

LEGISLATION'S INFLUENCE ON JUDICIARIZATION: EXAMINING THE EFFECTS OF STATUTORY STRUCTURE AND LANGUAGE ON RATES OF COURT USE IN CHILD WELFARE CONTEXTS

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Overview

- Introduction: Nature & scope of project
- Part I: Existent Literature
- Part II: Legislative Analysis
- Part III: Methods
- Part IV: Findings & analysis
- Conclusion: Relevance of project

Introduction

- Research Question → Does the language and structure of child welfare legislation in Canada affect the frequency and nature of court use (i.e., the “judicialization”) in child welfare matters? If so, how?
- Scope → 3 provinces: Quebec, Ontario, Alberta

Part I: Existent Literature

- Interface between child welfare matters and use of judicial institutions has received little scholarly attention (Sedlak *et al.* 2005)

- Relevant studies canvassed in the scholarship:
 - ▣ Relevance of legislation over social work decisions and interactions *generally* (i.e., not re: court use) – e.g., mandatory reporting laws.

 - ▣ Non-judicial factors shaping social work decisions and interactions (e.g., resource availability, perceptions of risk, parental involvement/roles, personal traits of worker/children/families)

 - ▣ Factors affecting rates of referral of child welfare cases to courts (e.g., existence of family support, drug use, strength of evidence) → studies do not explore legislation as a factor

Part II: Legislative Analysis

Statutes considered:

- Quebec's *Youth Protection Act*
- Ontario's *Child and Family Services Act*
- Alberta's *Child, Youth and Family Enhancement Act*.

4 factors considered most likely to affect court use:

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

Part II: Legislative Analysis

a) ADR

- ❑ Exists in Ontario (CAS must consider whether ADR presents a viable resource; if child is Aboriginal, must consult with “band or community” to assess prospect of band/community-established ADR process).
- ❑ Exists in Alberta (CYFEA allows child, guardian or person with a “significant connection” to the child, or the Director, to enter agreement re: ADR proceedings).
- ❑ Does not exist in Quebec statute.

Part II: Legislative Analysis

b) Opportunities for Negotiating Outcomes with Children/Families/Communities

- ❑ Quebec → “voluntary measures” regime is an alternative to the court at DYP’s disposal (requires consent from parents, child if 14 or more). NB: does not preclude judicial involvement.
- ❑ Ontario → in general, children’s services are to be provided in a way that includes child and parental participation, as well as community involvement, where appropriate; encouragement of Aboriginal communities’ implementation of own CFS.
- ❑ Alberta → “Family enhancement agreements” are designed to provide services in a way that allows children to remain in their usual homes, in collaboration & agreement w/families. Note also availability of custody and permanent guardian agreements.

Part II: Legislative Analysis

c) **Mandatory court referral**

- Quebec → for “urgent measures” (e.g., immediate removal, entrusting a child to an institution or foster family) ; and where voluntary measures break down/expire and child is still considered to be in danger.
- Ontario → where prior consensual agreements expire, on apprehension without prior authorization, on naming a child as a CAS ward or placing her under CAS supervision.
- Alberta → within two days of a child’s unauthorized apprehension; for “secure services certificate”; for administering essential medical care that has been refused; for guardianship orders.

Part II: Legislative Analysis

d) Provision of community-based services

- ❑ Quebec → YPA requires provision of info about community-based resources for families, and delivery of community services, in some contexts; child has a right to: *“adequate health services, social services and educational services, on all scientific, human and social levels, continuously and according to his personal requirements.”*
- ❑ Ontario → CFSA includes within its definition of “services” offered to families “community support services”; statute is not explicit re: when such services should replace formal arrangements.
- ❑ Alberta → “differential response” model privileges family supports & intervention suited to the needs of each child → key feature = agreements with child's family/community.

Part II: Legislative Analysis

- Similarities in each statute (court involvement for most intrusive/serious situations; possibilities for Director or workers to reach consensual arrangements with families; (sometimes also with communities); reference to community services).
- Distinctions – level of *explicit* incorporation of mechanisms and processes for mediated settlements/management of cases; variations in the extent to which communities are *explicitly* incorporated into CW negotiations and discussions.
- Hypothesis → Alberta's judicialization rate would be lowest; Quebec's would be highest; and Ontario's would fall somewhere between, but likely closer to Alberta's rate.

Part III: Methods

- “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.” (Poirier 1986: 227)

- Key Difficulties:
 - ▣ Isolating and categorizing child protection files (# files vs. #children proceeding to court).
 - ▣ Wide variance in provincial data collection, definition and organization practices.

Part III: Methods

- Collection of data on actual rates of court use in CW cases in Qc, On, Ab for 2006 (with one additional year per province as a comparator)
- Data collection (i.e., # children/yr whose case proceeded to court) through detailed communication (over 2-yr period) with agents responsible for gathering CW info
- Exclusion of status reviews

Part III: Methods

- To ensure comparable data, focus was on *point of entry* into the court system for cases in each province
 - Qc → “*nombres d’orientations judiciairisées pour chaque problématique*” (# of children whose cases had court proceedings initiated in a given year)
 - On → FRANK and SUSTAIN (# of cases before courts opened in a particular year)
 - Ab → Information and Management and Information Strategies, Alberta Children and Youth Services (# of children whose child protection cases opened before a court in a given year)
- Comparison to “child” population in each province

Part IV: Findings and Analysis

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

	Age range covered by child protection statute	Child population for age range	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

Part IV: Findings and Analysis

- Variances are slight, but may be more significant than appears here given:
 - ▣ Divergent statutory definitions of “CINP” (esp. inclusion of “serious behaviour disturbances” status in Quebec)
 - ▣ Ontario’s anomalous data collection practice

- Implications of Findings
 - ▣ Utility and relevance of legislation and policy
 - ▣ Questions about informal norms and practices

Part IV: Findings and Analysis

This is a pilot study, illuminating a need for further research on:

- ▣ Qualitative information on judicialization (who is using the courts, and what are the “players” experiences?)
- ▣ The informal forces that may drive child protection workers’ court use (feasibility, fidelity, findings, as derivative of policies, guidelines, workplace culture, habits and perceptions)
- ▣ The relevance and utility of judicial institutions and formal rules *in the specific context of child protection* (i.e., should we seek to encourage or discourage court use??)

Conclusion

- Tracking of first time court use vs. reality of court experience for children in care.
- Exposures of gaps in scholarly knowledge regarding child welfare practice & the relevance of this for those involved in Canada's CW systems.
- Reflections on legal pluralism and “legal” intersections.