 1990, c. C-11.

Bills

- Bill 125, *An Act to Amend the Youth Protection Act and other legislative provisions*, 1st Sess., 37th Leg., Quebec, 2005 (assented to 15 June 2006), S.Q. 2006, c.34.
 Bill 210, *The Child and Family Services Statute Law Amendment Act*, 2nd Sess., 38th Leg., Ontario, 2006 (assented to March 28th 2006) S.O. 2006, c.5.

Secondary Materials

- Ainsworth, Frank. "Mandatory Reporting of child Abuse and Neglect: Does it Really Make a Difference?" (2002) *Child and Family Social Work*. 57.
 Anglin, James P. "Risk, Well-Being, and Paramountcy in Child Protection: The Need for Transformation" (2002) *Child & Youth Care Forum*. 233.
 Bernstein, Marvin M. "Child Protection Mediation: Its time has Arrived" (1998) 16 *C.F.L.Q.* 76.
 Crush, Linda. "The State of Child Protection Mediation in Canada" (2005) 24 *C.F.L.Q.* 219.
 Crush, Linda. "Child Protection Mediation in Ontario: Which Way Forward?" (Winter 2007) *OACAS Journal*.
 Dokkum, N Van. "The Statutory Obligation to Report Child Abuse and Neglect" (1996) *Acta Juridica*. 163.
 Dumbrill, Gary C. "Parental Experience of Child Protection Intervention: A Qualitative Study" (2006) 30 *Child Abuse & Neglect*. 27.
 Fallon, Barbara. et al. "Ontario Incidence Study of Reported Child Abuse and Neglect – 2003: Major Findings 2005" (2005) *Centre of Excellence for Child Welfare*
 Flatters, Nancy A. "A Family/Child Judicial Dispute Resolution (JDR): An Overview of one Canadian Court-Settlement Conference Approach to the Pre-Trial Resolution of Family and Child Welfare Protection Matters. (2003) 41 *Family Court Review*. 182.
 Glad, Johan. "Co-operation in a Child Welfare Case: A Comparative Cross-National Vignette Study" (2006) 9 *European Journal of Social Work*. 223.
 Howe, R. Brian. "Implementing Children's Rights in a Federal State: The Case of Canada's Child Protection System" (2001) 9 *International Journal of Children's Rights*. 361.
 Jones, Lisa M. David Finkelhor & Stephanie Halter. "Child Maltreatment Trends in the 1990s: Why does Neglect Differ from Sexual and Physical Abuse?" (2006) *Child Maltreatment*. 107.
 Karski, Ruth Lawrence. "Key Decisions in Child Protective Services: Report Investigation and Court Referral" (1999) 21 *Children and Youth Services Review*. 643.

- Khoo, Evelyn G. et al. "Gatekeeping in Child Welfare: A Comparative Study of Intake Decision-making by Social Workers in Canada and Sweden" (2003) 82 *Child Welfare*. 507.
- Kopels, Sandra. Taliah Charlton & Susan J. Wells. "Investigation Laws and Practices in Child Protective Services" (2003) 82 *Child Welfare*. 661.
- Lazar, Ammon. "Determinants of Child Protection Officer's Decisions in Emergency Situations: An Experimental Study" (2006) *Child Youth Care Forum*. 263.
- Levine, Murray. "Do Standards of Proof Affect Decision Making in Child Protection Investigations?" (1998) 22 *Law and Human Behaviour*. 341.
- Maresca, June. "Mediating Child Protection Cases" (1995) 74 *Child Welfare*. 731.
- Masson, Judith Dr. "The Role of Law in Social Work with Children" (1989) *Cambrian L. Rev.* 38.
- McConnell, David. Gwynnyth Llewellyn & Luisa Ferronato. "Context-contingent Decision-Making in Child Protection Practice" (2006) 15 *International Journal of Social Welfare*. 230.
- McNeilly, Gerry. "Mediation and Child Protection: An Ontario Perspective" (1997) 35(2) *Family Court Review*. 206.
- Palmer, Sally E. "Mediation in Child Protection Cases: An Alternative to the Adversary System" (1989) 68 *Child Welfare*. 21.
- Parada, Henry, Lisa Barnoof & Brienne Coleman. "Negotiating Professional Agency: Social Work and Decision-Making within the Ontario Child Welfare System" (2007) 34 *Journal of Sociology and Social Welfare*. 35.
- Platt, Dendy. "Threshold Decisions: How Social Workers Prioritize Referrals of Child Concern" (2006) 15 *Child Abuse Review*. 4.
- Poirier, Donald. "Social Worker Enforcement of Child Welfare Legislation: An Increasing Potential for Abuse of Power" (1986) 5 *Can.J.Fam.L.* 215.
- Sedlack, Andrea J. "Child Maltreatment and the Justice System: Predictors of Court Involvement" (2005) 15 *Research on Social Work Practice*. 389.
- Tourigny, Marc. et al. "Incidence of Maltreatment of Aboriginal Children Reported to Youth Protection in Quebec: Intercultural Comparisons" (2007) 3 *First Peoples Child and Family Review*. 103.
- Trocmé, Nico. "Differentiating between Substantiated, Suspected, and Unsubstantiated Maltreatment in Canada" (2008) [unpublished, on file with authors].
- Trocmé, Nico & Marc Tourigny. "Facteurs Associés a la Décision d'entreprendre des poursuites criminelles a la suite d'un signalement pour Abus Sexuel ou Physique Envers un Enfant" (2000) *Criminologie*. 8.
- Trocmé, Nico. et al. "Canadian Incidence Study of Report Child Abuse and Neglect – Major Findings – 2003" (2005) Minister of Public Works and Government Services Canada
- Turcotte, Daniel. et al. "Étude sur l'incidence et les caractéristiques de la maltraitance signalée à la Direction de la protection de la jeunesse au Québec : La situation en 2003" online : Public Health Agency of Canada < <http://www.phac-aspc.gc.ca/cm-vee/csca-ecve/index-fra.php>>

Other Materials

Alberta Children and Youth Services “Overview of Changes to the Child, Youth, and Family Enhancement act” (August 2004) online:
<www.child.gov.ab.ca/whatwedo/enhancementact/pdf/CS%20Overview%20%20low.pdf>