

2016

Government Efforts to Address Bullying in Canada: Any Place for Children's Rights?

Mona Paré

Tara Collins

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/jlsp>

Citation Information

Paré, Mona and Collins, Tara. "Government Efforts to Address Bullying in Canada: Any Place for Children's Rights?." *Journal of Law and Social Policy* 25. (2016): 54-77.

<http://digitalcommons.osgoode.yorku.ca/jlsp/vol25/iss1/3>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

Government Efforts to Address Bullying in Canada: Any Place for Children's Rights?

MONA PARÉ & TARA COLLINS*

Au Canada, les gouvernements ont récemment intensifié leurs efforts pour combattre l'intimidation dans les écoles, principalement en adoptant des lois et des politiques. Cet article examine ces mesures en utilisant le cadre d'analyse des droits de l'enfant et en se fondant sur les obligations juridiques internationales du Canada. Il explore l'utilisation du langage des droits de l'enfant et des droits de la personne dans le contexte de ces efforts, ainsi que le contenu de la législation et des politiques. Les principes fondamentaux des droits de l'enfant orientent cette analyse : la non discrimination, l'intérêt supérieur de l'enfant, le droit à la survie et au développement de l'enfant, et le respect des opinions de l'enfant. Les conclusions de l'article démontrent la présence fragmentée des droits de l'enfant dans les efforts provinciaux et leur absence dans les efforts fédéraux. Les auteures soutiennent que l'inclusion explicite des droits de l'enfant dans la législation en matière d'éducation est une étape minimale pour assurer une application plus uniforme et systématique des droits de l'enfant dans toutes les initiatives contre l'intimidation.

Recently, governments in Canada have increased efforts to address bullying in schools primarily through the adoption of laws and policies. This paper examines these measures using a child rights framework, based on Canada's international legal obligations. It examines the language of child rights and human rights that is present in these efforts, as well as the content of legislation and policies. Analysis is guided by the main child rights principles: non-discrimination, the best interests of the child, the child's right to survival and development, and respect for the views of the child. The findings point to a fragmented presence of child rights in provincial efforts and their absence in federal efforts. The authors contend that the explicit inclusion of child rights in education legislation is a minimal step to ensure a more uniform and systematic application of child rights in all anti-bullying initiatives.

BULLYING AT SCHOOL IS AN OLD PHENOMENON, but it was not until about the 1990s that it became a subject of research among academics in Canada and around the world.¹ While research results on bullying have been available for at least three decades, it is mostly in the last decade that governments have started or increased efforts to address bullying in schools.

At the government level, responses to bullying are generally embedded in three types of laws and policies, most of which have resulted in changes to provincial education legislation.

* Mona Paré is Associate Professor at the Faculty of Law, Civil Law Section, University of Ottawa; Tara Collins is Assistant Professor at the School of Child and Youth Care, Ryerson University. They would like to acknowledge the research assistance of Danny Nguyen, Tate Chong and Pierre Rogué, and thank the Advisory Committee, interviewees, and focus group participants for their contribution to this project. This research was supported by the Social Sciences and Humanities Research Council of Canada.

¹Dan Olweus & Susan Limber, "Bullying in School: Evaluation and Dissemination of the Olweus Bullying Prevention Program" (2010) 80:1 *American J of Orthopsychiatry* 124.

First, there are safe schools policies that address bullying among other forms of violence, and that tend to focus on responses to inappropriate behaviour. These policies may include “zero tolerance” approaches to discipline, increased surveillance and security measures, and the adoption of codes of conduct. Second, and often in parallel, there are equity and diversity policies, which deal with prevention by enhancing a positive school atmosphere. Such policies are focused on anti-discrimination measures that indirectly address causes and consequences of bullying. Measures may include changes to the curriculum to be more inclusive of various minority groups, school events that foster a common sense of belonging, character development programs, and religious accommodation. Third, since 2012, many provinces have started tackling bullying in a more targeted way by adopting specific anti-bullying policies and legislation. Ontario and Quebec adopted extensive anti-bullying legislation in 2012. Nova Scotia adopted cyberbullying legislation in 2013. Many provinces and territories, including Manitoba, Alberta, New Brunswick, Nova Scotia, Newfoundland and Labrador, and the Northwest Territories, made amendments to their education legislation to include bullying related provisions. Provinces and territories that chose not to legislate, such as British Columbia, Saskatchewan and Yukon, adopted policies instead. At the federal level, the government adopted cyberbullying legislation through amendments to the *Criminal Code* in 2014.

