VOICE (Views On Interdisciplinary Childhood Ethics) presents:

To Look and to Play Roundtable/Regards et Jeux Table Ronde 2021: A Space for Research on Children and Law – Espace de recherche sur l'enfance et le droit

Roundtable Document

Professor Shauna Van Praagh (McGill University) & Professor Jean-Frédéric Ménard (Université de Sherbrooke)

Efat Elsherif (Student Coordinator)

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2020/2021 Stipend Recipients

Arnela Kovac FR

Claire Lawrence

Andrew Clubine

Anaïs de Yparraguirre FR

Ji Eun Lee

D.J. Tokiwa

Arsalan Ahmed

Juliette Mestre

Kayla Maria Rolland

Stephanie Belmer

Panel 1: *Children in and Beyond Their Families*

Student Contact Information

Arnela Kovac	Arnela.kovac@usherbrooke.ca
Claire Lawrence	Claire.lawrence@mail.mcgill.ca
Andrew Clubine	Andrew.clubine@mail.mcgill.ca

Arnela Kovak

La non-admissibilité à la RAMQ pour les enfants issus de parents au statut migratoire précaire

Essai Réflexif

Avant l'adoption *du Projet de loi 83, Loi concernant principalement l'admissibilité au régime d'assurance maladie et au régime général d'assurance médicaments de certains enfants dont les parents ont un statut migratoire précaire*, le droit québécois restreignait certains enfants nés au Québec à la couverture médicale offerte par la RAMQ.

Tout d'abord, refuser un enfant au régime d'assurance maladie et médicament public en raison du statut migratoire précaire de ses parents vient atteindre le droit à l'égalité des enfants garantie par la *Charte canadienne*[1], mais aussi compromet l'exercice de leur droit à la protection de la santé, à la sûreté et les engagements du Québec face à la *Convention relative aux droits de l'enfant.*

Cette pratique appliquée par la RAMQ se veut comme discriminatoire et l'organisme Médecins du Monde souligne les impacts dévastateurs, sur ces enfants et leurs familles, que peut entraîner le refus à la couverture de la RAMQ en raison du statut migratoire de leurs parents[2].

Ensuite, le projet de loi 83 adopté le 10 juin 2021 vise à modifier l'admissibilité au régime d'assurance maladie et au régime général d'assurance médicaments de certains enfants dont les parents ont un statut migratoire précaire[3]. Toutefois, il comporte toujours quelques préoccupations. Selon l'avis de la Commission des droits de la personne et des droits de la jeunesse du Québec, le projet de loi contreviendrait encore aux dispositions de la *Charte québécois*e et aux engagements internationaux du Québec envers les droits de l'enfant[4] .

L'une des principales préoccupations qu'apporte le projet de loi 83 est la nécessité des parents à fournir une preuve qu'ils ont l'intention de résider plus de 6 mois au Québec[5]. Donc en théorie, le parent de l'enfant qui n'est pas considéré comme résident au Québec au sens de la *LAM* devrait démontrer qu'il a « l'autorisation de demeurer au Québec ou, à défaut, son intention ainsi que celle de son enfant de demeurer au Québec pour une période de six mois dans l'année qui suit

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[1] *Charte canadienne des droits et libertés*, partie I de la Loi constitutionnelle de 1982, [annexe B de la Loi de 1982 sur le Canada, 1982, c. 11 (R.U.), art.15(1)

[2]MÉDECIN DU MONDE, *Enfants sans RAMQ : La nécessité d'une couverture de santé pour tous en temps de pandémie*, 2020, [En ligne], https://www.medecinsdumonde.ca/actualites/enfants-sans-ramq-medecins-du-monde-rappelle-la-necessite-dune-couverture-de-sante-pour-tous-en-temps-de-pandemie/

[3] PL 83, *Loi concernant principalement l'admissibilité au régime d'assurance maladie et au régime général d'assurance médicaments de certains enfants dont les parents ont un statut migratoire précaire*, 1e sess, 42e lég, Québec, 2020, (adoption 10 juin 2021)

[4] COMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire de la Commission de la santé et des services sociaux de l'Assemblée nationale sur le Projet de loi No.83: Loi concernant principalement l'admissibilité au régime d'assurance maladie et au régime général d'assurance-médicaments de certains enfants dont les parents ont un statut migratoire précaire*, avril 2021, Cat. 2.412.139, p.69

[5] *Règlement sur l'admissibilité et l'inscription des personnes auprès de la Régie de l'assurance maladie du Québec*, RLRQ c A-29, r 1, art. 2.1 et art. 15, al. 1 par. 2.01, tels qu'ils seraient introduits par le projet de loi n° 83, art. 8 et 11.

l'inscription à la RAMQ »[6]. Par conséquent, il devrait faire une déclaration assermentée[7]. La RAMQ peut donc transmettre des renseignements aux autres ministères « si les renseignements sont nécessaires aux fins de prévenir, de détecter ou de réprimer une infraction à une loi applicable au Québec »[8].

Face à cette nouvelle obligation apportée par le projet de loi 83, le gouvernement du Québec devrait également penser à opter pour l'approche qu'on qualifie de pare-feu qui est la traduction française du terme firewall en anglais. Les pares-feux consistent à s'assurer que les autorités d'immigration ne puissent pas accéder aux informations portant sur le statut d'immigration des personnes qui souhaitent avoir accès à des services publics tels que dans des établissements de santé[9]. Par exemple, en Italie, il n'est pas autorisé au personnel médical et administratif de rapporter aux autorités d'immigration des personnes en situation migratoire irrégulière[10]. Grâce aux pares-feux, les institutions publiques ne sont pas soumises à une obligation de demander et de partager des informations sur le statut d'immigration des personnes[11].

Pour terminer, pendant des années, la RAMQ a causé des préjudices importants à de nombreux enfants canadiens en les refusant à leur couverture d'assurance. De ce fait, une action collective a été intentée contre la RAMQ. Les demandeurs allèguent que cette pratique du gouvernement d'exclure des enfants canadiens, qui a duré des années, est contraire à la *LAM* et elle est venue violer les droits fondamentaux des enfants canadiens dont leurs droits à la vie, à la sécurité et à l'intégrité garantis par la *Charte canadienne* et la *Charte québécoise*[12].

Les enjeux sur l'accès à la couverture de la RAMQ, non seulement pour les enfants issus de parents au statut migratoire précaire, mais bien pour tout migrant arrivé au Québec est loin d'être réglé. Les nouveaux arrivants au Canada auraient un risque d'infection et de mortalité plus élevée liées à la COVID-19[13]. Effectivement, plusieurs nouveaux arrivants au Canada ont notamment un faible revenu et sont plus à risque de vivre dans des logements surpeuplés ou multigénérationnels[14]. De plus, notons également qu'un accouchement sans aucune couverture d'assurance maladie et hospitalisation peut s'élever jusqu'à 17 000$ au Québec[15]. Alors que la *Loi sur l'instruction*

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[6] COMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire de la Commission de la santé et des services sociaux de l'Assemblée nationale sur le Projet de loi No.83: Loi concernant principalement l'admissibilité au régime d'assurance maladie et au régime général d'assurance-médicaments de certains enfants dont les parents ont un statut migratoire précaire*, avril 2021, Cat. 2.412.139, p.30

[7] *Règlement sur l'admissibilité et l'inscription des personnes auprès de la Régie de l'assurance maladie du Québec*, RLRQ c A-29, r 1, art. 2.1 et art. 15, al. 1, par. 2.0.1b) tels qu'ils seraient introduits par le projet de loi n° 83

[8] *Loi sur l'assurance maladie,* RLRQ c A-29, art. 65, al. 2, par. 2°

[9] CRÉPEAU, F. et HASTIE, B. *The Case for "Firewall" Protections for Irregular Migrants : Safeguarding Fundamental Rights*, European Journal of Migration and Law, 2015, p.165

[10] GRAY, B.H et VAN GINNEKEN, E. *Health Care for Undocumented Migrants: European Approaches*, The Commonwealth Fund, 2012, p. 7,

[11] CRÉPEAU, F. et HASTIE, B. *The Case for "Firewall" Protections for Irregular Migrants : Safeguarding Fundamental Rights*, European Journal of Migration and Law, 2015,p.165

[12] *Sulaimon et al. c. Procureur général du Québec*, [2021], CSC,, par.54

[13]GUTTMANN, A. GANDHI, S. et all. COVID-19 in Immigrants, Refugees and Other Newcomers in Ontario: Characteristics of Those Tested and Those Confirmed Positive, 2020. ICES, p.XVII

[14] Id, p.XII

[15] OBSERVATOIRE DES TOUTS-PETITS *Accès aux soins de santé pour les femmes enceintes et les tout-petits de familles migrantes*, 2019, Québec, [En ligne], https://tout-petits.org/img/dossiers/migrant/Dossier-Acces-soins-migrants-FaitsSaillants.pdf, p.16

*publiqu*e a amené des modifications en 2017 déclarant que tout enfant au Québec a accès à une éducation gratuite[16], la RAMQ est loin de cette pratique. Est-ce que la sphère de la santé publique québécoise devrait s'en inspirer?

Bibliographie annotée

Texte constitutionnel

Charte canadienne des droits et libertés, partie I de la Loi constitutionnelle de 1982, [annexe B de la Loi de 1982 sur le Canada, 1982, c. 11 (R.U.)

- L'article 15 de la *Charte canadienne* est au cœur de l'analyse. Il garantit le droit à l'égalité à tous sans exception leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.
- L'art.15(2) de la *Charte canadienne* entend qu'il s'agit d'une discrimination tout acte qui est fondés sur les motifs de distinction illicites qui y sont énoncées sans pour autant définir ce que c'est la discrimination.
- Le juge Iacobucci décrit dans *l'arrêt Law* l'art.15 de la Charte canadienne comme étant « peut-être […] la disposition de la Charte la plus difficile à comprendre au niveau conceptuel».

Textes québécois

Loi sur l'assurance maladie, RLRQ c A-29, art. 65, al. 2, par. 2°

- Législation québécoise qui encadre notamment les compétences de la Régie et les critères d'admissibilité à la couverture de la RAMQ.
- L'art.5 de la *LAM* énumère 5 critères afin d'être admissible au régime de la RAMQ et posait des enjeux quant à l'admissibilité des enfants issus de parents au statut migratoire précaire.
- Selon l'interprétation de la L*AM* et du *Règlement*, afin d'être admissible au régime de la RAMQ, l'enfant doit résider au Québec et y être domicilié. Par conséquent, l'enjeu qu'on comprend de l'interprétation par la RAMQ est qu'il est difficile de déterminer si un enfant a l'intention de s'établir au Québec ou non.
- Suite à l'adoption du Projet de loi 83, le parent doit déclarer solennellement qu'il a l'intention de s'établir au Québec plus de 6 mois et donc partager ses informations de son

[16] *Loi sur l'instruction publique*, RLRQ c I-13.3 -, art.3

statut au Canada. Par conséquent, les dispositions de l'art.65 de la *LAM* permettent à la RAMQ de communiquer des renseignements privés à un autre organisme, tel que le l'Immigration, de la Francisation et de l'Intégration, si elle juge que ces informations peuvent prévenir, de détecter ou de réprimer une infraction aux lois ou si elles sont nécessaires aux fins d'une poursuite pour une infraction à une loi applicable au Québec.

Loi sur l'instruction publique, RLRQ c I-13.3

- Contrairement au réseau public de la santé, tout enfant au Québec a droit à la gratuité des services éducatifs prévus par la *Loi sur l'instruction publique* et par le régime pédagogique établi par le gouvernement.
- Tout comme le droit à la protection de la santé, l'éducation, le droit à l'éducation est un droit humain fondamental.
- L'analyse amène une piste de réflexion afin que la RAMQ s'inspire des dispositions de cette loi.

PL 83, *Loi concernant principalement l'admissibilité au régime d'assurance maladie et au régime général d'assurance médicaments de certains enfants dont les parents ont un statut migratoire précaire*, 1e sess, 42e lég, Québec, 2020, (adoption 10 juin 2021)

- Déposé en décembre 2020 et adopté officiellement le 10 juin 2021.
- Le projet de loi 83 tentera de répondre au besoin des enfants canadiens qui n'ont pas accès à la couverture de la RAMQ en définissant qu' « un mineur non émancipé qui n'est pas déjà domicilié au Québec en application de l'article 80 du *Code civil québécois ».*
- Distingue l'enfant né au Québec du statut migratoire de ses parents et rendrait accessible ces enfants à la couverture de la RAMQ.
- Afin que l'enfant né au Québec y soit admissible, les parents devront démontrer leur intention de demeurer au Québec pour une période de plus de 6 mois dans l'année suivant la date de son inscription.

Règlement sur l'admissibilité et l'inscription des personnes auprès de la Régie de l'assurance maladie du Québec, RLRQ c A-29, r 1,

- Une personne doit répondre à l'un des 5 critères afin d'être admissible. Parmi ces critères le premier est d'être un citoyen canadien.

- Par contre, il ne s'agit pas du seul et unique critère qui rendrait une personne automatiquement admissible au régime. Un citoyen canadien y est éligible s'il séjourne au Québec qui satisfait aux conditions prévues par l'art. 5.0.1 du *Règlement*.
- Il est aussi possible de perdre son statut de personne qui séjourne au Québec en vertu de l'art.5.0.2.
- Toutefois, un mineur qui n'est pas déjà domicilié au Québec considéré domicilié au Québec, lorsqu'il y est établi en fonction de l'art.80 du *C.c.Q*.

Jurisprudences

Sulaimon et al. c. Procureur général du Québec, [2021], CSC*,* par.54

- Les demandeurs, Ridwan Sulaimon et Durowoju Hiqmat Sulaimon, affirment que la pratique de la RAMQ était discriminatoire à l'égard des enfants.
- Ils avaient un visa étudiant ainsi qu'un permis de travail ouvert et lorsque Mme Sulaimon a donné naissance de A.B le 4 février 2020 à l'hôpital Sacré-Cœur, sans complication.
- Le 10 février 2020, les alléguant se sont présentés à l'hôpital Sainte-Justine pour masse dans le dos de A.B et ils ont dû payer en plus des frais d'ouverture de dossier de 721,50 $, car leur enfant n'était pas couverte par la RAMQ.
- Ils n'ont pas pu consulter de médecin en raison du manque financier. Toutefois, le lendemain, un délai leur a été accordé pour payer les frais d'ouverture du dossier ce qui a permis d'hospitaliser A.B pour subir des tests et veiller à sa santé. Au total, son séjour aura coûté près de 15 000$ sans aucune couverture d'assurance.
- Devant le besoin de soins, de manière continue et en raison humanitaire, le MSSSS avait octroyé en août 2020 une carte temporaire à l'enfant d'une durée d'un an.

Références gouvernementales

COMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire de la Commission de la santé et des services sociaux de l'Assemblée nationale sur le Projet de loi No.83: Loi concernant principalement l'admissibilité au régime d'assurance maladie et au régime général d'assurance-médicaments de certains enfants dont les parents ont un statut migratoire précaire*, avril 2021, Cat. 2.412.139, 70 p.

- La Commission, dont les membres sont nommés par l'Assemblée nationale, a le mandat de « relever les dispositions des lois du Québec qui seraient contraires à la Charte et faire

au gouvernement les recommandations appropriées ». Ainsi, elle a analysé le projet de loi n° 83, *Loi concernant principalement l'admissibilité au régime d'assurance maladie et au régime général d'assurance médicaments de certains enfants dont les parents ont un statut migratoire précaire*

- La Commission a donc dressé un résumer de la problématique concernant l'exclusion des enfants issus de parents au statut migratoire précaire de la couverture de la RAMQ afin de démontrer les effets du projet de loi 83 sur ceux-ci.
- Elle établit également certaines préoccupations concernant les modifications apportées par le projet de loi 83.

Autres

CRÉPEAU, F. et HASTIE, B. *The Case for "Firewall" Protections for Irregular Migrants : Safeguarding Fundamental Rights*, European Journal of Migration and Law, 2015,

- Les instances politiques, sociales et judiciaires portent une attention particulière sur la question de la migration irrégulière. Les discours actuels prône notamment l'augmentation des contrôles d'entrée dans un pays et la limitation des infractions aux lois.
- Cet article se concentre davantage sur la protection des droits fondamentaux de ces migrants et de leurs traitements dans leur pays de destination.
- Afin d'avoir la capacité d'accéder aux services publics et respecter leurs droits fondamentaux, l'article propose la solution d'une approche pare-feu qui permet une séparation entre l'application de la loi en matière d'immigration et l'accès aux services publics tel que les soins et services de santé.

GRAY, B.H et VAN GINNEKEN, E. *Health Care for Undocumented Migrants: European Approaches*, The Commonwealth Fund, 2012, 12 p.

- Cet article dresse un portrait de la situation des migrations sans papier en Europe.
- Bien que l'Europe compte moins de migrants sans papier que les États-Unis, les besoins en soins médicaux sont importants pour les personnes sans papier et ils font face à des enjeux politiques même dans les pays dont le système d'assurance maladie se dit universel.
- Cet article montre des études européennes sur des politiques mises en place pour l'accès à des soins et services en santé pour ces personnes. L'article énonce trois dimensions importantes à considérer pour élaborer des stratégies qui visent l'accès aux services publics pour les personnes sans papier :
    - Quelle partie de la population se concentrer (femme enceinte, enfant, etc.).
    - Les types de services visés (préventif, traitement, etc.).
    - Politique de financement spécifique.
- On y retrouve des exemples de l'application de l'approche pare-feu dans certains pays européens.

GUTTMANN, A. GANDHI, S. et all. *COVID-19 in Immigrants, Refugees and Other Newcomers in Ontario: Characteristics of Those Tested and Those Confirmed Positive*, 2020. ICES, 117 p.

- Ce rapport se concentre sur la situation des immigrants et réfugiés en Ontario pendant la pandémie de la COVID-19.
- Il mesure les risques d'infection pour cette partie de la population selon plusieurs caractéristiques sociodémographiques tel que l'âge, le sexe, le revenu, le statut d'immigration, etc.
- Selon les données recensées, les personnes migrantes et les réfugiés seraient plus à risque de contracter la COVID-19.
- Face à ce risque plus élevé, ces personnes devraient donc avoir accès à une couverture d'assurance maladie publique.

MÉDECINS DU MONDE, *Enfants sans RAMQ : La nécessité d'une couverture de santé pour tous en temps de pandémie*, 2020, [En ligne], https://www.medecinsdumonde.ca/actualites/enfants-sans-ramq-medecins-du-monde-rappelle-la-necessite-dune-couverture-de-sante-pour-tous-en-temps-de-pandemie/

- Médecins du Monde, association médicale militante de solidarité internationale qui a lutté pendant des années à l'accès à la couverture de la RAMQ pour tous les enfants au Québec.
- Dans son article, l'association salue l'annonce du gouvernement du Québec de son intention d'élargir l'accès pour tous les enfants nés au Québec.
- Médecins du Monde dénonce dans cet article la pratique discriminatoire de la RAMQ et la nécessité d'une couverture d'assurance maladie surtout en temps de pandémie de la COVID-19 dont la situation économique et sociale s'est parfois dégradée.

OBSERVATOIRE DES TOUTS-PETITS *Accès aux soins de santé pour les femmes enceintes et les tout-petits de familles migrantes*, 2019, Québec, [En ligne], https://tout-petits.org/img/dossiers/migrant/Dossier-Acces-soins-migrants-FaitsSaillants.pdf, 62 p.

- Obesrvatoire des touts-petits souligne les faits saillants sur l'accès aux soins de santé pour les femmes enceintes et les enfants des familles migrantes.
- En plus de la définition du terme de migrant précaire et des statistiques sur les enfants nés au Québec de ces familles, l'organisme établit dans son rapport les lourdes conséquences que peut avoir un enfant pour le restant de sa vie sans accès aux soins et service de santé.
- Par conséquent, sans accès à la couverture de la RAMQ, un enfant pourrait vivre avec des handicaps, des troubles du développement ou des maladies chroniques

Claire Lawrence

Children Self-Advocating in Legal Proceedings: How Children Can Advance their Interests and Rights in Divorce and Gender Transition

Reflection Essay

This semester, I had the privilege of writing a term paper as part of the To Look and To Play Project run by Professor Van Praagh and Professor Ménard. My paper is entitled "Children Self-Advocating in Legal Proceedings: How Children Can Advance their Interests and Rights in Divorce and Gender Transition," supervised by Professor Beaudry at the McGill University Faculty of Law. This paper constituted the last credits of my BCL/JD degree at McGill and ending my time at McGill in this way was a delightful experience.

My paper explored how and when children can self-advocate in pursuit of their rights and interests in legal proceedings. To answer this question, I surveyed key tensions between children and the law and found there were a few reoccurring themes: issues of balancing autonomy with protection of children and the guiding principle of the best interests of the child. I explored my main question in two comparable but different legal contexts: children self-advocating for their needs and preferences when their parents are divorcing and trans children self-advocating for the recognition and respect of their gender identity. I looked at these legal contexts under the lenses of autonomy, protection, and best interests of the child.

In both contexts, I found that the literature suggests that children benefit the most from guiding their self-advocacy efforts on their own, including being able to actively participate in legal proceedings which implicate them if they choose so while also being able to choose to not participate, if they prefer. For divorce, children typically want to be included in custody decisions in ways where they feel their voices are heard and considered. For trans children, much of the self-advocacy revolves around disagreements in whether the child should be permitted to transition at all. These disagreements can do real harm to children given that we know that the most important factor in a trans child's wellbeing is family support. Nevertheless, I saw that the trends for trans children self-advocating are changing. Where case law from earlier in the 2000s saw judges altering custody agreements to place trans children in the custody of a parent who did not approve of their child's transition – to 'protect' the child from the harm of transitioning – a recent case in British Columbia saw a child successfully petition the court for his father to recognize his gender identity, to allow him to continue hormone replacement therapy, and to continue his social and medical transitions.

I was interested in the topic of children self-advocating in legal spaces for three main reasons. First, I wrote a paper in disability law last year on the subject of parents of trans youth and youth with disabilities advocating for their children in schools. In writing that paper, I questioned whether parents should be the legal and social advocates for their children. In particular, I wondered what tensions might arise when a parent does not recognize their child's gender identity or disagrees with their transition plan and goals. From there, I began to wonder about how children would interact with the law and in what ways they would be able to self-advocate. Could children

receive dedicated legal counsel in civil proceedings? How can children fight for their rights when they, by virtue of their age, have different legal status from adults? While researching for this paper, I appreciated seeing the different ways children have been able to have their voices heard during legal proceedings in different contexts.

Second, I was interested in this topic because of my desire to work in family law in my future career. While I have worked in family law in a few capacities, I often wonder about the children implicated by the decisions being made. In practice in family law we rarely interact directly with children, but that does not negate the importance that family court decisions have on them. I think that learning about the kinds of barriers children face in having their voices and interests fully heard will support my long-term career plans, helping me become a more sensitive lawyer in my future work with children and families.

Finally, I was interested in this topic because I have, during my time at McGill, developed a real interest in the wellbeing of trans youth and families. Along with the research I completed in 3L for my disability law paper, I worked as a Research Assistant for a professor in the Centre for Research on Children and Families within the McGill School of Social Work. Together, we explored access needs for parents of trans youth and how the relationships between parents and their trans children impact family wellbeing. I also co-organized a therapy group for parents of trans youth and helped run the McGill Trans Youth and Family Journal Watch. Writing my term paper, thus, helped deepen my knowledge of trans youth and families, allowing me to compliment my more social work-oriented knowledge with a view into specific legal issues and recent case law.

Overall, I enjoyed the process of researching for and writing my term paper. I will take away from this experience a deeper understanding of tensions in the area of children's legal rights and how children themselves have been able to self-advocate in a variety of situations. I also feel both frustrated and hopeful for how trans children in particular have and continue to self-advocate both within legal regimes and extralegally. I hope that the knowledge I have gained from this experience will be something I can take with me in my practice to help me become a better, more sensitive family lawyer.

Annotated Bibliography

Jurisprudence

AB v CD and EF, 2019 BCSC 254

AB v CD, 2020 BCCA 11

- These two cases follow a series of legal actions between a trans child and his father. The cases are important because they are the first judgments where a court ordered the child's father to use the child's name and pronouns that align with his gender identity. The court also found that the child continuing HRT was in his best interests.

B (SG) v L (SJ), 2010 ONCA 578

- This case is the only example to date where a child obtained leave to intervene on a custody and access appeal brought by his parent.

Juliana et al v United States of America et al, 2020 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 64.

- This case is an American example where the plaintiffs were a group of 21 children. While their remedies sought were ultimately not granted, the children were successful in having standing as plaintiffs despite their minor ages.

Smith v Smith, 2007 No 01-DR-86

Williams v Frymire, 2012 377 SW 3d 579

- These cases are examples of custody disputes where, following a child coming out as trans, the non-custodial parent petitioned court to obtain custody so as to bar the child from transitioning. In both cases the court agreed with the father who petitioned the court and transferred custody.

Legislation

Alberta Rules of Court, Alta Reg 124/2012, Rule 2.11.

Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 7.01(1)

- These rules are examples where a child must act through a litigation guardian in a legal proceeding in Canada.

Arts 33 and 34 CCQ

Children's Law Reform Act, RSO 1990, c. C. 12

- Examples where the "best interests of the child" principle is enshrined in legislation.

Convention on the Rights of the Child, 20 November 1989, UNTS 1577 (entered into force 12 December 1991) at art 1 [CRC].

UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para 1), 29 May 2013, CRC /C/GC/14

- The CRC provided the basis for many arguments around children's "right to be heard."

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Andrew Clubine

Critiquing *The* Christening Contract: Towards a canon law critique of Mary McAleese's analysis of canonical and international children's rights

Reflection Essay

Research context

An initial reading of the present version of this paper might give the impression that children are only secondarily the objects of the author's concern. Such a reading is admittedly possible. The substantive issues considered here fall within the realm of comparative legal scholarship, namely as it relates to regimes of canon law and international law. Yet, on another reading–the one intended and preferred by the author–this paper falls squarely within the realm of the To Look and To Play project, of the law as it relates and applies to children. In fact, despite the sustained discussion on canon law and its interface with international law, the paper may have more to offer to advocates and scholars of children's rights than to international law scholars and canonists.

The idea for this paper began with the idea of providing a general survey of the state of the civil law in Canada concerning children and religion, with a focus on its similarities and differences with the canon law of the Roman Catholic Church. Several authors have contributed to filling this gap in literature in Canada, but a comprehensive treatment of issues related to children, law and religion is still necessary. (Indeed, there is insufficient treatment of both religious law, and children and the law in Canada, let alone the intersection of both). However, it quickly became evident that even a cursory overview of the issues at play in this intersection would require more space than this project would allow.

Simultaneously, a new and little-commented ground of tension at the intersection of children and the law came to the fore and seemed worthy of immediate commentary: the conflict between the Holy See and the United Nations Committee on the Rights of the Child (the "CRC" or the "Committee") over the application of the *United Nations Convention on the Rights of the Child* (the "UNCRC" or the "Convention") within the jurisdiction of the Holy See. Seeing an opportunity to comment on a live issue related to children, law and religion, the focus on the Canadian context fell away. The result is a paper that contributes to the still very limited scholarly dialogue on the Holy See–United Nations conflict. It surveys and critiques the only substantive treatment of this issue, namely, Mary McAleese's book*, Children's Rights and Obligations in Canon Law: The Christening Contract* (Brill Nijhoff, 2019). The corrective offered by this paper may also contribute more broadly to methods in comparative law, namely concerning international and religious law.

Reflection on contribution of paper to existing literature

The facts of the aforementioned conflict are summarized in the paper and are detailed at much greater length in Mary McAleese's book. At its core, the conflict between the Holy See and the

United Nations is one of the interpretation and application of laws, namely of the consequences of the Holy See's ratification of the UNCRC. Does the Holy See have an obligation under international law to ensure compliance within the walls of the Vatican city state, or across all of the Roman Catholic Church through its *Code of Canon Law*? Far from a merely theoretical exercise, as McAleese points out, the interests of 300 million child members of the Roman Catholic Church are at stake in this question. The conflict raises further questions about the Holy See's status as a subject of international law, the nature and resolution of conflicts between legal systems, the extent to which international law can influence religious law and vice versa, all in the context of the rights of children.

Much has been written about this issue from the perspective of international law and children's rights. McAleese's study is the first of its kind to address the issue (or any related issue for that matter) from the perspective of canon law. Yet, to put it mildly, McAleese's analysis is hardly consistent with dominant thought in canon law and social teaching of the Roman Catholic Church. She concludes that the Holy See's ratification of the UNCRC effectively establishes an irrevocable obligation to implement the Convention in both the Holy See's state law and the Roman Catholic Church's canon law.

This paper analyzes McAleese's general argument. It highlights several critical points of weakness in McAleese's arguments. It concludes that McAleese does not in fact argue from the ground of canon law, as she claims to do. Rather, McAleese subjects her apparent canon law analysis to the presuppositions of international law and human rights. This error causes her reasons for supporting the recommendations of the Committee on the Rights of the Child to fail from a canon law perspective. This renders her argument unacceptable to canonists and other church leaders.

This paper does not to pick sides between McAleese's prescriptions and those of the Holy See. Rather, in providing a critical commentary of McAleese's *The Christening Contract*, it creates space for more fruitful dialogue between scholars, advocates, international jurists, and Catholic canonists. It serves to caution scholars of children's law and international law from assuming that McAleese's work offers an authoritative canon law perspective on the Holy See's obligations under the UNCRC. Interdisciplinary law and human rights scholars would do well to draw on McAleese' expertise and thorough summary of the canonical sources relevant to the Holy See-CRC conflict. However, they should also recognize the limitations of her argument: above all, that McAleese ultimately fails to engage canon law on its own terms and thus will fail to engage with most canonists and church leaders in a meaningful way.

Ultimately, in its critique of McAleese's book, this paper builds on her pioneering study of a live intersections between international human rights and religious law. It provides a correction to McAleese's comparative method by introducing the Roman Catholic Church's theological understanding of sacrament, particularly as it relates to canon law, into scholarship on the Holy See-CRC dispute. This is relevant to the work of canonists as it brings the theological basis of canon law into dialogues about children's rights and other points of interest for comparative law. It is also relevant to the work of human rights scholars and advocates as it encourages a deeper understanding of religious belief, religious institutions, and religious law.

The issues found at the intersection of law and religion are complex. The limitations of this paper only allowed commentary one issue from one perspective. However, the author hopes that the correction offered here will lead to more nuanced and fruitful dialogue between scholars and

practitioners of canon law and international children's rights, and more specifically to a willingness to meet each other "on their own turf." Ultimately, dialogue that respects rather than misrepresents differences in conceptions of life and law will be to the benefit of the 300 million children that McAleese shows are impacted by the Holy See-CRC conflict.

Annotated bibliography

Sources related to children and the law

Monographs

Beal, John P, James A Coriden & Thomas J Green, eds. *New Commentary on the Code of Canon Law*, 1st ed (New York: Paulist Press, 2000).

Beal et al. prepared one of the most commonly relied-upon commentaries on the 1983 Code of Canon Law (*Codex Juris Canonici*). It contains detailed commentary of each section of the Code. Although comprehensive in terms of coverage of the whole Code, the depth of its analysis is necessarily limited. Since the Code itself does not treat children as a stand-alone category of legal persons, neither do Beal et al. Furthermore, in keeping with the nature of the Code itself, the commentary barely address international law. Thus, this resource should be used primarily by scholars seeking to develop a general understanding of the internal logic of the Code. Researchers should not consult this commentary for detail on the relationship of canon law to international or domestic state law.

McAleese, Mary. *Children's Rights and Obligations in Canon Law: The Christening Contract* (Boston: Brill Nijhoff, 2019).

The first comprehensive treatment of the Holy See-CRC dispute over the legal consequences of the Holy See's ratification of the UNCRC. McAleese positions the book as a canon law perspective on the dispute. She provides with an extensive survey of children's rights under canon law, with particular attention paid to what she calls the "theological" and the "juridic" consequences of baptism. She also provides commentary on the UNCRC and the Holy See's long-standing support for international children's rights. She explores the intersection of rights for children baptized into the Roman Catholic Church: that is, their rights by virtue of international law, and their rights and obligations by virtue of canon law. McAleese contends that these two juridic realms which afford rights to baptized children are in tension. She ultimately argues that tensions should be resolved by the Holy See ensuring that canon law be modified to reflect the UNCRC in areas of conflict.

Vandenhole, Wouter, Gamze Erdem Türkelli & Sara Lembrechts. *Children's Rights: A Commentary on the Convention on the Rights of the Child and its Protocols* (Edward Elgar Publishing, 2019).

This commentary provides an international law perspective on children's rights, and more specifically on the development of children's rights through the UNCRC and its protocols. The text of the UNCRC is explored in-depth. An interdisciplinary approach is taken throughout the commentary, but given the relatively few points of intersection, theological and canonical perspectives are understandably not engaged.

Articles

Cismas, Ioana. "The Child's Best Interests and Religion: A Case Study of the Holy See's Best Interests Obligations and Clerical Child Sexual Abuse" in Elaine E Sutherland & Lesley-Anne Barnes Macfarlane, eds, *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge: Cambridge University Press, 2016) 310.

Cismas is a scholar of public international law who specializes in international human rights and humanitarian law. In this chapter, she builds on her past writing on the status of religious organizations as potential actors under international law, commenting specifically on the implementation of Article 3 of the UNCRC (on the "best interests" of the child), and applies this obligation to the Holy Se. In light of clergy sexual abuse and the Church's response, she criticizes the dissonance between the words and actions of leaders of the Holy See with respect to the implementation of Article 3. Cismas argues that the Holy See is bound to implement the UNCRC across its entire jurisdiction, namely in the canon law of the Roman Catholic Church. She concludes that despite the Holy See's opposition, it remains bound by the obligations produced by its ratification of the UNCRC, and thus to continued implementation of Article 3, as recommended by the Committee.