This paper chooses children’s rights as the framework of analysis for laws and policies on bullying. As a state party to the United Nations Convention on the Rights of the Child (CRC), Canada is obliged under international law to conform its laws and policies to this treaty.² This is notwithstanding the fact that Canada follows a dualist legal system, which does not allow for direct applicability of non-incorporated international treaties by domestic courts. Even without incorporation into national law, international human rights treaties must be implemented in good faith, in accordance with the “pacta sunt servanda principle,”³ and this may be done in a variety of ways through legal, administrative, budgetary, and other measures. Interestingly, interviews with government representatives from Canadian provinces and analysis of relevant policy documents demonstrate that current provincial anti-bullying efforts are understood by these representatives to be measures that help apply children’s rights in the education context. Anti-bullying initiatives can therefore be considered as measures to implement Canada’s obligations under the CRC. Hence, it is appropriate to use child rights as a yardstick to measure these efforts, highlighting commonalities and differences within that framework. A children’s rights focus, within a larger human rights framework, is essential as it allows considering the rights of all children involved, including the victim and the bully, as well as addressing the duties of a variety of actors, including schools and governments.⁴

This paper thus examines the main legislative and policy efforts taken across Canada, at the federal and provincial/ territorial levels, through the lens of children’s rights. However, as efforts at the federal level have been minimal, the focus is on laws and policies adopted by provincial governments. Due to the decentralized nature of education in Canada, this paper does not discuss policies adopted by school boards and by schools. For example, in Ontario alone there are seventy-two school boards, each adopting their own policies, and each school board is

² Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, art 4 (entered into force 2 September 1990) [CRC].

³ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol 1155, art 26.

⁴ See the child rights analysis in Mona Paré, Tara Collins & Miad Ranjbar, “Canadian Bullying and Cyberbullying Research, Laws and Policies – Introducing a child rights perspective” (Paper delivered at Canadian Association for the Practical Study of Law in Education Conference “Equality in Law and Education: The Small Under the Protection of the Great”) [forthcoming].

responsible for many schools, often numbering over one hundred. While school board policies must conform to provincial policies, there are great differences in the nature and number of initiatives taken to prevent and combat bullying. It would therefore be difficult to justify the choice of one school board as an example over another. Moreover, the aim of this paper is not to monitor application of provincial policies, but to provide analysis of a broad section of laws and policies applying to bullying in Canada. The only exception in this study is Prince Edward Island (PEI), as it has not yet adopted a law or a policy related to bullying. PEI has two school boards—an English language school board and a French language school board—thus the policies of these two boards are included in the analysis as representative of the province’s efforts to combat bullying.

The policy analysis was completed through review of interview transcripts from eight representatives from provincial and territorial ministries of education, who participated in interviews with the co-authors between April 2014 and March 2015.⁵ References to interviews in this article refer to these interviews collectively, unless otherwise specified. Interviews were based on a set of thirteen questions covering the interviewees’ definition of school violence, their experience in developing, implementing or evaluating anti-violence initiatives, their views on the effectiveness of current anti-violence programs, the role of various actors, and their knowledge of children’s rights. Eight representatives from civil society, four from academia, and three from the offices of provincial child advocates were also interviewed, and the findings are included here where relevant to legislation and policy. It is to be noted that only four of the non-governmental interviewees made reference to specific laws or policies. There was no great dissonance in the interviewees’ thoughts and experiences related to anti-violence or anti-bullying efforts. It was generally found that government actors had a wide understanding of violence, comprising, *inter alia*, different forms of bullying. Nonetheless, some dissociated violence from bullying, while others considered bullying a form of violence. Some participants spoke of the need to avoid the term “bullying,” which can be stigmatizing or lead to limited and reactive responses. They shared the view that a complex problem requires a multi-pronged approach, involving many actors, preferably the whole community. Interviewees also all felt that child rights were relevant to anti-violence efforts, but they demonstrated varying levels of familiarity with children’s rights.

At the international level, bullying is considered to be a violation of children’s right to be protected from all forms of violence.⁶ According to Peter Smith, a consensual academic definition of bullying also identifies bullying as violent action: “bullying is aggressive behaviour which intentionally hurts or harms another person; together with repetition ...; and a power imbalance such that it is difficult for the victim to defend him- or herself. A succinct definition is the ‘systematic abuse of power’.”⁷ Some authors expressly identify examples of forms of bullying, and these include “physical aggression, such as beating, kicking, shoving, and sexual touching ... [being] excluded from peer groups, stalked, stared at, gossiped about, verbally threatened and harassed.”⁸ As for cyberbullying, it has been defined as “using electronic means

⁵ Transcripts on file with the authors.

⁶ Committee on the Rights of the Child, General Comment No 13, The Right of the Child to Freedom from all Forms of Violence, 18 April 2011, CRC/C/GC/13 [General Comment 13].

⁷ Peter K Smith, “Bullying and Harassment in Schools and the Rights of Children” (2000) 14:4 *Children & Society* 294 at 294-95.

⁸ Shaheen Shariff, “Cyber Dilemmas in the New Millennium: School Obligations to Provide Student Safety in a Virtual School Environment” (2005) 40:3 *McGill J Education* 457 at 458.

to harm intentionally an intended target (victim),”⁹ and can include the use of “cell-phones, websites, web-cams, chat rooms, and email ... MUD rooms ... [and] sexual photographs.”¹⁰ The elements of aggression and harm are always found in legal definitions of bullying. However, governments draw on existing research in different ways, and to varying extent. For example, there are differences between the main elements of bullying chosen by provinces, some preferring to include or omit elements that have been repeatedly identified by researchers, such as intention, repetition and power imbalance.¹¹ Generally, one can note from a review of legislation that government definitions attempt to provide more inclusive definitions than the ones suggested by researchers by responding to a variety of considerations, including human rights legislation.¹²

Building on these findings, the paper first examines the place of child rights and human rights in literature and policy documents related to anti-bullying efforts, child rights being considered as part of human rights. The use of human rights language in policy evaluation research and in provincial/territorial laws and policies is particularly of interest. This first part provides a portrait of the use of rights in government initiatives: the types of rights present in legislation and policies, as well as the frequency with which they appear in legislation and policies. In the second part, the paper assesses conformity of anti-violence laws and policies with the general principles of the CRC, thus using a child rights lens more specifically. Most of these principles find resonance in Canadian legislation, and therefore they may be considered as legal principles. They are the principles of non-discrimination, the best interests of the child, the child’s right to survival and development, and respect for the views of the child. Many other articles from the Convention would be relevant in view of the development of child rights-based anti-violence measures, such as article 19 on the protection of children from violence, and articles 28 and 29 on education.¹³ However, it is not the purpose of this paper to fully define a child rights-based approach to violence in school;¹⁴ rather, it refers to internationally recognized principles that guide the application of all children’s rights, and proceeds to an original content analysis of current legislative and policy efforts. On this basis, a few recommendations are made in the conclusion, namely the need for greater involvement by the federal government and better coordination between provinces and territories, the adoption of comprehensive anti-bullying laws, as well as the inclusion of child rights principles in education laws.

I. THE LANGUAGE OF CHILD RIGHTS AND HUMAN RIGHTS IN LITERATURE, LAWS AND POLICIES

This part examines the place and use of child rights and human rights language first in the literature on bullying and then in anti-bullying laws and policies. Child rights and human rights

⁹ Rina A Bonanno & Shelley Hymel, “Cyberbullying and Internalizing Difficulties: Above and Beyond the Impact of Traditional Forms of Bullying” (2013) 42 J Youth and Adolescence 685 at 685.

¹⁰ Shariff, *supra* note 8 at 459.