McManus, Kaleigh. "The Holy See's Compliance with the United States Convention on the Rights of the Child" (2018–2019) 12:1 DePaul J for Soc Just 1–27.

In light of recent clergy sexual abuse scandals within the Roman Catholic church, McManus comments on the status of the Holy See under international law and the ensuing consequences of the Holy See's ratification of the UNCRC. She identifies an important complicating factor in the Holy See's status under international law: that it is both a state (governing the Vatican City State) and a religious institution (governing the Roman Catholic Church). Contrary to scholars such as Cismas, McManus considers the Holy See to be a state with full international legal personality. McManus proceeds by applying the logic of international law, and concluding that the Holy See is in breach of its obligations under Articles 3 and 34 of the UNCRC. She provides recommendations that would move the Holy See towards compliance.

Peters, Edward. "Some correctives to Mary McAleese's Trinity College remarks", (21 November 2019), online: *In the Light of the Law: A canon lawyer's blog* https://canonlawblog.wordpress.com/2019/11/21/some-correctives-to-mary-mcaleeses-trinity-college-remarks/.

This blog by Edwards Peters, a canon lawyer, provides an alternative canon law perspective on McAleese's criticisms on canon law's treatment of children as expressed at her 2019 Edmund Burke Lecture at Trinity College Dublin. Peters argues that McAleese makes a fundamental mistake in a central part of her argument: that is, she distinguishes and separates the "theological consequences" of baptism from the "juridical consequences" of baptism. This distinction serves to create the space for McAleese's proposal that the Holy See should effectively subordinate its law with respect to children to the provisions of the UNCRC. Peter rejects both her premise and conclusion, arguing that Catholic teaching does not allow for the bifurcation of consequences of a sacrament. Consequently, in Peters' view, McAleese strays from theological and canonical orthodoxy, making her case untenable from the perspective of the Holy See.

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Committee on the Rights of the Child. *Concluding Observations on the Second Periodic Report of the Holy See on the UNCRC*, by Committee on the Rights of the Child, CRC/C/VAT/CO/2 (Geneva, Switzerland, 2014).

This document is the response of the UN Committee on the Rights of the Child to the Holy See's second periodic report with respect to UNCRC compliance. The most significant response is the Committee's opposition to the Holy See's rejection to amend canon law, and its recommendation to "that the Holy See undertake a comprehensive review of its normative framework, in particular Canon Law, with a view to ensuring its full compliance with the Convention." The Committee raises other issues with respect to the implementation of the UNCRC by the Holy See. These are related to the eventual elimination of the Holy See's reservations, to the monitoring of the Holy See's compliance with the convention, and the promotion of children's dignity by protecting their right to express themselves. These recommendations highlight fundamental differences in how the Committee and the Holy See understand the nature of rights, children and education.

***Gravissimum educationis* (1965).**

A publication of the Second Vatican Council, *Gravissimum educationis* is a declaration on Christian education. It establishes education as a universal right, and describes the nature of education from a Christian perspective. It outlines the roots and purposes of Christian education from infancy, through school years to higher education. Furthermore, it affirms the rights and duties of parents and teachers in the context of the upbringing and education of children, importantly establishing parents as the "primary educators" of their children. It describes the desired content and form of education for Catholic homes, parishes, schools, colleges, and universities.

McAleese, Mary. *The 2019 Annual Edmund Burke Lecture—Human Rights and Children's Rights* (Trinity College Dublin, 2019).

In the 2019 Burke Lecture at Trinity College Dublin, Mary McAleese provided an extended commentary on her book, *Children's Rights and Obligations in Canon Law: The Christening Contract*. The lecture is essentially a summary of the argument in *The Christening Contract*. However, McAleese's lecture pays particular attention to children's rights in canon law, international and domestic law as they exist in her home country of Ireland. In light of clergy sex abuse and other scandals that have hit the Roman Catholic Church in Ireland, McAleese's provides an especially scathing critique of the Church's (that is, both the Holy See in general, and the Roman Catholic leadership in Ireland in particular) refusal to enshrine UNCRC norms within canon law.

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Ombres, Robert. "Canon Law and Theology" (2012) 14:2 Ecc LJ 164–194.

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Panel 2: *Responsibilities to Protect Children – Health and Education*

Student Contact Information

Anaïs de Yparraguirre	anais.de.yparraguirre@usherbrooke.ca
Ji Eun Lee	ji.eun.lee@mail.mcgill.ca
D.J. Tokiwa	dj.tokiwa@mail.mcgill.ca

Anaïs de Yparraguirre

L'aide médicale à mourir pour les mineurs

Essai Refléxif

ESSAI RÉFLEXIF TRAITANT DE L'AIDE MÉDICALE À MOURIR POUR LES MINEURS

Alors que, depuis le 17 mars 2021, le gouvernement du Canada a officiellement modifié les critères d'admissibilité à l'aide médicale à mourir (AMM)[1] et sachant qu'au Québec, sous certaines conditions, un adolescent en soins palliatifs peut lui-même décliner un soin qui est essentiel à sa survie[2], il est à se demander pour quelles raisons l'AMM ne lui est toujours pas accessible. La finalité n'est-elle pourtant pas la même ? Par le biais de mon essai, j'ai tenté d'illustrer que l'AMM aux mineurs est une option réalisable en fonction du cadre législatif québécois actuellement en vigueur. Dans cet objectif, j'ai présenté l'historique de l'AMM au Canada et résumé les régimes de consentement aux soins du Canada et du Québec, en plus d'étudier les régimes de consentement en situation d'AMM de la Belgique et des Pays-Bas afin de pouvoir m'en inspirer. J'ai également dressé les différents enjeux à considérer, avant d'exposer les nombreuses recommandations des groupes d'experts qui se sont penchés sur le sujet. C'est en fonction de ces aspects que j'ai pu formuler ma position concernant l'AMM aux mineurs.

À la suite des diverses recherches effectuées dans le cadre de cet essai, la principale conclusion est que la discussion concernant l'AMM doit se poursuivre, particulièrement lorsqu'il est question de l'octroyer aux mineurs. L'idée qu'il s'agisse de donner la mort de façon précoce aux adolescents doit être déconstruite. Malgré des enjeux et la polémique entourant la question, je maintiens qu'il est possible d'élargir l'AMM aux adolescents au Québec, et ce, seulement en instaurant quelques modifications législatives et ajustements supplémentaires. Principalement, il faudrait prévoir l'évaluation par deux médecins différents[3], la consultation de l'équipe médicale

[1] *Loi modifiant le Code criminel et apportant des modifications connexes à d'autres lois (aide médicale à mourir)*, L.C. 2021, ch. 2.
[2] BARREAU DU QUÉBEC, *Pour des soins de fin de vie respectueux des personnes*, Groupe de travail concernant la Commission spéciale de consultation de l'Assemblée nationale sur la question de mourir dans la dignité, septembre 2010, page 106, PDF en ligne : http://aqdmd.qc.ca/attachments/File/memoire_complet_du_Barreau__sept_2010.pdf. [3] Camille

et des parents lors de la prise de décision[4], l'analyse de la maturité du mineur par un psychologue ou un pédopsychiatre[5] ainsi que l'implication du tribunal si nécessaire. Ces quatre éléments semblent être des mesures fiables permettant de contrôler les dangers entourant la pratique de l'AMM auprès des jeunes. De plus, en maintenant le critère de fin de vie[6] tout en abolissant le critère d'âge en faveur de l'analyse au cas par cas, les mineurs seraient suffisamment protégés des débordements, comme c'est le cas en Belgique et aux Pays-Bas.

En outre, dans un ordre plus général, il découle de cet essai une constatation fort surprenante. À chaque étape de ma réflexion, j'ai réalisé la place trop limitée que les mineurs, surtout d'âge mature, occupent dans notre société québécoise. D'abord, en dressant l'historique de l'AMM au Québec et au Canada, j'ai pu souligner le manque de considération des mineurs par rapport à cette question : même aujourd'hui, alors que la possibilité de rendre l'AMM accessible pour des raisons de maladie mentale est étudiée, le cas des mineurs est encore mis de côté.
Constater que le législateur considérait les personnes dans des cas plus ambigus (comme des personnes atteintes de maladie mentale, par exemple) avant même de considérer les mineurs m'a choquée et m'a incitée dès lors à remettre en question la réelle place que les mineurs occupent au sein du droit québécois. Ensuite, en étudiant le régime de consentement aux soins, j'ai pu encore observer le rôle assez passif du mineur, particulièrement au Québec, étant donné la codification aléatoire de l'âge de 14 ans. De plus, la comparaison avec le régime de la Belgique et des Pays Bas rend cette constatation plus flagrante, vu que les mineurs sont activement impliqués dans tout processus décisionnel relié à leur état de santé, surtout en fin de vie. Finalement, j'ai pu confirmer cette lacune en faisant état des recommandations des divers groupes d'experts qui proposent de délaisser les limites d'âge au profit de l'analyse des capacités propres des mineurs.

Bref, il m'apparaît dépassé qu'encore aujourd'hui, le législateur opte pour une vision très patriarcale, exigeant qu'il remplisse un fardeau de protection des mineurs, au détriment du

[4] *Ibid*. Aussi conseillé par plusieurs auteurs québécois qui prônent une relation triadique entre la famille, l'équipe médicale et le mineur. Voir à cet effet Joséanne DESROSIERS, *Processus décisionnel du consentement aux soins de l'adolescent atteint d'un cancer dans une perspective triadique : Adolescent – Parent – Infirmière*, mémoire de maitrise, Montréal, Faculté des sciences infirmières, Université de Montréal, 2016 et Guylaine LAROSE, *Les soins critiques et les décisions de fin de vie en*

pédiatrie: à la recherche d'un droit adapté, essai de maîtrise, Sherbrooke, Faculté de droit, Université de Sherbrooke, 2009.

[5] *Supra* note 3. Voir aussi l'arrêt *A.C.* c. *Manitoba (Directeur des services à l'enfant et à la famille),* 2009 CSC 30 qui prône l'analyse de la maturité propre à l'enfant.

[6] Jessica DESCHAMPS MAHEU, *Repenser l'accès des soins de fin de vie chez les mineurs : pour une plus grande autonomie des droits et libertés fondamentaux*, essai de maitrise, Sherbrooke, Faculté de droit, Université de Sherbrooke, 2020, page 93.

respect de leurs droits. La codification de l'âge de 14 ans me semble être la plus flagrante lacune de notre régime de consentement, que ce soit en contexte de fin de vie ou dans d'autres circonstances impliquant une prise de décision du mineur. D'ailleurs, plusieurs auteurs, qu'ils soient familiers avec le régime québécois ou non, ont critiqué l'établissement d'un âge fixe pour l'acquisition de la maturité chez les adolescents[7]. Selon moi, le législateur québécois devrait minimalement modifier son régime en concordance avec les conclusions de l'arrêt *A.C c. Manitoba*. Il n'est pas seulement question de suivre les traces de la common law, mais plutôt de prendre en considération les acquis psychologiques confirmant qu'aucun âge fixe ne peut réellement déterminer la capacité de discernement ainsi que la maturité de tout mineur. Par conséquent, en vue de respecter davantage les droits des mineurs, l'analyse au cas par cas devrait dorénavant être préconisée au Québec, en dépit de ce que le droit civil privilégie actuellement. Pour conclure, le législateur québécois devrait changer sa vision en ce qui concerne les mineurs, qui ont des intérêts et des opinions à faire respecter au même titre que les adultes. Depuis l'arrêt *A.C.* c. *Manitoba*, cette nouvelle perception des mineurs est de plus en plus applicable au Canada ;il est donc impératif que le législateur québécois reconnaisse qu'une remise en question est requise.

[7] Voir à ce sujet Robert P. KOURI et Charlotte LEMIEUX, «Les Témoins de Jéhovah et le refus de certains traitements : problèmes de forme, de capacité et de constitutionnalité découlant du *Code civil du Québec*», (1996), 26 *R.D.U.S.*, Brigitte BRABANT, « Adolescents, neurosciences et prise de décisions médicales : devrions-nous revoir certaines dispositions du Code civil du Québec? », (2016), *BioÉthiqueOnline 5*, Joan M. GILMOUR, «, Legal Considerations in Paediatric Patient and Family-Centred Healthcare », (2014), *International Library of Ethics, Law and the New Medicine 57,* 115-125 et Dav KAGAN, « The next *Carter*? Medical assistance in dying and mature minors », (2018), *University of Manitoba Journal of Medicine*.

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Déclaration des droits de l'enfant, 20 novembre 1959, AG 1386 XIV

De ces documents internationaux découlent les premiers droits officiellement reconnus aux mineurs. Au sein de mon essai, ces documents se sont avérés pertinents, car ma requête d'octroyer un statut plus avantageux aux mineurs (notamment en situation de fin de vie) provient directement de cette reconnaissance internationale des droits des enfants. Par ailleurs, ces documents pourraient être invoqués par un mineur lors d'une demande d'aide médicale à mourir (ci-après « AMM ») en vue d'assurer le respect de ses droits, c'est pourquoi il était essentiel de les nommer au sein de mon essai.

TABLE DE LA JURISPRUDENCE

Jurisprudence canadienne

A.C. c. *Manitoba (Directeur des services à l'enfant et à la famille),* 2009 CSC 30

Cet arrêt est central lorsqu'il est question de l'analyse de la maturité et de la capacité de discernement propres à chaque mineur. En effet, dans cet arrêt, la Cour a reconnu que l'établissement d'un âge fixe, lorsqu'il est question du consentement des mineurs en contexte médical, doit être délaissé au profit de l'analyse de la maturité et de la capacité de discernement du mineur. Or, en situation d'AMM, les conclusions de cet arrêt s'avèrent très pertinentes: ces capacités propres au mineur qui demande l'aide médicale à mourir doivent être analysées, sans considération de son âge. Toutefois, ce principe jurisprudentiel n'est pas reconnu par les tribunaux québécois, ce qui créé une incohérence entre le droit applicable au Canada et le droit québécois. Il s'agit donc d'un enjeu central que j'ai dû aborder dans mon essai.

Jurisprudence québécoise

Centre hospitalier Sainte-Justine c. *X.*, 2011 QCCS 3803

Centre hospitalier universitaire Sainte-Justine c. *M.C.*, 2013 QCCS 2583

Centre hospitalier universitaire de Sherbrooke- site Fleurimont c. *B.P.*, 2012 QCCS 3670

Ces jugements ont présenté qu'en contexte médical, le droit des parents à la liberté de religion doit céder le pas au droit de l'enfant à la vie, la sûreté et l'intégrité. En outre, ils mettent en application la prémisse de « l'intérêt supérieur de l'enfant », prémisse découlant entre autres des documents internationaux présentés précédemment. J'ai trouvé essentiel d'aborder cette partie de la jurisprudence afin d'illustrer ce que les tribunaux québécois priorisent en contexte de prise de décision médicale.

Centre universitaire de santé McGill (CUSM—Hôpital général de Montréal) c. *X*, 2017 QCCS 3946

Hôpital Sainte-Justine c. Giron, 2002 CanLII 34269 (QCCS)

Ces jugements présentent eux aussi la position des tribunaux québécois en contexte de soins médicaux. Il découle de ces jugements que l'intérêt de l'enfant prime sur sa volonté exprimée, surtout si celle-ci tend à compromettre sa vie.

DOCUMENTS D'ORGANISMES CANADIENS

CONSEIL DES ACADÉMIES CANADIENNES, *L'état des connaissances sur l'aide médicale à mourir pour les mineurs matures : Groupe de travail du comité d'experts sur l'AMM pour les mineurs matures*, Ottawa, Conseil des académies canadiennes, 2018, PDF en ligne : https://www.rapports cac.ca/wp-content/uploads/2019/02/L'état-des-connaissances-sur-l'aide-médicale-à-mourir-pour les-mineurs-matures.pdf

Le rapport du Conseil des Académies canadiennes dresse un portrait global des enjeux entourant

l'aide médicale à mourir aux mineurs. Ce document m'a donc été très utile, car il dresse un historique de l'AMM, en passant par la description de la doctrine du mineur mature, tout en détaillant le processus décisionnel des mineurs autant sous un œil neuropsychologique que juridique. Le rapport fait également état des cadres législatifs belge et néerlandais lorsqu'il est question de l'administration de l'aide médicale à mourir pour les mineurs. Finalement, le rapport expose aussi les conséquences possibles du refus de l'AMM aux mineurs, autant que les conséquences possibles de légalisation de l'AMM aux mineurs.

DAVIES, D., *L'aide médicale à mourir : le point de vue des pédiatres*, Ottawa, Société canadienne de pédiatrie (comité de bioéthique), 2018, PDF en ligne

: <https://academic.oup.com/pch/article/23/2/131/4969602?fbclid=IwAR1LTMxYhWnZEbPHb6 EPDfjFVySrLCHYDTmD4iwcZb-CSE1jOMIk9Bz4Pp0>

Dans le cadre de mon essai, le rapport de la Société canadienne de pédiatrie (SCP) est surtout pertinent pour les recommandations détaillées qui sont élaborées spécifiquement par des pédiatres. D'abord, il est recommandé que dans un contexte où l'AMM est rendue accessible aux mineurs compétents, il soit créé au sein du système de santé des soins palliatifs adaptés pour les enfants et leur famille, et que l'accès aux soins palliatifs en milieu communautaire ou à la maison soit également amélioré. Cette recommandation vise essentiellement à offrir d'autres alternatives de soins de fin de vie en concordance avec l'aide médicale à mourir, pour que l'AMM soit présentée comme une option supplémentaire, et non pas un incontournable. Pour l'aide médicale à mourir particulièrement, la SCP propose que tous les ordres de gouvernement prévoient des politiques en vue d'éviter les risques et les dérives reliés au statut vulnérable des mineurs. Bref, ce rapport a été particulièrement intéressant pour élaborer mes propres recommandations à la fin de mon essai.

MONOGRAPHIE

GOUBAU, D., *Le droit des personnes physiques*, 5e éd., Cowansville, Éditions Yvon Blais, 2014

Cette monographie est très complète en ce qui a trait au droit des personnes. Elle m'a été d'une grande aide lorsque j'ai dû présenter le régime de consentement aux soins des majeurs, des mineurs de moins de 14 ans et des mineurs de plus de 14 ans. J'ai aussi pu m'en servir lorsque j'ai dû présenter l'évolution des droits des mineurs au Québec.

ARTICLES

BRABANT, B., « Adolescents, neurosciences et prise de décisions médicales : devrions-nous revoir certaines dispositions du Code civil du Québec? », (2016), *BioÉthiqueOnline 5*

Le principal aspect à retenir de cet article est la critique du bien-fondé des articles 14 al. 2 et 16 al. 2 du Code civil en regard des données provenant des neurosciences, ainsi que des pratiques cliniques. Le régime de consentement aux soins des mineurs applicable au Québec est hautement critiqué et l'auteure préconise un régime uniformisé aux mineurs de tous âges en fonction de plusieurs critères propres à chacun, et non plus en fonction d'un âge arbitraire. Dans le cadre de mon essai, cet article s'est avéré particulièrement pertinent pour remettre en question la codification de l'âge de 14 ans concernant le consentement aux soins des mineurs, en plus de confirmer les recommandations de groupes d'experts qui demandent à ce que l'âge ne soit plus considéré comme un critère lors d'une demande d'AMM par un mineur.

DEMICHELIS, C., R. ZLOTNIK SHAUL et A. RAPOPORT, « Medical Assistance in Dying at a paediatric hospital », (2019), 45 Journal of Medical Ethics 60

Le rapport des pédiatres de l'hôpital Sick Kids de Toronto m'a lui aussi été très utile pour formuler mes recommandations. En effet, le rapport présente autant les risques que les avantages de l'AMM aux mineurs. Les pédiatres en viennent à la conclusion que l'AMM est assez similaire aux autres soins de vie, et qu'elle devrait donc être permise au même titre que la cessation de soins, par exemple. Ils concèdent cependant que l'AMM comporte davantage de considérations éthiques et que par conséquent, un cadre législatif plus précis doit entourer l'administration de ce soin aux mineurs en vue de les protéger des débordements possibles.

GILMOUR, J.M., «, Legal Considerations in Paediatric Patient and Family-Centred Healthcare », (2014), *International Library of Ethics, Law and the New Medicine 57*, 115-125, en ligne : http://ndl.ethernet.edu.et/bitstream/123456789/48558/1/60.pdf#page=135

Cet article présente, entre autres, la doctrine du mineur mature et les avantages de celle-ci. Lu conjointement avec l'arrêt *A.C. c. Manitoba*, cet article souligne l'importance de l'implication du mineur jugé mature dans sa prise de décision médicale.

KAGAN, D., « The next Carter? Medical assistance in dying and mature minors », (2018), University of Manitoba Journal of Medicine, PDF en ligne : https://umjm.ca/assets/documents/V1I1/V1I1A1.pdf

Dans le même objectif que dans l'article précédent, l'auteur critique les limites d'âge qui sont établies en contexte médical et encourage une plus grande reconnaissance des conclusions de l'arrêt *A.C. c. Manitoba*. L'auteur considère que les limites d'âge codifiées ont un rôle crucial, mais que ce rôle n'a pas sa place en contexte médical et qu'elles viennent plutôt restreindre les droits des mineurs dans leurs choix médicaux.

KAUR SINGH, H., M.E. MACDONALD et F. A CARNEVALE, « Considering medical assistance in dying for minors: the complexities of children's voices », (2020), Journal of Medical Ethics, en ligne : https://jme.bmj.com/content/medethics/46/6/399.full.pdf?casa_token=vMv9hWxhR7MAAAAA:Pw-Aa ISwkB2KxYbKLNbVCQ0f6vcnpsnIgn2O2gvN0hPX4hgOavbUyPGs9iRQ5wKf5fvuCHuq3E

Cet article met l'accent sur l'importance de l'agentivité, capacité centrale acquise chez les mineurs de tous âge. Plus précisément, l'agentivité fait référence à la capacité d'agir délibérément, de représenter soi-même ses intérêts et de se remettre en question en fonction du

monde dans lequel nous et notre entourage évoluons. Les auteurs proposent que dû à l'existence de cette capacité chez les mineurs, une plus grande autonomie devrait leur être accordée malgré l'incertitude entourant leur capacité juridique. À l'aide de cet article, j'ai pu remettre en question encore davantage l'enjeu entourant l'âge de la capacité chez le mineur : j'ai tenté de mettre de l'avant que cette capacité devrait être considérée dans l'analyse de la maturité du mineur, surtout en contexte d'AMM.

MCINTOSH, C., « Carter, Medical Aid in Dying, and Mature Minors », (2016), Revue de droit et santé de McGill, en ligne : https://mjlhmcgill.files.wordpress.com/2017/07/mjlh_10_1_macintosh1.pdf

Dans cet article, l'auteure a présenté un important comparatif entre la vulnérabilité des mineurs et la vulnérabilité abordée dans l'arrêt Carter qui découle de la souffrance vécue par les personnes requérant l'AMM. Comme il a été reconnu dans Carter que la vulnérabilité qui découlait d'un état de souffrance n'était pas suffisante pour considérer que toutes les personnes requérantes n'avaient pas une capacité décisionnelle adéquate, l'auteure a fait le parallèle avec les mineurs : pourquoi considérer alors que tous les mineurs n'ont pas une capacité décisionnelle suffisante
seulement en se basant sur leur statut vulnérable? Il s'agit d'une conclusion erronée. Par conséquent, cet article encourage l'accès à l'AMM pour les mineurs, en tentant de démontrer qu'un refus sous un prétexte de vulnérabilité serait insuffisant au sens de la loi.

P KOURI, R. et C. LEMIEUX, « Les Témoins de Jéhovah et le refus de certains traitements : problèmes de forme, de capacité et de constitutionnalité découlant du Code civil du Québec », (1996), 26 R.D.U.S.

Cet article rédigé par des auteurs québécois vient encore une fois remettre en question la codification de l'âge de 14 ans au Code civil en contexte de consentement aux soins. Entre autres, Kouri et Lemieux font état de l'historique de cette codification : ils reconnaissent que l'article 14 C.c.Q. n'est que « le produit d'un historique législatif dont le but n'était pas de révolutionner le droit, mais plutôt de rassurer les gestionnaires du réseau de la santé et des services sociaux qui doutaient de la valeur du consentement du mineur aux soins » (Kouri et Lemieux, page 98). Par conséquent, il en découle que cet âge est arbitraire et qu'il ne respecte pas les apprentissages psychologiques sur le développement de la maturité chez les mineurs. Les auteurs préconisent eux aussi la reconnaissance des acquis de l'arrêt *A.C. c. Manitoba*, tout en soulignant toutefois que les tribunaux québécois n'ont pas voulu le faire jusqu'à maintenant en justifiant que la common law ne s'applique pas à notre droit civil.

ESSAIS

DESCHAMPS MAHEU, J., *Repenser l'accès des soins de fin de vie chez les mineurs : pour une plus grande autonomie des droits et libertés fondamentaux*, essai de maitrise, Sherbrooke, Faculté de droit, Université de Sherbrooke, 2020

En plus de formuler ses propres recommandations, l'auteure de cet essai dresse un portrait complet des enjeux constitutionnels entourant la question de l'AMM aux mineurs. Parmi ses différentes recommandations, j'ai surtout retenu sa proposition de maintenir le critère de fin de vie seulement pour les mineurs, en vue d'éviter le plus possible des débordements et de rassurer la population quant à l'administration de ce soin à nos mineurs.

DESROSIERS, J., *Processus décisionnel du consentement aux soins de l'adolescent atteint d'un cancer dans une perspective triadique : Adolescent – Parent – Infirmière*, mémoire de maitrise, Montréal, Faculté des sciences infirmières, Université de Montréal, 2016

Je me suis surtout référé à cet essai en vue de comprendre puis d'illustrer l'approche pédiatrique la plus appropriée en contexte de fin de vie au sein de notre droit québécois. L'auteure présente une approche triadique, qui met de l'avant l'implication à part égale (ou presque) de l'adolescent, des parents et de l'équipe médicale. J'ai tenté d'intégrer cette approche dans mes recommandations, en concordance avec les différentes propositions de groupes d'experts qui, eux aussi, suggèrent d'intégrer davantage l'adolescent dans le processus décisionnel, en plus de toutes les sources précédentes qui préconisent l'analyse de la maturité du mineur en vue de lui laisser de plus en plus d'autonomie. Bref, cet essai est venu confirmer que dans un contexte comme l'AMM aux mineurs, il est préférable d'intégrer le mineur dans le processus décisionnel, comme c'est déjà mis de l'avant au Québec dans d'autres situations de fin de vie.

LAROSE, G., *Les soins critiques et les décisions de fin de vie en pédiatrie: à la recherche d'un droit adapté*, essai de maîtrise, Sherbrooke, Faculté de droit, Université de Sherbrooke, 2009

Cet essai vient présenter le cadre législatif et la pratique en vigueur au Québec dans une situation de mineur en fin de vie. Dans le cadre de ma rédaction, je me suis référé à cet essai notamment lorsque j'ai dû comparer l'AMM à d'autres situations de fin de vie, comme la cessation des soins,

par exemple. En comparant l'AMM à ces situations déjà autorisées au Québec, j'ai pu faire un parallèle avec l'AMM et imaginer un cadre législatif basé sur les pratiques déjà courantes en contexte de fin de vie chez un mineur.

MÉMOIRE

DEGRAUX, C., *L'euthanasie des mineurs en Belgique,* mémoire de maîtrise, Louvain, Faculté de droit et de criminologie, Université catholique de Louvain, 2015

Ce mémoire a essentiellement été utilisé pour prendre exemple sur les cadres législatifs mis en place en Belgique et aux Pays-Bas. Lu conjointement aux différentes recommandations des groupes d'experts, ce document illustre les meilleures mesures de protection à mettre en vigueur au Canada, ainsi que tous les enjeux entourant la question de l'AMM aux mineurs. Ce mémoire a également aidé à soutenir mon argument quant à l'importance de la place du mineur dans le processus décisionnel en contexte d'AMM, en démontrant que dans ces deux pays, le mineur est le principal acteur dans la prise de décision, et qu'avec les bonnes mesures de protection, aucun débordement n'a eu lieu jusqu'à ce jour.

Ji Eun Lee

Legally Protecting Children from Video Games

Reflection Essay

Before writing my research paper, I possessed little knowledge about video games and even less about their connection to the law. I knew that video games were an emerging topic in intellectual property law, but I never heard of video games being discussed in any other areas of law until last year, when I heard on the news that a class action was being filed against a big video game developer for failing to warn consumers about their game's addictiveness. When hearing this news, I immediately thought about my little cousins in South Korea who are always playing games on their phone and some of my high school classmates who would always fall asleep in class or arrive at school late, if at all, because they were awake all night playing video games.

These thoughts made me wonder if there were laws in Canada that regulated video games like South Korea that has implemented a shutdown policy many years ago to restrict children's video game usage. I was not surprised to discover that Canada has not created any laws regulating against gaming addiction and that there was no jurisprudence on the topic either. However, many of my other discoveries during the process of writing this paper have astonished me, notably the gaming industry's reach on the global population, the physical and emotional vulnerabilities of children that should influence the law, the Quebec legislature's willingness to protect children, and the differences in culture that cause the action or inaction in legislating laws that aim to mitigate excessive gaming in children.

I knew that some people enjoyed playing video games, but I had no idea how popular and lucrative the video game industry has become. I was stunned that so many people, regardless of age, gender, nationality, played video games, that video gaming have become the most popular form of entertainment, and that other types of entertainment that are deemed more traditional, such as television, music, sports, etc., could barely compete with its success. I now understand why intellectual property lawyers specializing in video games are thriving and why this area of the law that was once considered niche has become a more popular field of practise. Although the video game industry's dominance impressed me, I also made the connection that its stunning rise in popularity was not random, as video game developers have been hacking people's brains to make them addicted to their products, using behavioural psychology. The popularity of video games also made me realize that gaming addiction was a bigger global issue than I originally thought it was; even if only a minority of people are affected by the disorder, the number of people being negatively impacted by this addiction remains significant, as so many people play video games all around the world.

My research on this topic has also taught me that children are especially vulnerable to these kinds of manipulation because they do not have fully developed brains, which also prevents them from fully controlling their compulsions and desires for dopamine-seeking activities and short-term rewards like playing video games. This explains why the percentage of children affected by video game addiction is a lot higher than that of the general population with gaming addiction. Furthermore, children are even more susceptible to falling prey to video game developers, as video

games are the new social currency, and children are generally more sensitive to peer pressure. When I was a child, only a decade ago, we were mainly made fun of for our clothes and general appearance, so I was stunned to find out that children nowadays were being bullied for what their online video game characters were wearing, which incites children to make in-game purchases. All this information made me really appreciate the gravitas of video game developers' predatory practises that induce addiction in children.

Although the issue of gaming addiction in children is not addressed in Canadian laws or jurisprudence, I was pleasantly surprised to learn that the vulnerabilities of children were taken into account in Quebec law in sections 248 and 249 of the *Consumer Protection Act*. The protective attitude that the Quebec legislature has adopted in regard to young children against all types of advertisements gives me hope that Quebec judges will interpret the legislative intent of existing laws in favour of protecting children from video game developers' predatory tactics to profit off children by making them addicted to their games and purchase in-game items. I am also hopeful that our province will eventually take legislative action to mitigate the risks of video game addiction.

Another aspect of my research that expanded my critical thinking was learning how different countries' views on children influenced their laws. I always thought that Asian countries had adopted strict laws on video gaming way before the West has even touched on the topic of video games in their law because video games were more popular in Asia. While this is partly true, there is another aspect to the story that I failed to realize. We now know that video games are not only popular in Asia but everywhere around the world, including North America, so the lack of popularity is no longer a factor to why our legislators have not legislated against video game addiction. Asian laws relating to gaming addiction are directed at youth because of the cultural importance Asian countries place on their academic performance. This made me realize that a country's culture and views on children affect the way its laws protect them or control them. I wonder how Canadian legislators and judges will act in response to the issue of gaming addiction in children because it will inform us on the way we, as a society, think about young consumers. Do we think that our country and its legislature and judiciary need to protect children from the risks of video game addiction or that the youth and their parents should make their own choices on whether or not to engage with these risks?

Annotated Bibliography

LEGISLATION: CANADA

Consumer Protection Act, CQLR c P-40.1, ss 248-249.

Section 248 of the *Consumer Protection Act* (*CPA*) prohibits advertising to children under the age of thirteen. Pursuant to article 249 *CPA*, whether an advertisement targets people under thirteen years old can be determined by considering three factors: a) whether the goods advertised are intended for and appealing to children, b) whether the advertisement was designed to attract children, c) whether children are present at the time and place the advertisement is shown.

JURISPRUDENCE: CANADA

F.N. et J.Z. v Epic Games Inc. et al. (3 October 2019), Montreal, Que CS 500-06-001024-195 (motion).
This motion involves a class-action lawsuit against Epic Games, the developer of Fortnite, one of the most popular and addictive games amongst children. The class action claims that Epic Games breached articles 248 and 249 of the *Consumer Protection Act* by advertising to children under 13 years old.

SECONDARY MATERIAL: ARTICLES

Orsolya Király et al, "Policy responses to problematic video game use: A systematic review of current measures and future possibilities" (2018) 7:3 Journal of Behavioral Addictions 503.
This article discusses and evaluates different regulations enforced by different countries, predominantly Asian countries, to mitigate gaming addiction in children. It also provides other possible solutions that legislators or video game developers could adopt in order to protect children from the risks of video game addiction.