¹¹ See *e.g.* *Education Act*, SA 2012, c E-0.3, s 1(1)(d); *Education Act*, CQLR c I-13.3, s 13(1.1); *The Public Schools Act*, CCSM c P-250, s 1.2(2)(a). For a review of definitions in laws and policies, see Paré, Collins & Ranjbar, *supra* note 4.

¹² Mona Paré, “Inclusion of Students with Disabilities in the age of Technology: Need for Human Rights Guidance” (2012) 22:1 Educ & LJ 39.

¹³ CRC, *supra* note 2, at arts 19, 28, 29.

¹⁴ This is being currently developed by the authors and will be published later.

are discussed together, yet highlighted separately. The reason for this is two-pronged. First, general human rights do not adequately take into consideration children's special status as developing human beings who are mostly dependant on adults, and who have multiple development needs. Because of these specific factors, it is preferable to consider children's rights more particularly when discussing human rights in relation to children, hence the special focus on children's rights in this paper. However, it is also important to recognize that children enjoy general human rights, and that children's rights are part of human rights. Thus, general human rights are considered to apply equally to children. Second, human rights tend to be better known, understood, and accepted than children's rights. They are also included in the Constitution and in federal and provincial legislation. Therefore, in the absence of data on specific child rights, the presence of human rights language will be highlighted.

A. CHILD RIGHTS AND HUMAN RIGHTS IN LITERATURE ON BULLYING

Child rights and human rights have been increasingly discussed as relevant to bullying. Smith has argued that the development of research in this area is partly due to a growing consciousness of human rights.¹⁵ There seems to be an understanding that the adverse consequences that bullying can have on individual children cannot be consistent with children's human rights.¹⁶ While human rights are sometimes discussed in relation to different topics, such as bullying prevention¹⁷ or the legal consequences of bullying and conflicting rights,¹⁸ human rights are rarely used to analyze anti-bullying laws and policies. Without proceeding to an actual policy evaluation, some authors specifically mention zero tolerance policies when discussing human rights. For example, Wanda Cassidy and Margaret Jackson criticize labelling and zero tolerance policies and practices as discriminatory, drawing on the *Canadian Charter of Rights and Freedoms*.¹⁹ According to these scholars, equity in education is denied to children who are pushed to drop out because of policies that label them. Similarly, Monique Lacharite and Zopito Marini criticize zero tolerance policies that have disproportionately affected racial minorities and children with disabilities.²⁰ In the American context, Greene finds fault with state laws on

¹⁵ Smith, *supra* note 7 at 295.

¹⁶ See Michael Greene, "Bullying in Schools: A Plea for Measure of Human Rights" (2006) 62:1 J Social Issues 63; and Olweus & Limber, *supra* note 1.

¹⁷ See e.g. Faye Mishna, "An Overview of the Evidence on Bullying Prevention and Intervention Programs" (2008) 8:4 Brief Treatment & Crisis Intervention 327; Monique Lacharite & Zopito A Marini, "Bullying Prevention and the Rights of Children: Psychological and Democratic Aspects" cited in Tom O'Neill & Dawn Zinga, eds, *Children's Rights - Multidisciplinary Approaches to Participation and Protection* (Toronto: University of Toronto Press, 2008) 297.

¹⁸ See e.g. Shariff, *supra* note 8; A Wayne Mackay & Janet Burt-Gerrans, "Student Freedom of Expression: Violent Content and the Safe School Balance" (2005) 40:3 McGill J Education 423.

¹⁹ Wanda Cassidy & Margaret Jackson, "The Need for Equality in Education: an Intersectionality Examination of Labeling and Zero Tolerance Practices" (2005) 40:3 McGill J Education 445.