SECONDARY MATERIAL: ELECTRONIC SOURCES

House of Lords, "Gaming Harm – Time for Action" (2 July 2020), online (pdf): *Select Committee on the Social and Economic Impact of the Gambling Industry* <committees.parliament.uk/publications/1700/documents/16622/default/>.
This report calls for the regulation of loot boxes under section 6(6) of the *Gambling Act 2005*, as it concludes loot boxes are forms of gambling that target children and are highly likely to incite gambling problems in the youth.

OPC, "Advertising Directed at Children under 13 Years of Age" (September 2012), online (pdf): *Office de la protection du consommateur* <www.opc.gouv.qc.ca/fileadmin/media/documents/consommateur/sujet/publicite pratique-illegale/EN_Guide_publicite_moins_de_13_ans_vf.pdf>.
This Guide provided by the Consumer Protection Bureau explains what sections 248 and 249 mean and how they should be interpreted, so merchants and advertisers can determine whether their advertisements are likely to be found in breach of sections 248 and 249 of the *Consumer Protection Act* (*CPA*).

Policy Department for Economic, Scientific and Quality of Life Policies, "Loot boxes in online games and their effect on consumers, in particular young consumers" (July 2020), online (pdf): *European Parliament* <www.europarl.europa.eu/RegData/etudes/STUD/2020/652727/IPOL_STU(2020)652727_EN.pdf >.
This report from the European Parliament discusses the two roles advertisement plays in loot boxes: 1) advertising the loot box to incite its purchase and 2) rewarding the gamer with a loot box for watching an advertisement. This document discusses how these

advertisements are predatory to children who are especially vulnerable to the manipulations of these microtransactions and recommends that the government protect children from these exploitative practises.

DJ Tokiwa

The Return to Ontario Elementary Schools: Surveying the Responsibilities of Teachers, Principals, and Students Amidst COVID-19

Reflection Essay

My best friend, a 24 year old elementary school teacher in his second year of a contract for the Fort McMurray Catholic Board of Education, called me in great distress this past summer. Being familiar with my background as a former teacher currently studying in law school, he wanted my opinion regarding his upcoming academic year amidst the coronavirus disease and the legal implications for the administration, teachers and the children returning to in-person learning. Little did I know this conversation was about to intrigue me to the extent that it would change my Fall 2020 term.

His questions primarily concerned the liabilities of teachers and students: What if a student removes their mask and transmits the virus? Who is liable? What happens if the students forget to physically distance? Can students sue one another if there is a viral outbreak? These questions snowballed into a void of more inquiries and uncertainties that effectively set the stage for my interest in researching the legal responsibilities of teachers, principals, and students returning to in-person learning during the novel COVID-19 virus.

The writing process of this term essay has been an extremely unique experience that can be distinguished from my previous written works due to the continuously evolving nature of the virus. In the past, my research has generally focused on less current issues and historical excavations of different legal regimes, whereas the themes of this term paper evolved alongside the shifting issues that children and teachers continued to face in schools. Since September, there have been substantial scientific discoveries relating to the virus, Ontario policy developments, and new outbreaks among children in Ontario schools which have made this writing experience never feel static; my supervisor and I have had to continuously adapt certain arguments and theories as new health and safety developments for the students occurred in society.

As a former elementary school educator, I grappled with the significance of the health and safety issues that children are currently facing amidst this pandemic. More specifically, the section about the teachers' duty to report was particularly eye-opening to me because it equipped me with a greater understanding of the rationale behind s. 72(1) of the *Child and Family Services Act*. In these times of unprecedented health and economic crisis, family homes and children in lower socioeconomic milieus are the individuals who disproportionately experience the negative impacts on the largest scale. The research and writing phase positioned my critical thinking through the lens of a child during COVID-19 – including increased rates of domestic abuse and neglect at home, food insecurity due to parental job loss, and the risk of viral transmission at school - to an extent where I have never believed more in the efficacy and dire need for the policy suggestions included in my essay's last section than ever before.

There are also some issues that I encountered that resonated with me because I do not believe they are being given the proper attention by the media or the provincial government. First, the government's operational guidance pertaining to the return to school recommends that children physically distance as much as reasonably possible. However, the Toronto District School Board has officially announced that classrooms do not have nearly enough space for 2 metre physically distancing for the current class sizes; this directive is effectively impossible for children to follow. Moreover, the Ontario government announced that they unlocked 50 million dollars for new ventilation in Ontario schools to stimulate more air flow in schools. However, on a per school basis, that amounts to less than 10 thousand dollars; for the vast majority of schools that are already in disrepair, that will not even provide for a new Air Conditioner system. There are thus some fundamental issues with the policies underpinning the Ontario "Back-to-School Plans" that severely augment the likelihood of viral transmission among the students.

Overall, this writing process was certainly insightful and immersed me within the perspective of educators and children at different times during my research. While analyzing the intensified duties of children returning to school during this pandemic, I was sensitive to the oppressive barriers that students may have to potentially face if they seek legal recourse against a school's negligent conduct. Given the rushed creation and unpresented scope of implementing the health and safety protocol of these "Back-to-School Plans," the odds of the school board, principal, teacher, or student committing some form of negligence that may materially increase the risk of viral transmission is likely. An immediate problem for students is the burden of proving causation. Due to the coronavirus' asymptomatic timeline of 2-14 days, coupled with the limitless vectors of transmission, a student who commences a civil action against the school for negligence will be heavily burdened with this onus of proof. Moreover, with Bill 218, children who suffer viral injury at the hands of their school's negligence will virtually have no recourse options at all due to the teachers' total immunity. As a province that has prided itself on advocating for the health and safety of children throughout this pandemic, Bill 218 appears to communicate the exact opposite sentiment. I could not help but conclude that students who are seeking legal recourse - even those with strong evidence that they have suffered as a direct result of a teacher's negligence - are essentially precluded from any compensation. Considering the province has already reported over 4 thousand school related cases, I feel sympathy for these families if Bill 218 is passed because it applies retroactively.

Even after finishing the term essay, I am left with many unanswered questions. How will the courts expect reasonable children to behave with so many new rules and complex protocols? Can children in schools be found negligent for viral transmission? Does Bill 218 immunity somehow apply to students as well? Most importantly, is Bill 218 really how Ontario wants to solve these issues as a society? The fact that Ontario Premier, Doug Ford, has publicly stated that there is a certainty that outbreaks will occur under this plan, coupled with Bill 218's immunity blanket, sends a political message that leaves me questioning whether it is true that "every child matters" in the eyes of the government. If there is one thing that is certain after participating in the "To Look and To Play" project – in light of the heightened duties that are expected of students at school and the manner in which the "COVID-19 generation" has adapted – these children will never look at the world, or play in it the same way ever again.

Annotated Bibliography

Bain v Calgary School Board, (1993) 146 AR 321.

` This case is particularly informative within the discourse of Canadian education law because the court's reasoning discusses the significance of the student's duty to self-regulate their own actions and take proper steps for their own safety. In this case, a grade 11 student suffered brain damage while on a school field trip. The student requested to go on a hike with other students without a supervising teacher. The teacher permitted the request and the students effectively decided to climb a small mountain unsupervised where Bain fell and suffered injury. The Alberta's Court of Queen's Bench found the teacher negligent and 75% at fault. However, given the student's age, he was 25% at fault. While teachers are saddled with the bulk of the fault, this case importantly exemplified that students – especially as they grow older – are still endowed with responsibility for their own actions.

"COVID-19: Guidance for School Reopening" (29 July 2020), online: *Sickkids* < https://www.sickkids.ca/PDFs/About-SickKids/81407-COVID19-Recommendations-for-School-Reopening-SickKids.pdf>.

This document advocates for the safe return of children and youth to school by emphasizing the importance of the school reopening with balanced policies that mitigate the health risks of coronavirus disease. This document is particularly useful because it draws on scientific evidence and paediatric-specific considerations in establishing its directives to policymakers. It makes nuanced policy recommendations that seek to maximize the child's health and safety during the return to school.

Dawn C Wallin, *Understanding Canadian schools: An Introduction to Educational Administration,* 5th ed (Winnipeg: University of Manitoba, 2014).

Dr. Wallin's book encapsulates a detailed survey of school administration, pedagogical ethics, and Canadian education law. The fourth chapter is particularly insightful because it examines some key aspects of law and they affect children in schools. The text discusses some of the important legal aspects of schooling including the powers and duties of teachers, negligence and liability, child abuse, and student rights and democratic practices. Other topics include the process of policymaking and how student needs are assessed and incorporated within the design of education laws.

Julian Kitchen & Christopher Dean, *Professionalism, Law, and the Ontario Educator,* (St Davids: Highland Press, 2010).

This book provides a comprehensive overview of the teacher-pupil relationship through the common law lens of Ontario. A significant portion of the text is dedicated to the

duties of care owed to students from the school boards, principals, and teachers. Moreover, there are several case commentaries that examine the details of cases involving students; most notably students suing the schools for negligence.

Myers v Peel, [1981] 2 SCR 21.

This case is often cited as a landmark decision that clarified the standard of care expected of teachers supervising their pupils and the standard of self-discipline that the courts expect of young students. In this appeal, a fifteen year old student was trying to perform a gymnastics manoeuvre at a high-school. The teacher had a combined class and gave permission to the student to practice their gymnastics in a separate room away from the teacher. The student attempted an advanced dismount from the rings without a spotter where he fell and broke his neck. The court found that the teacher had not properly exercised his duty of care because the student was engaging in a dangerous activity unsupervised and was given faulty protective matting that failed to soften the fall; a prudent parent would have exercised a higher standard of care. However, this case importantly established that students, despite being young and under the supervision of teachers acting *in loco parentis,* students are also expected to exercise a certain amount of self-discipline and self-control in taking steps to ensure their safety in school activities. Myers, the student, was held partly responsible for his injuries because of his age and his choice to perform the manoeuvre without a spotter.

Ontario, Ministry of Education, *COVID-19 cases in schools and child care centres,* (Queen's Printer for Ontario, 2020).

This living document showcases the data of confirmed COVID-19 school-related cases across Ontario. This data is paramount in assessing the progression of the virus among schools and students, and therefore the health and safety of children in Ontario.

R Masonbrink & Emily Hurley, "Advocating for Children During the COVID-19 School Closures" (2020) 146:3 AAP 3.

Masonbrink and Hurley's article is a valuable resource because it explores the ongoing impact on students in regards to the nationwide elementary and secondary school closures that occurred in 2020 due to the coronavirus disease. The text provides an in depth analysis of how school closures disproportionately affected the safety and security of children in poverty who most heavily rely on school-based services for nutritional, physical, and mental health needs.

Rosonna Tite, "Detecting the Symptoms of Child Abuse: Classroom Complications" (1994) 19 *Canadian Journal of Education* 1 (JSTOR).

Tite's article discusses a 1994 study that assesses the difficulties teachers can experience in attempting to detect the signs of child abuse and or neglect in their students. Despite being a dated study, the information in this article is particularly useful because it illustrates the importance of cultivating strong teacher-parent relationships and how doing

so allows teachers to assume a more powerful position in detecting child-abuse occurring in the family home. The study revealed that teachers are prone to being reluctant in performing their duty to report child abuse and neglect to Children's Aid Societies because of the uncertainty of actual abuse and the fear of potentially compromising the teacher-parent relationship. This short work thus highlights the teacher's legal duty to ascertain a child's safety and security at home can be complicated and envelope the teacher with legal liability if he/she fails to act.

Valerie Tarasuk & Andy Mitchell, *Household Food Insecurity In Canada 2017-2018* (Toronto: PROOF, 2020)

This article analyzes the ongoing issue of food insecurity across Canada. The study draws on data from over 100 thousand Canadian households in 2017-2018 and concludes that more than 1.2 million children under 18 are living in food-insecure households; this is higher than any prior national estimate. Moreover, the researchers explore policy considerations by showcasing how food insecurity can take a serious toll on a child's health and development.

Panel 3: *Children's Interests and Identities in the World*

Student Contact Information

Arsalan Ahmed	arsalan.ahmed@mail.mcgill.ca
Juliette Mestre	juliette.mestre@mail.mcgill.ca
Kayla Maria Rolland	kayla.rolland@mail.mcgill.ca
Stephanie Belmer	stephanie.belmer@mail.mcgill.ca

Arsalan Ahmed

Navigating eSports Law in Canada

Reflection Essay

Reflection on "Navigating eSports Law in Canada"

Arsalan Ahmed

This semester, I wrote a paper titled "Navigating eSports Law in Canada." The paper seeks to consolidate key legal issues affecting eSports players, creating a playbook that succinctly analyzes relevant Canadian case law. A particular effort was made to focus on the recruitment and employment of underaged players into professional leagues and teams. This summary is prepared for the *Regards et Jeux/ To Look and to Play* research project for Winter 2021.

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An eSports contract is akin to a contract to play professional sports. It is designed to enable a professional league or eSports team to recruit, manage, and endorse a specific player. As with most contracts, players themselves have unique obligations relevant to the work they are recruited for. In eSports, a player might be required to train a specific skill (i.e., shooting a virtual target in a video game) for multiple hours in a day.

In an effort to appeal to its largest demographic, eSports teams have begun recruiting a number of underage players into both long-term contracts and competition-centered agreements. In 2018, Singaporean Gavin 'Meracle' Jian Wen, was recruited onto a professional team for DOTA 2 at the age of 17. In the US, Sumail Hassan Syed, 16, became the youngest professional gamer to cross US$1 million in earnings. In 2019, *Team 33* signed an 8-year-old gamer, Joseph Deen.

At first glance, I found the ages of these players to be quite… shocking. Throughout this research project, I was curious about how teams could lawfully employ an 8-year-old to participate in intense competitions. And while provincial legislation (including BC *Employment Standards Regulation* and Ontario's *Protecting Child Performers Act, 2015*) explicitly provide for circumstances where a child performer can be lawfully employed, it is unclear whether eSports can be grandfathered into these legislative frameworks. Truth be told, focussing on provincial legislation proved to be a bit of a dead end; information is limited, and it is unclear what kinds of penalties are levied on organizations that do not follow employment guidelines. Select teams have attempted to address these obligations by attenuating the minor's working hours. Joseph Deen, the eight-year-old *Fortnite* star signed to Team 33, maintains a relaxed work schedule, officially kept to a maximum of 3 hours per day and up to 8 hours on weekends. Other activities, including YouTube/ Twitch streams, promoting merchandise on his store, and engaging with fans, are done "at-will," meaning Joseph Deen (and his parents) can dictate how many hours he spends on promoting his personal brand.

For this reflection, I will focus on one key issue of interest: a minor's ability to disaffirm a contract. Of the many issues that come up when choosing to hire an underaged performer or athlete,

there is a rich doctrinal and judicial history related to contracting with minors. Under the common law, minors typically lack the legal capacity to enter into a binding contract for services. This is ameliorated by having a parent or legal guardian sign on their behalf. Contracts for necessities (involving food, medicine, etc.) are always enforceable. But entertainment or service contracts are not contracts for necessities; minors, being the ones who provide the service, retain a right to void the contract at the unilateral election of the underage player.

In certain circumstances, the minor's right to void the contract can help escape an abusive contract. Consider the case of Owen "Smooya" Butterfield, a well-known eSports player who entered into a professional contract at 16. Just before his 18th birthday, Smooya built a modest following and sought to move teams. He found himself trapped to his current team due to an exorbitant $100,000 buyout clause for early termination of his contract, a value far removed from the real economic value he brought to his team. Smooya was able to successfully disaffirm the contract, arguing that the penalty clause was not beneficial to him because it unduly impeded his ability to develop skills and grow in his profession.

While this instance is a win for Smooya, a minor's ability to void a contract carries significant risk for a professional eSports team. It allows an underage player to walk away even after a significant investment has been made in them. In the US, section 6751 of California's *Family Code* has attempted to address this issue by allowing an employer (i.e., a professional eSports team) to petition a court, with the cooperation of the minor and their parent/ legal guardian, to have a contract confirmed by a court.

No such analog exists in Canada. Canadian courts have held that entertainment contracts may be held to be enforceable against a minor so long as the child receives an *advantage* from the transaction "equal to or in excess of any rights or interests which are being foregone." In *Tonelli,* a 17-year-old entered into a sports contract involving a junior hockey club known as the Toronto Marlboros. The contract required Tonelli to play exclusively with the Marlboros for three years; in addition, if the player left the club for the NHL, he would have to remit 20% of all gross earnings for the club for three years. Tonelli was later recruited by the Houston Aeros, a professional team in the World Hockey Association; Tonelli terminated his association with the Marlboros and the junior club sued him for breach of contract. On appeal, ONCA supported Tonelli, noting that the minor had no realistic option but to sign the agreement with the Marlboros. Justice Blair took note that the Marlboros' contract rendered "obvious economic disadvantages" for Tonelli, given that the salary paid to Tonelli in the minor leagues was "a pittance" to what he would earn as a professional player.

I found this example from *Tonelli* to be quite interesting. While eSports teams may have to deal with a risk of contract disaffirmation, it highlights how courts might assess whether a contract can be adequately enforced or not. As an added strategy, eSports teams have turned to using parental indemnity, where parents compensate the league/ team for any damages associated with the minor's actios, to recuperate their losses. Today, *Tonelli* continues to maintain a presence in Canadian courts; judges continue to focus their analyses on prospective metrics, including the minor's future earning potential, opportunity loss, and ability to capitalize on one's strength, make up a relevant part of the analysis in determining whether a minor's disaffirmation is valid.

What we have before us is a turning point. A niche field is now becoming more sophisticated. With its growth, observers have begun to criticize abusive practices. This paper identifies many of the legal risks associated with overbearing management contracts. Collectively, these concerns call for change. Players, leagues, and teams must work together to better govern the industry, safeguarding its most vulnerable members. The question is: who will take the first step?

Annotated Bibliography

- **Bob Tarantino, "A Minor Conundrum: Contracting with Minors in Canada for Film and Television Producers" (2006) 29 Hastings Comm & Ent LJ 45.**
  - Quoting Tarantino, "In film and television production, the child performer's contract may itself be for a relatively small amount of remuneration - however, the potential losses to a producer who is unable to bind a child performer could be enormous: the entire production may be rendered unexploitable if, for example, the minor played a leading role … the "disaster" scenario for a producer would involve a minor who plays a significant role in a film attempting to disaffirm the contract. If successful, such effort would result in the producer being unable to exploit the production at all because the terms which granted the producer the right to make use of the image or voice of the minor would be void."
- ***Ceccol v Ontario Gymnastic Federation*, 2001 CanLII 8589 (ON CA).**
  - In *Ceccol v Ontario Gymnastics Federation,* where a senior manager of a non-profit athletic organization was hired in 16 consecutive 1-year fixed term contracts. Even though her contract explicitly limited Ms. Ceccol's entitlement to basic guarantees under the *Employment Standards Act* ("ESA"), the Ontario Court of Appeal (ONCA) determined that Ms. Ceccol's was clearly in an employment contract. As such, Ms. Ceccol was entitled to reasonable notice based on her 16 years of service. As a result, damages paid out to Ms. Ceccol amounted to 16 months of unpaid salary (1 month for each year of service)- a significant amount of money. For eSports teams mistakenly taking advantage of an IC classification to pay low salaries and avoid employer obligations, these decisions serve as a warning that court-ordered payouts could cripple operations.
- ***Chaplin v Leslie Frewin Publishers,* [1966] 2 WLR 40 [UK].**
  - In *Chaplin v Leslie Frewin Publishers* (1966), the defendant, Charlie Chaplin's son (a minor at the time of contract), was refused an injunction to stop the publication of his father's biography. The son sought to sell and profit off of his father's memoirs via a ghost-written biography, but subsequently sought to stop production realizing the biography would portray him in a negative light. The Court of Appeal disagreed with the defendant, noting that the publishing agreement constituted a benefit for Chaplin's son by providing him with (i) a source of income, and (ii) "entry to an otherwise closed industry, coupled with the possibility of a reasonable amount of remuneration for services rendered or rights granted, is sufficient to render a contract enforceable." The Court of Appeal continued, acknowledging that *even if* the contract was voidable, the assignment of copyright and any related rights contained in the agreement were not revocable.
- **Michael Comartin et al, "Employing Minors in the Entertainment Industry: A Primer for Employers Doing Business in Canada" *Ogletree Deakins* (Feb 23, 2017), online: ogletree.com/insights/employing-minors-in-the-entertainment-industry-a-primer-for-employers-doing-business-in-canada/.**

- In BC, minors under the age of 15 working in the recorded entertainment industry (such as in film, video, or television productions) are governed by an entirely separate set of rules from those that apply to other minors. These rules are set out in section 45.13–45.5 of the BC *Employment Standards Regulation*." Among other things, the rules note:
    1. For children under the age of 12, a shift cannot last longer than 8 hours after the child reports to the work location. For children aged 12 to 14, a shift cannot last more than 10 hours.
    2. Special rules apply to working on school days, and the hours at which employment may begin and must cease depend on whether the next day is a school day and/or whether school is in session.
    3. Split shifts are prohibited, as are long lunch breaks (that might otherwise be used to create split shifts).
    4. Time in front of a recording device is strictly regulated, and a specified break must be provided between recording sessions. The length of time and break depends on the child's age.
    5. A child must have at least 48 consecutive hours free from work each week (or else be paid 1.5 times his or her regular rate of pay for any hours the child would otherwise have been free from work); 12 hours free between each shift of work; and 12 hours between the end of work and when the child is scheduled to attend school.
    6. The child cannot work more than 5 days in a week (or 6 days, if the Director of Employment Standards approves in writing).
- ***No Doubt v Activision Publishing, Inc.*, 192 Cal App 4th 1018 (2011) [United States].**
    - In *No Doubt v. Activision,* members of the popular rock band "No Doubt" sued videogame publisher Activision for a near identical depiction of the group in its rock band simulation game, *Band Hero*. While Activision had licensed the rights to No Doubt's likeness, the US 9th Circuit of Appeal found that Activision's actions had gone far beyond its reasonable use of the license. The video game characters were "literal recreations of the band members… doing the same activity by which the band achieved and maintained its fame." For this reason, the in-game avatars, identical to the band members in real life, could not pass the US courts' "transformative use defense" which was developed by the California Supreme Court in *Comedy III Productions*, which allows artistic renditions or products creatively transformed into "something more than the celebrity's likeness" to be sold or marketed without being considered misappropriation of personality.
- ***Toronto Marlboros Major Junior "A" Hockey Club v Tonelli et al*, [1979] 23 OR (2d) 193.**
    - A 17-year-old entered into a sports contract involving a junior hockey club known as the Toronto Marlboros. The contract required Tonelli to play exclusively with the Marlboros for three years; in addition, if the player left the club for the NHL, he would have to remit 20% of all gross earnings for the club for three years. Tonelli was later recruited by the Houston Aeros, a professional team in the World Hockey Association; he terminated his association with the Marlboros and the junior club sued him for breach of contract. Both the trial and appeal courts concluded that the contract was not enforceable against Tonelli, on the basis that the Marlboros' contract did not provide a benefit to the minor. At trial, the contract was found to unevenly and heavily favour the Marlboros' interests, "noting that it allowed the Marlboros to terminate Tonelli at their discretion, but bound Tonelli for several years." At appeal, the ONCA affirmed the trial judge's assessment, acknowledging that

Tonelli had no realistic option but to sign the agreement with the Marlboros. Refusing to sign the amateur contract would mean giving up a reasonable expectation of pursuing a career in a professional hockey league. In addition, Justice Blair took note that the Marlboros contract rendered "obvious economic disadvantages" for Tonelli, given that the salary paid to Tonelli in the minor leagues was "a pittance" to what he would earn as a professional player. In addition, the requirement to pay 20% of his gross earnings for three years prevented Tonelli from capitalizing on his ability as a player.

Juliette Mestre

Impacts of Youth-Led Climate Litigation In and Out of the Courtroom

Reflection Essay

Recent years have witnessed the unprecedented mobilization of children and youth to combat climate change. The most visible and mediatized forms of activism have been movements such as the #FridaysForFuture initiative, climate strikes and marches that took place around the world before the onset of the global pandemic. My essay focused on how the recent youth-led social movement has turned to the courts to enforce climate-related rights in a novel fashion. Children and youth have in the last few years filed ground-breaking lawsuits against their respective governments arguing that past and current climate action or inaction violate their constitutional and human rights, as well as those of future generations. Although similar arguments are being made in other climate litigation cases, youth plaintiffs are suffering particular injuries because they are disproportionately affected by the consequences of climate change and will be for the longest.

I studied three landmark lawsuits filed by youth plaintiffs in different countries: *Juliana v. the United States*, *Future Generations v. Ministry of the Environment and others* (Colombia), and *Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy* (Norway). Although these case studies and associated findings are further detailed in the essay, I argued that, win or lose, these lawsuits had transformative impacts in and out of the courtroom. Unfortunately, only in *Future Generations* did the Colombian Supreme Court grant the requested remedy after, among other things, historically declaring the Amazon to be an entity subject of rights. Nevertheless, in all three cases the courts interpreted existing constitutional rights as encompassing climate-related rights. For instance, Judge Aiken in *Juliana* held that "the right to a climate system of sustaining human life" was a constitutional right.[17] These three rulings also recognized the urgency of the climate crisis and the state's responsibility in causing the plaintiffs' climate-related injuries. They set global precedents that are already being relied upon by courts around the world and inspiring new legal actions on similar grounds. Beyond the legal realm, these decisions have significant political and social repercussions for the plaintiffs, the broader social movement and society more generally. They act as a focal point for mobilization, complementary to other forms of dissent. They are also a way for children and youth to bring their unique perspective to the table and a means of true inclusion, contrary to tokenistic participation. Finally, these judicial decisions contribute to the construction of shared narratives of responsibility, impacting existing normative frameworks. It is important to note that further empirical research is required to assess the practical and long-term effects of this youth-led climate litigation movement.

While conducting research for this essay, I became especially involved with this subject as it went far beyond a purely academic interest. I related to and identified with the plaintiffs in these

[17] *Juliana v United States*, Case No 6:15-cv-01517-TC at 2 (District Court of Oregon, 10 November 2016) at para 32, online (PDF): *Our Children's Trust* <ourchildrenstrust.org/s/Order-MTDAiken.pdf>.

lawsuits since a lot of them have the same age as me. I was struck by some of the younger plaintiffs' maturity and lucidity when I heard them speak on documentaries or read what they said about the lawsuits in various articles. Even though they are accompanied by experienced lawyers, their activism is inspiring and challenges mental and societal constructs that children are not capable of making a meaningful contribution to the climate debate or do not have an important role to play in politics. These are ideas that I may have unconsciously shared, not just about children and youth generally, but also about myself when I was in high school and already had an opinion about climate politics. That personal impression alone was reason enough for me to think that youth-led climate litigation had wider repercussions than legal consequences. Sociological studies on youth activism in general were helpful in assessing what impacts these lawsuits may have on youth's political engagement and personal development.

As I was writing this essay, I was struck by the interconnectedness of these youth-led judicial initiatives within the broader climate justice movement. Plaintiffs often directly cited other youth-led climate cases in their complaints and lawyers leading these cases in different countries had been communicating on what strategies might work best. This was explicit in *Future Generations* and *Juliana*, where both legal teams successfully used storytelling technics and emphasized the personalized injuries young plaintiffs were currently experiencing due to climate change. For instance, they often spoke about the outdoor and sporting activities they were no longer able to do. They both aimed to put a face on the climate debate, often seen as remote from daily lives. The objective was twofold: establish standing to sue by identifying individualized injuries and fulfill the pedological function of showing that the effects of climate change are real and already happening.

On that last point, something else I found striking was the crucial role communication played in youth-led climate litigation. Since the goal is not just victory in court but also to raise awareness, mobilize or convey certain narratives, great efforts were spent on communicating about ongoing legal initiatives. In that regard, social media platforms and their immense mobilizing power were essential in targeting children and youth. An important part of my research was to follow the various environmental organizations and young activists behind the lawsuits I studied on Twitter, Instagram or Facebook. Social media activity about lawsuits happening around the world really makes it easier for young people to follow and be included in the legal process, something usually so remote and technical that younger citizens might otherwise not have felt a part of.

Although long-term effects remain to be researched, this essay showed that the involvement of children and youth in climate litigation can be a powerful and transformative force for the climate movement. Youth plaintiffs make a unique contribution and have leveraged innovative legal arguments, such as those made on behalf of future generations, to advance a cause political branches have yet to effectively deal with. Beyond judicial effects, these legal initiatives, even when unsuccessful, serve different social and political purposes. As I was personally impacted by this research project, I have no doubt these lawsuits will play an important role in fostering the civic engagement of other children and youth around the world.

Annotated Bibliography

I. Jurisprudence

The three cases studied in the term essay are especially representative of the youth-led judicial movement. Below are the most relevant judicial decisions for these cases.

Juliana v. the United States

Juliana v United States, Case No 6:15-cv-01517-TC (**District Court of Oregon**, 10 November 2016), online (PDF): *Our Children's Trust* <ourchildrenstrust.org/s/Order-MTDAiken.pdf>.

This historic ruling by Judge Aiken established that the "right to a climate capable of sustaining human life" is an unenumerated constitutional right (at para 32). The public trust doctrine was also held to be applicable in that case. It was a major victory for the young plaintiffs and a decision that benefited from great media attention. It inspired many lawsuits around the world and set an important precedent in the global climate justice movement.

Juliana v United States, DC No 6:15-cv-01517-AA (**Court of Appeals for the Ninth Circuit**, 17 January 2020), online (PDF): *Our Children's Trust* <ourchildrenstrust.org/s/20200117-JULIANA-OPINION.pdf>.

This decision from the Ninth Circuit Court of Appeals overturned Judge Aiken's ruling and concluded that the plaintiffs' claim needed to be addressed to the political branches rather than the judiciary. Two of the three judges on the panel found that the alleged climate-related injuries were not redressable by the court. This decision is currently under appeal. Although it is a setback for the plaintiffs, the decision stressed the urgency of the climate crisis and the government's responsibility in causing it. It also did not question the right to a climate capable of sustaining life articulated by Judge Aiken.

Future Generations v. Ministry of the Environment and Others

Corte Suprema de Justicia [Supreme Court], 5 April 2018, STC4360-2018 (Colombia), online (PDF): *De Justicia* <dejusticia.org/wp-content/uploads/2018/01/Fallo-Corte-Suprema-de-Justicia-Litigio-Cambio-Clim%C3%A1tico.pdf?x54537>.

This decision from the Colombian Supreme Court is one of the most progressive of its kind and a truly historic ruling within the global climate justice movement. Among other things, the Court notably held that notions of "public ethics," duties of solidarity and nature's intrinsic value warranted granting future generations certain environmental rights. As part of the remedies prescribed by the Court, the government was ordered to draft and implement an intergenerational pact in cooperation with the plaintiffs to address deforestation in the Amazon.

Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy

Oslo District Court, 4 January 2018, ***Greenpeace Nordic Association and Nature and Youth v The Government of Norway*** (Norway), online (PDF): *Klimasøksmål Arktis* <xn--klimasksml-95a8t.no/wp-content/uploads/2019/10/Judgement-4.-jan-2017-Oslo-District-Court-stamped-version.pdf>.

The Oslo District Court dismissed the lawsuits holding that the government's decision to issue production licenses for oil drilling was not contrary to the Norwegian Constitution (Article 112 more specifically). This decision was important because it was the first time Article 112 was used in court and interpreted as conferring actionable rights to Norwegian citizens.

Borgarting Court of Appeal, Oslo, 23 January 2020, ***Greenpeace Nordic Association and Nature and Youth v The Government of Norway*** (Norway), online (PDF): *Klimasøksmål Arktis* <xn--klimasksml-95a8t.no/wp-content/uploads/2019/10/judgement_Peoplevs_ArcticOil_Appeal_Jan2020.pdf>.

The Court of Appeal dismissed the appeal but showed sympathy towards the plaintiffs and emphasized the urgency of climate change. It also upheld the District Court's finding that Article 112 is a rights provision. While it ruled against the plaintiffs, it nevertheless stated, contrary to the District Court, that emissions from combustion of Norwegian oil outside of Norway had to be included in any impact assessment of governmental decisions. This decision is currently under appeal at the Supreme Court of Norway.

Canadian youth-led climate lawsuits

This global judicial movement is also present in Canada. Several lawsuits have been filed by youth plaintiffs against the federal or provincial governments. The following decisions are important recent developments in these cases.

ENVironnement JEUnesse v Canada, 2019 QCCS 2885.

This class action lawsuit was filed in Quebec on behalf of all Quebec residents aged 35 and under. Among other things, the environmental organization Jeunesse argued that Canada's lack of decisive action in reducing GHG emissions is violating the class plaintiffs' rights under the *Canadian Charter or Rights and Freedom* ("the *Charter*"). The Quebec Superior Court accepted that the class plaintiffs raised a justiciable legal question at this stage but still refused to certify the class action because it considered the choice of 35 years old as the maximum age to identify the class to be arbitrary. This decision is currently under appeal.

La Rose v Her Majesty the Queen, 2020 FC 1008.

The plaintiffs in this case are 15 children and youth arguing that the federal government's action and inaction contribute to climate change, which violates their rights under the *Charter*. They also posit, like in *Juliana*, that a public trust doctrine can be relied upon at trial. The Federal Court recently accepted the defendant's motion to strike holding that the claims under the *Charter*

were not justiciable and that the public trust doctrine, although justiciable, does not disclose a reasonable cause of action.

Mathur v Ontario, 2020 ONSC 6918.

Seven youth plaintiffs sued the Ontario government for alleged violations of the *Charter* due to its inadequate action and inaction in curbing climate change. The Ontario Superior Court rejected the defendant's motion to strike and stated that the court could review Ontario's decision to repeal the *Climate Change Act* and its GHG reduction target. This is the first time a Canadian court holds that failure to address climate change may constitute a *Charter* rights violation.

Other significant legal initiatives

Sacchi et al v Argentina et al, Communication to the Committee on the Rights of the Child (23 September 2019), online (PDF): *United Nations* <courthousenews.com/wp-content/uploads/2019/09/thunberg-petition.pdf>.

Greta Thunberg and 15 other children, from age 8 to 17, filed this complaint to the Committee on the Rights of the Child in September of 2019. It names five countries as respondents and claims that they knowingly contributed to and perpetuated the climate crisis, thereby violating the petitioners' rights to life, health and culture.

Supreme Court of the Netherlands, The Hague, 20 December 2019, ***The State of the Netherlands v Stichting Urgenda*** (2019), (The Netherlands).

This Dutch judicial decision does not involve youth in particular but is especially important in the global climate justice movement. In that case the court held that the Dutch government was under a duty to limit its GHG emission by 25% below 1990 levels by 2020. It would otherwise be violating Dutch citizens' fundamental rights under various international agreements as well as the Dutch Constitution. This case was explicitly relied upon by the plaintiffs in *Nature and Youth*.

II. <u>Scholarship</u>

Benwell, Matthew C and Peter Hopkins, *Children, Young People and Critical Geopolitics*, first ed (London: Routledge, 2016).

This book reviews research on children and youth in relation to geopolitics. It challenges the idea that children and youth are passive rather than active participants in politics and society. The various chapters put forth different ways in which young people can be empowered and gain agency in geopolitical processes, including through activism.

Blumm, Michael C and Mary C Wood, "'No Ordinary Lawsuit': Climate Change, Due Process, and the Public Trust Doctrine" (2017) 67 Am U L Rev 1.

This article discusses Judge Aiken's decision to deny the defendants' motion to dismiss in the *Juliana* case. It goes over the context of this historic lawsuit and its role within the wider

atmospheric trust litigation movement. This study helps grasp the significance of *Juliana* and the role courts may play in combatting climate change. It must be borne in mind that this article was written before Judge Aiken's decision was overturned by the Ninth Circuit Court of Appeals.

Brown Weiss, Edith, "Intergenerational Equity: A Legal Framework for Global Environmental Change," in Edith Brown, ed, *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo, Japan: United Nations University Press, 1992).

This chapter articulates a theory of intergenerational equity as a fundamental principle for global environmental change. It also explores the increased prevalence of intergenerational equity as a major theme in international legal instruments. This theoretical framework is helpful in understanding this idea which is being relied upon in the youth-led lawsuits studied in the term essay. Although the chapter was written in 1992, its theoretical assessment is still relevant today.

Fisher, Dana, "The Broader Importance of #FidaysForFuture" (2019) 9 Nature Climate Change 430.

This short article discusses the significance of the #FridaysForFuture campaign uniting young activists around the world. This campaign is part of the wider youth-led social movement combatting climate change which gave impetus to the lawsuits studied in the term essay. Dana Fisher argues that the #FridaysForFuture initiative has important implications not just for climate policy but also for individual activists who are more likely to become active participants in democracy. Dana Fisher is one of the leading researchers on youth activism from a sociological perspective.

Gallay, Erin et al, "Youth Environmental Stewardship and Activism for the Environmental Commons" in Jerusha Conner and Sonia M Rosen, eds, *Contemporary Youth Activism: Advancing Social Justice in the United States* (Denver: Praeger, 2016).

This chapter delves into youth climate activism and assesses the role of "environmental commons" as a space for youth activism. Gallay et al argue that this movement acknowledges the interdependence between environmental degradation, climate change and issues of justice, discrimination and oppression. This study is very interesting in understanding how the concept of climate justice plays into youth-led climate litigation and the broader social movement around it.

Han, Heejin and Sang Wuk Ahn, "Youth Mobilization to Stop Global Climate Change: Narratives and Impact" (2020) 12 Sustainability 1.

This article discusses the mobilization of children and youth on issues related to climate change, particularly since the climate strikes launched by Greta Thunberg in 2018. The study looks at the movement's shared narratives and how it is used as a tool to unite young activists around the world. The authors argue that the youth movement was successful in raising awareness about climate change, prompting incremental change in some states, shifting global attitudes on climate change and highlighting the need to include youth in climate governance. However, this article also puts forth the movement's limitations and its inability to bring about immediate change.

Jodoin, Sébastien, Shannon Snow and Arielle Corobow, "Realizing the Right to be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming" (2020) 54:1 L & Society R 168.

This article analyzes the long-term impacts of the 2005 petition filed by Inuit communities at the Inter-American Commission for Human Rights on the communities concerned by the petition, actors in the climate justice movement and political actors in general. It is an informative study on the framing of climate change as a human rights issue and the innovative legal arguments that are being made in that field. This study also discusses the limitations of rights-based climate litigation and, among other things, shows that the petition did not encounter great success in mobilizing Inuit communities on climate justice.

Marris, Emma, "Why young climate activists have captured the world's attention" (2019) 573 Nature 471.

This short article discusses recent developments in the youth-led climate movement and highlights some of its key characteristics. For example, its points to the activists' perceived moral integrity and authenticity and the movement's increased media attention.

NeJaime, Douglas, "Winning Through Losing" (2011) 96 Iowa L R 941.

Although not on climate litigation in particular, this article discusses the productive role of litigation loss for social movements. It frames litigation as an advocacy tool and argues that litigation loss may serve an important role in building a social movement's identity and mobilizing constituents. Loss can be used as a strategy to further the movement's political and social goals. This article was relied upon in the term essay to argue youth-led climate litigation, win or lose, had transformative impacts for individual plaintiffs, the broader climate justice movement and the socio-political order more generally.

Nissen, Sylvia, Jennifer H K Wong and Sally Carlton, "Children and young people's climate crisis activism – a perspective on long-term effects" (2020) Children Geographies 1.

This article examines research on social movements to assess the potential long-term impacts of recent youth climate activism. It argues, among other things, that climate activism is likely to have long-lasting impacts on the children and youth involved as well as on their families, friends and future career. The authors also emphasize potential political legacies with implications for both formal and informal political arrangements. For instance, they point to possible "institutional activists" who may emerge from this movement and pursue the movement's goals through conventional bureaucratic channels.

Nosek, Grace, "Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories" (2018) 42:3 Wm & Mary Envtl L & Pol'y Rev 733.

Grace Nosek looks at how climate litigation may be used not only to prompt substantive legal change but also to shape the political and social discourse through the construction of frames. Strategic and effective use of frames and narratives in climate litigation can be an important means

to overcome cognitive hurdles in tackling climate change and modify people's perception of the threat posed by the climate crisis. The use of specific frames and narratives (centered around responsibility, morality or intergenerational equity) is central to the lawsuits studied in the term essay.

O'Brien, Karen, Elin Selboe and Bronwyn M Hayward, "Exploring youth activism on climate change: dutiful, disruptive, and dangerous dissent" (2018) 23:3 Ecology & Society 42.

This article articulates a typology of dissent present in youth climate activism. It identifies three interrelated forms of dissent: dutiful, disruptive and dangerous dissent. The term essay argued that climate litigation can be categorized as dutiful dissent since young plaintiffs are voicing their concerns through existing institutional spaces. Climate litigation as a form of dissent has advantages and drawbacks. For instance, it rarely addresses the underlying causes of climate change, such as certain development and economic models. Successful social movements use different forms of dissent as complementary mechanisms to prompt substantial change.

Olson, Julia, "Youth and Climate Change: An Advocate's Argument for Holding the US Government's Feet to the Fire" (2016) 72:2 Bulletin of the Atomic Scientists 79.

Julia Olson, lead counsel in the *Juliana* case, contextualizes the lawsuit and explains the plaintiffs' main arguments as well as the case's broader significance.

Paiement, Philip, "*Urgenda* Agenda: How Climate Litigation Builds Transnational Narratives" (2020) 11 Transnational Legal Theory 121.

This article looks at how climate litigation constructs common transnational narratives by examining specific cases, including *Nature and Youth*, studied in this essay. The author argues that litigants attribute meaning to complex climate change issues through narratives focused on urgency, timelines for actions, responsibility and relying on particular symbols and discourse. This theory is relied upon in the term essay and transposed to the particular context of youth-led climate litigation.

Peel, Jacqueline and Hari M Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7:1 Transnational Environmental L 37.

This article provides an overview of the recent "rights turn" in climate litigation, which stems from the increased recognition of the human rights aspects of climate change. Courts have been increasingly receptive to this approach and more and more climate lawsuits invoking right-based arguments are being filed around the world. The three cases studied in the term essay are illustrative examples of this transnational judicial movement.

Preston, Brian J, "The Evolving Role of Environmental Rights in Climate Change Litigation" (2018) 2 Chinese J Environmental L 131.

Brian Preston's article outlines some of the major trends in rights-based climate litigation. It articulates and categorizes the types of environmental rights relied upon in different lawsuits. The article also reviews recent jurisprudence to illustrate how this judicial movement is shaping global climate justice advocacy. The three lawsuits studied in the term essay are discussed in Preston's study.

Slobodian, Lydia, "Defending the Future: Intergenerational Equity in Climate Litigation" (2020) 32:3 Geo Intl Envtl L Rev 569.

Slobodian's study on intergenerational equity looks at how this concept has integrated the judicial discourse, international legal instruments, national constitutions and judicial decisions. A number of lawsuits are being filed on behalf of future generations, making innovative arguments articulating rights and obligations owed to them by the state. That includes cases like *Future Generations* and *Juliana*, discussed in this article as well as the term essay. Slobodian studies how intergenerational equity plays into questions of standing and how it is integrated into legal arguments and used to craft remedies. ù

Trajber et al, "Promoting Climate Change Transformation *with* Young People in Brazil: Participatory Action Research Through a Looping Approach" (2019) 17:1 Action Research 87.

This paper, although not on the judicial process, highlights how children and youth bring a unique perspective to climate governance. Trajber et al detail a case study on community efforts to address and adapt to climate change in Brazil. They argue that young people's participation makes for better preparation to climate-related events and is particularly valuable when dealing with issues of social justice.

III. <u>Other Online Sources</u>

Boom, Keely, Julie-Anne Richards and Stephen Leonard, "Climate Justice: The International Momentum Towards Climate Litigation" (2016), online (PDF): *Heinrich Boell Foundation* <static1.squarespace.com/static/571d109b04426270152febe0/t/5b1ffbb4575d1fc3161be111/1528822716566/report-climate-justice-2016.pdf >.

This report gives an overview of climate justice initiatives around the world. It starts by discussing the Paris Agreement and how concepts of climate justice have gained momentum thereafter. It then goes over climate litigation trends and looks at cases launched against companies and governments. The report reviews a number of youth-led climate litigation cases. It also examines how litigation interacts with other sectors, including climate negotiations and the fossil fuel industry.

Mila, Carolina, "Colombia's youth fighting for the Amazon — in the courts and on the streets" (18 July 2019), online: *DW* <dw.com/en/colombias-youth-fighting-for-the-amazon-in-the-courts-and-on-the-streets/a-49523373>.

This article on the aftermaths of the Colombian Supreme Court decision shows how interlinked the broader youth-led social movement is with climate litigation. The plaintiffs in *Future Generations* are taking actions in their communities and becoming spokesperson for the climate movement in Colombia. It also explains how this court ruling has impacted the public debate, normative frames and brought the issue of deforestation closer to people.

Quiroz-Martinez, Julie, Diana Pei Wu and Kristen Zimmerman, "ReGeneration: Young People Shaping Environmental Justice" (2005), online: *Racial Equity Tools* <movementstrategy.org/?smd_process_download=1&download_id=3506>.

This report examines the youth-led environmental justice movement. It goes back to its history and relationship with other social movements. It emphasizes the intersectionality of the movement and its commitment to inclusiveness and sustainability as organizational principles. Various experiences, strategies, processes and initiatives are reviewed to understand how this movement is evolving and what its core values are. This report is still helpful to apprehend the origins and underpinnings of the youth-led climate movement although much has happened in that field since it was published in 2005.

Setzer, Joana, and Rebecca Byrnes, "Global Trends in Climate Change Litigation: 2020 Snapshot" (July 2020), online (PDF): *LSE* <lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf >.

This report provides an overview of recent development and potential future trends in climate litigation. It relies on up-to-date data to track evolutions in climate litigation and reviews the kinds of legal arguments that are being raised, how cases may relate to each other and the types of parties involved. Potential and observable impacts of litigation are discussed, as well as the risks associated with this strategy. Lastly, it assesses the impacts of COVID-19 on litigation efforts around the world.

Kayla Maria Rolland

Ticking Time Bombs' or Victims First?: Children in the Former Islamic State

Reflection Essay

In my paper "Ticking Time Bombs' or Victims First?: Children in the Former Islamic State," I sought to address the issue of foreign children—who were brought or born in the former Islamic State—and who are presently detained in camps in northeast Syria. These children now reside in overcrowded and dangerous detainment camps that are not conducive to their health or wellbeing. While the Kurdish-led Syrian Democratic Forces (SDF) who have been guarding the detainees since 2019 have pleaded with countries to repatriate their citizens, many states—including Canada—have been slow to take action.[18] To date, only three Canadians (including two children) have been released from the camps.[19]

Going into the project months ago, what interested me most was the dichotomy I saw in my initial research, where children were frequently portrayed as either grave threats to national security, or as victims of the Islamic State of Iraq and Syria (ISIS). Domestic politicians and security analysts have often described these children as threats—or "ticking time bombs."[20] Portrayals of these children as threats to national security due to their association with ISIS were used to justify their continued suffering. My paper explored the concept of the extraterritorial application of international human rights law, as well as a broader concept of the right for child victims of armed conflict to reintegration and recovery.

Reflecting on my experience related to the research and writing done for my paper, there are several things that come to mind. The first was the challenge of locating *legal* arguments for repatriation, when repatriation is much more easily justified under *security* or *humanitarian* considerations. From a humanitarian perspective, it is not difficult to make the argument that these children should be returned to an environment that can better ensure their wellbeing. Several UN Special rapporteurs, for example, have called not repatriating these children a "moral failure."[21] From a security perspective, radicalization experts have also called for repatriation, emphasizing that they may pose a greater long-term threat if they continue to be exposed to extremist ideologies.[22] Locating legal arguments for

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[18] See generally "Bring Me Back to Canada" (29 June 2020), online: *Human Rights Watch* <www.hrw.org>.

[19] See Annie Bergeron-Oliver & Christy Somos, "Canadian woman released from ISIS detention camp in Syria", *CTV News* (28 June 2021), <www.ctvnews.ca >.

[20] See Aïssata Athie, "The Children of ISIS Foreign Fighters: Are Protection and National Security in Opposition" (18 December 2018), online: *IPI Global Observatory* <theglobalobservatory.org>.

[21] See United Nations Human Rights Special Procedures, "Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic" (2020) at 2, online (pdf): *OHCHR* <www.ohchr.org>.

[22] See Ana Luquerna, "The Children of ISIS: Statelessness and Eligibility for Asylum under International Law" (2020) 21:1 Chicago J Intl L 148 at 156–157.

repatriation when there is no clear right to repatriation under international law, however, proved more challenging. While states cannot deny their citizens entry or deprive a person of nationality, they are under no obligation to take proactive steps to return them to their country of origin.[23]

The second is a reflection on the evolving approach to the extraterritorial application of human rights treaties. In November 2020, for example, the Committee on the Rights of the Child made its decision on an internal communication procedure, determining that France had jurisdiction over several children of French families who had been brought to Syria by their parents and were now in detainment camps in the country.[24]

This is a fascinating area that has noble aspirations to expand human rights protections, but also challenges the assumed universality of human rights, and raises concerns related to arbitrariness or creating an undue burden for states.[25]

Lastly is the relevance of areas of the social sciences to providing context to my paper. In my paper, I acknowledged that it would be a glaring omission to neglect to address the underlying currents of Islamophobia and xenophobia that permeate the discussions regarding foreign children detained in northeast Syria. This included acknowledging that children who have joined armed groups considered to be 'terrorist' groups often face stricter responses and are more likely to face detention and punishment than children who join other armed groups.[26] Moreover, gendered analyses such as one offered by Fionnuala Ní Aoláin (the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism) helped to ensure that an emphasis on the vulnerabilities of girls did not neglect the suffering of boys.[27] These reflections provided critical context and nuance to my paper, and I was grateful to the interdisciplinary approach of the "To Look and to Play/Regards et Jeux" project for allowing me the space to explore them.

I am very grateful to the "To Look and to Play/Regards et Jeux" project for all of its support this summer, and for providing me the opportunity to explore this topic.

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[23] See Alessandra Spadaro, "Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?" (2020) 70:1 Intl Comparative LQ 251 at 253.

[24] See Félix A Aguettant, "A Turn of the Tide in the Extraterritorial Application of Child Rights" (2021) 14:3 J Politics & L 51 at 51.

[25] *Ibid* at 55; Marko Milanovic, "Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights" (10 November 2021), online (blog): *EJIL:Talk!* <www.ejiltalk.org>.

[26] See Francesca Capone, "'Worse' than Child Soldiers? A Critical Analysis of Foreign Children in the Ranks of ISIL" (2017) 17:1 Intl Crim L Rev 161 at 174.

[27] See Fionnuala Ní Aoláin, "Gendering the Boy Child in the Context of Counterterrorism: The Situation of Boys in Northeast Syria" (8 June 2021), online: *Just Security* <www.justsecurity.org>.

Annotated Bibliography

Source #1:

Aguettant, Félix A, "A Turn of the Tide in the Extraterritorial Application of Child Rights" (2021) 14:3 J Politics & L 51.

In "A Turn in the Tide of the Extraterritorial Application of Child Rights," author Félix Aguettant described the recent developments of an individual communication procedure by the Committee on the Rights of the Child in November 2019 that determined that France—that has denied any existence of competence in Syria—has jurisdiction over hundreds of children of French jihadists in northeast Syrian camps. In the short article, Aguettant demonstrates both the benefits and pitfalls of this development in the extraterritorial application of human rights.

This source was a helpful aid in my paper as it provided a succinct summary of recent developments, as well as addressed similar tensions between public security and rights of the child.

Source #2:

Capone, Francesca, "The children (and wives) of foreign ISIS fighters: Which obligations upon the States of nationality?" (2019) 60 Questions Intl L 69.

Francesca Capone seeks to provide a response to the question of whether or not there is an obligation on states of nationality to repatriate to accompanying family members of foreign terrorist fighters (FTFs) through the lenses of multiple areas of international law, including "international humanitarian law, international counter-terrorism law, the law of diplomatic and consular relations and international human rights law." Ultimately, Capone identifies that while a "straightforward obligation" may not exist, multiple commitments under international law argue in favour of repatriation.

This source was useful for my paper as it echoed many similar arguments made by human rights organisations (i.e. Human Rights Watch or the Open Society Justice Initiative included below), while providing a more objective and rigorous legal analysis.

Source #3:

Capone, Francesca, "'Worse' than Child Soldiers? A Critical Analysis of Foreign Children in the Ranks of ISIL" (2017) 17:1 Intl Crim L Rev 161.

In "Worse' than Child Soldiers? A Critical Analysis of Foreign Children in the Ranks of ISIL," Capone examines the phenomenon of children affiliated with ISIL through the lens of the law related to child soldiers. Capone identifies how children affiliated with ISIL are typically regarded first and foremost as threats to national security. They provide an overview of the current legal framework, and address some of the challenges relevant to designing a meaningful reintegration process.

Likewise, this source was helpful as it addressed the core tension between public security and the rights of the child that I sought to address in my paper.

Source #4:
Carroll, Jacinta, "The citizen as enemy combatant: dealing with foreign terrorist fighters" (2019), online (pdf): *Australian National University* <nsc.crawford.anu.edu.au>.

In this brief policy paper, Jacinta Carroll provided a succinct summary of the challenges relevant to the issue of FTFs in the Australian context. It addressed both legal challenges—such as evidentiary issues with domestic prosecution—and other challenges relating to government communication and the public debate surrounding the issue. It included two case studies, including of the Australian teenager Zaynab Sharrouf, who travelled to Syria with her parents at the age of 13.

This source was helpful to my paper as public perception has fuelled much of the response to this issue. The critical analysis of how governments communicate their strategies was helpful in going beyond the legal context, identifying variables that impact state behavior. The case study in particular was particularly valuable to my research.

Source #5:
"European States' Obligations to Repatriate the Children Detained in Camps in Northeast Syria" (2021), online (pdf): *Open Society Justice Initiative* <www.justiceinitiative.org>.

This legal briefing paper by the Open Society Justice Initiative provided a comprehensive legal analysis meant to assist European lawyers advocating for the repatriation of children detained in northeast Syria. Through the lens of a child's rights perspective, it addressed both overarching human rights considerations, as well as key substantive human rights such as the right to life, the right to be free from torture and ill treatment, and the right to liberty and security. Ultimately, the paper identifies a duty for European states to take proactive measures to repatriate these children.

While in the European context, this detailed source provided a detailed analysis that strengthened several sections of my paper.

Source#6:
Luquerna, Ana, "The Children of ISIS: Statelessness and Eligibility for Asylum under International Law" (2020) 21:1 Chicago J Intl L 148.

In "The Children of ISIS: Statelessness and Eligibility for Asylum under International Law" Ana Luquerna provided a comprehensive analysis that explores whether stateless children detained in camps in northeast Syria may be eligible for asylum under international law. Luquerna expands their analysis to include children who are *de facto* stateless due to the unwillingness of states of nationality to repatriate them. Ultimately, Luquerna concludes that these children "meet the requirements for refugee status because they are being persecuted as a particular social group (defined as "children who lived in the ISIS regime and who do not have the ability to be repatriated to their home country")."

While Luquerna's core argument was not reflected in my analysis, their points related to the Convention on the Rights of the Child (CRC) were helpful. As one of the most recent sources, this article also helped to strengthen the background section on the humanitarian crisis in my paper.

Source #7:

Ní Aoláin, Fionnuala, "Gendering the Boy Child in the Context of Counterterrorism: The Situation of Boys in Northeast Syria" (8 June 2021), online: *Just Security* <www.justsecurity.org>.

This short blog post by Fionnuala Ní Aoláin provided a gendered analysis of the role of boys in the Islamic State of Iraq and Syria. Aoláin emphasizes that gendered analyses cannot only address the harms experienced by women and girls, but must recognize the unique impacts of terrorism and counterterrorism on boys "precisely because of the assumptions being made about their gender (male), the parentage (presumed association with ISIL), the geography (Syria), and their religious beliefs (Muslim)." Aoláin emphasizes that the rights of children are universal, and boys must be recognized as children in situations of armed conflict.

Aoláin's empathetic and nuanced analysis was helpful to my paper as it addressed a significant blindspot in both policy papers and the academic discourse on this topic. As Aoláin implores, it was a reminder to avoid the reproduction of harmful tropes in any analysis on this topic.

Source #8:

Nyamutata, Conrad, "Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood" (2020) 25:2 J Confl & Sec L 237.

In "Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood," Conrad Nyamutata addresses the "contentious" and inconsistent status of Western citizens who travelled to join ISIS as children. Nyamutata argues for 'ISIS-associated' children to be considered as child soldiers, with all the protections afforded to child soldiers extended to them—including to be treated as victims first.

Nyamutata's analysis was very helpful to my paper as it drew explicit links between a well-established area of international law—the law related to child soldiers—with the more contemporary issue addressed by my paper.

Source #9:

Spadaro, Alessandra, "Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?" (2020) 70:1 Intl Comparative LQ 251.

In "Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?" Alessandra Spadaro reflects on recent decisions by Belgian and Dutch courts related to family members of ISIS fighters now detained in northeast Syria. Spadaro explores the questions of the right to consular assistance, the right of return to one's own country, and the extraterritorial application of human rights treaties. Ultimately, Spadaro argues that these individuals hold no

individual right to be repatriated by their state of nationality, yet identifies related policy reasons why states should nevertheless repatriate their nationals.

Spadaro's analysis was very helpful to my paper as it provided counterarguments to the arguments presented in multiple other sources. As one of the few sources to argue for an absence of a right to repatriation, it helped to 'pressure test' potential weaknesses in these arguments and provide greater nuance in my analysis.

Source #10:

van Spaendonck, Rozemarijn, "To School or to Syria? The foreign fighter phenomenon from a children's rights perspective" (2016) 12:2 Utrecht L Rev 41.

Rozemarijn van Spaendonck's analysis in "To School or to Syria? The foreign fighter phenomenon from a children's rights perspective" reflects on the international, national and local level efforts to prevent citizens from travelling to join ISIS. For children, van Spaendonck encourages an approach that takes the best interest of the child into account, in accordance with article 3 of the CRC. Ultimately, van Spaendonck concludes that present approaches do not distinguish between children and adults, particularly when criminal or administrative measures are taken.

As one of the earliest sources identified, van Spaendonck's analysis was helpful for sections of my paper that addressed the best interest of the child.

Stephanie Belmer

Losing the Private Self: Cyberspace and Children's Privacy

Reflection Essay

The first half of my paper reread the tort of intrusion upon seclusion, as it was adopted in *Jones v Tsige* (ONCA 2012), to include a fuller account of online privacy. The facts of the case addressed cyber-harassment – one woman snooping around in the online banking records of another – and the Court took this opportunity to reflect on the nature of privacy harms in a digital era. The cyberspace context was said to make information especially at risk and thus the ONCA read modern intrusions as exclusively affecting a person's information. I saw this emphasis on informational harm as an unnecessary limitation on what it means to be intruded upon in a cyber context. I proposed that the stress upon information forfeits a more dynamic and 'spatialized' conception of the harms at stake within this privacy tort.

Building on this critique, I developed a relational account of spatial privacy using three categories of experience: bodily habits, narration, and experimentation. I began by looking at Iris Marion Young's essay on seniors' residences ("A Room of One's Own: Old Age, Extended Care, and Privacy") – in which she observes privacy in the embodied spatial habits that her stepfather stood to lose as he transitioned to a nursing home. From there, I looked more closely at Virginia Woolf's *A Room of One's Own*, as well as Jennifer Nedelsky's book *Law's Relations*. Based on a close reading of these three works, I developed an account of relational space based on three features – embodied habits, narrative, and experimentation – which I proposed as a kind of supplement to the informational reading of privacy in *Jones.* This became the basis for the first part of my paper.

The second part of my paper argued that a spatial reading of privacy is especially important for young people who are native to the digital context and who are often the target of legal initiatives around cyber harm. While *Jones* is not a case about young people, I nonetheless took the Court's emphasis on digital technology as an invitation to reflect on young people's privacy. Using different accounts of young people's online experience, I proposed that while privacy is certainly transformed by the online world, its basic spatial features have not changed as dramatically as the Court in *Jones* suggested.

Moreover, I argued that the features of online privacy are further blunted by a broader cultural tendency to conceive of the Internet as a space of hazard and risk. These risks include old-fashioned ones like bullying or sexual predation. And they also include some unique to the online world, such as loss of data privacy to corporate trackers or lifelong reputational damage from intimate information posted and shared. Faced with these potential harms, I noticed a persistent sense among adults (including myself) that young people don't know what's good for them and that their online behaviour must be supervised and controlled. This emphasis on protecting young people's information loses sight of why these spaces are sought after to begin with. Having grown up without the Internet, I was motivated by a desire to understand better what young people seek

when they go online. This felt especially important after having a child last summer and finding myself fearful for her digitalized future. In writing the paper, I tried to work against my own preconceptions – and against unspoken tendencies to fear young people and find their experiences unruly and strange.

Finally, I looked to other civil liability contexts featuring young people to see how their privacy was treated. I came across Nova Scotia's recent *Intimate Images and Cyber- protection Act* (SNS 2017) and noticed that young people's privacy was entirely absent, at least in the way I understood it. The Act even goes as far as compromising young people's privacy by portraying the parent as the direct supervisor of their child's online activity. If a child is accused of cyber-bullying, for instance, the parent is automatically the respondent, the assumption being that they had not properly supervised the child at the time of the alleged harm.

I argued that civil liability initiatives such as these inevitably shape the way that parents and children understand responsibility and harm. Such initiatives also make it hard to see how privacy and its corresponding freedoms emerge through a difficult negotiation with other important relations in our lives, including and especially with our parents. For this last part of the paper, I turned to Sara Ahmed's book *Living a Feminist Life* (2017) to draw out the way that a parent's expectations for their child's futurity can weigh a child down, pressing them into some image of the good life they have not chosen. Against these expectations, a child finds their own direction, experimenting with alternative spaces in which to express their developing sense of self.

This challenge – of the child carving out a sense of personal space against a parent's persistent meddling – expresses perhaps most clearly my point that a sense of space only emerges through relations with others. In a digitalized environment, children also seek out opportunities to experiment, take risks, communicate with their friends, without feeling the pressure of adult norms. How to develop and foster healthy and constructive relationships is part of growing up but it cannot happen without some distance from the watchful eyes of parents. This is already presumed with analog experience; in a physical playground, a parent doesn't usually hover over a child's every movement, even when they know that children often learn responsibility the hard way – through harming and being harmed. Ultimately, I argued that such extensions of analog experience into the law's interpretation of digitalized environments are necessary if we are to avoid demonizing cyberspace at young people's expense.

Annotated Bibliography

Bailey, Jane, "Canadian Legal Approaches to 'Cyberbullying' and Cyberviolence: An Overview" (September 20, 2016) Ottawa Faculty of Law Working Paper No. 2016-37.

Bailey provides an overview of legal responses to online harassment and violence at the national, provincial, and territorial level. She notes a policy shift from the earnest attempts to connect people online in the mid-1990s to an increasingly negative focus on the potential dangers of the Internet as the decade progressed. She argues for the necessity of a multi-pronged approach to

cyber-violence, focusing in particular on human rights and education law (although she also covers the approaches taken by civil, administrative/regulatory, and criminal law).

Barassi, Veronica, "Datafied Citizens in the Age of Coerced Digital Participation" *Sociological Research Online* 2019, Vol. 24(3) 414–429.
Barassi argues that in the current context of surveillance capitalism, a new type of datafied citizenship has emerged. Online digital profiling blurs the line between individuals as consumers and as citizens in a process that Barassi dubs coerced digital participation. Barassi uses children as a case study since they are the first generation to have been datafied from before they were born, without their consent or control. Barassi draws on her larger ethnographic project (Child / Data / Citizen) to draw out the implications of what she describes as the datafication of children in terms of children's rights, particularly their right to privacy.

boyd, danah, *It's Complicated: The Social Lives of Networked Teens* New Haven: Yale University Press, 2014).
Based on her extensive fieldwork interviewing American teenagers, boyd dispels many myths about young people online. She addresses the fear-mongering around the Internet in popular discourse, arguing that it damages young peoples' chances of becoming active and engaged citizens in a cyber context. She examines young people's experiences from a number of angles, including privacy, identity, and bullying.

Lauritanio-Werner, Bly, "The Effort to Keep an Online Diary Private" (July 24 2006), online: *NPR Youth Radio* https://www.npr.org/templates/story/story.php?storyId=5579002.
In this short episode for *NPR Youth Radio*, Bly Lauritanio-Werner and her mother discuss Bly's mother's reading of her online diary. The two express very different views over whether or not something posted online – in this case, an online journal open to select friends – is public or private.

Livingstone et al, Sonia, *Children's Data and Privacy Online: Growing up in a Digital Age, An Evidence Review* (December 2018) *LSE Media and Communications.*
Livingstone et al. provide an extensive review of existing knowledge on children's data and their right to online privacy. They include an assessment of research gaps in the literature and suggest possible avenues for future policy. The authors identify a key challenge as balancing the need to preserve children's online autonomy with the need to protect children's data from unwanted invasions of privacy by corporate trackers and other third parties.

Madden, Mary et al, "Teens, Social Media, and Privacy" (May 21 2013) online: *PEW Research Centre* http://pewinternet.org/Reports/2013/Teens-Social-Media-And-Privacy.aspx
This report presents the findings from a survey of 802 teenagers on how teenagers manage privacy on their social media sites. It was found that while teenagers do share more widely than before, most do use various means to protect their privacy, including restricting access to their profiles, masking their information, and shaping what people know about them. It was found that their primary motivation tends to be how they appear to friends and family, not a concern with avoiding third party trackers.

Russell, Legacy, *Glitch Feminism: A Manifesto* (New York: Verso, 2020).
In this manifesto of cyberfeminism, Russell describes how online spaces facilitate experimentation with identity and the self. A glitch, in her account, is the way in which these spaces allow for a liberatory break with traditional conceptions of gender, technology, and the body. Russell illustrates her argument with a number of contemporary artists whose work explores the ability to experiment with various identities online.

Third, Amanda et al, *Young People in Digital Society: Control Shift* (London: Palgrave Macmillan, 2019).
Third et al. conducted fieldwork with Australian youth aged 12–25 on their experiences of digital environments. Third et al. argue that control paradigm has emerged, according to which younger people are in need of constraint as they navigate a new and supposedly dangerous cyber world. This control paradigm has begun to affect how young people themselves understand the online world. The authors attempt to dispel many of the anxieties around the youth and the Internet, pointing to the many opportunities afforded by digital contexts for both younger and older generations.

Young adult literary magazines:

There are numerous literary magazines for young adult writers, which I found to be helpful guides to young people's experience as I was doing research for this paper. For instance:

Polyphony Lit
https://www.polyphonylit.org/vol16fall2020/snapshot
Founded in 2004, this magazine provides a global online platform for high school writers of poetry, fiction, and creative non-fiction.
The Adroit Journal
Founded in 2010, the Adroit Journal publishes art, prose, and poetry by emerging high school or undergraduate writers and artists.
The Voyage Journal
https://thevoyagejournal.com/about/
This journal publishes fiction and non-fiction about young adults, but doesn't limit their publications to children under 18.

For a more detailed list, see: https://curiosityneverkilledthewriter.com/17-literary-magazines-accepting-submissions-from-young-writers-474b9eed51cf