²⁰ Lacharite & Marini, *supra* note 17. This refers to the *Ontario Safe Schools Act* of 2000, which was considered to encourage a "zero tolerance" approach by school boards. The Ontario Human Rights Commission published a report on the impact of the law on certain groups of children, and launched complaints against the Ministry of Education and the Toronto District School Board. As a result, the law was revised in 2007, making it mandatory to consider mitigating factors before imposing penalties, and providing flexibility for dealing with discipline on a case-by-case basis. See Ontario Human Rights Commission, "The Ontario Safe Schools Act: School Discipline and

bullying that are limited in scope, focusing exclusively on establishing anti-bullying policies, reporting instances of bullying, and sanctioning the perpetrator, instead of adopting a human rights framework.²¹

The work by Smith *et al* provides an exception to the absence of human rights in systematic policy evaluation.²² Their research evaluates schools' anti-bullying policies arising from the legal requirement that schools must adopt such a policy in England, in light of relevant governmental policy documents.²³ Some of these governmental directives reflect a special focus on racist, sexist, and homophobic bullying, as well as bullying that is related to disability or to religion,²⁴ thus demonstrating an understanding of the link between bullying and prohibited grounds for discrimination. Smith *et al* evaluated schools' policies based on whether they mentioned items included in the government policy documents, such as these different types of prejudice-based bullying.

Generally we have noticed that a link with human rights in literature is more apparent with prejudice-based bullying than other types of bullying. An example is Catherine Taylor's review of the Winnipeg School Division's "Human Rights/Anti-Homophobia" initiative that equates anti-homophobic education with human rights education.²⁵ The reason for the use of a human rights framework was to strengthen the anti-homophobia initiative. Combating homophobia in this case became a part of people's and institutions' responsibilities to fulfill their legal obligations vis-à-vis human rights legislation, and helped to avoid public criticism of the program. While the initiative was not without weaknesses, this example can be used to demonstrate that a human rights framework and human rights language can be employed to strengthen anti-bullying initiatives.

What a review of the literature demonstrates is that authors who mention human rights or child rights mostly make the point that bullying is a human rights issue, perhaps to draw attention to its seriousness. This also includes the message that anti-bullying efforts are more generally in line with human rights efforts. Aside from zero tolerance policies, nowhere in the literature have government anti-bullying efforts been criticized from a human rights perspective, for example as potentially violating children's human rights. Human rights are generally not used in research as a tool for analysis, and conformity of anti-bullying efforts with human rights is rarely questioned. We contend that it is important to initiate such an enquiry to find out how current policy efforts conform to Canada's international obligations and how child rights can inform anti-bullying laws and policies.

B. CHILD RIGHTS AND HUMAN RIGHTS IN LAWS AND POLICIES

1. THE FEDERAL GOVERNMENT RESPONSE

Discrimination," Ontario Human Rights Commission, 2003, online: < ohrc.on.ca/en/ontario-safe-schools-act-school-discipline-and-discrimination > [perma.cc/LP9H-BS3A].

²¹ Greene, *supra* note 16.

²² Peter K Smith et al, "A Content Analysis of School Anti-Bullying Policies: A Follow-Up After Six Years" (2012) 28:1 Educational Psychology in Practice 47.

²³ *Ibid* at 47.

²⁴ *Ibid* at 48.

²⁵ Catherine G Taylor, "A Human Rights Approach to Stopping Homophobic Bullying in Schools" (2007) 19:3-4 J Gay & Lesbian Social Services 157.

A rights-based vocabulary is absent from the efforts of the federal government, which have been minimal. The government's efforts focus on criminal law and the provision of information.²⁶ Isolated funding announcements concern specific civil society initiatives and international cooperation to help tackle school violence outside Canada.²⁷ The Canadian government misleadingly announced "holistic legislation" to fight cyberbullying.²⁸ Bill C-13, which was adopted in October 2014, barely addresses bullying and simply adds the non-consensual distribution of intimate images as a new crime in the *Criminal Code*.²⁹ No nation-wide anti-bullying strategy has been adopted, despite the federal government's predominant role in meeting Canada's international obligations. This is despite the fact that the Committee on the Rights of the Child, the United Nations monitoring body for the CRC, noted with concern the "widespread incidence of bullying" in Canadian schools.³⁰ While the federal government's legislative competence does not extend to education, federalism does not pose an insurmountable barrier to the application of international human rights treaties. The Committee on the Rights of the Child has repeatedly asked Canada to ensure that the Convention is applied consistently in all provinces and territories.³¹ In its latest observations, it recommended that Canada, "find the appropriate constitutional path to allow it to have in the whole territory ... including its provinces and territories, a comprehensive legal framework which fully incorporates the provisions of the Convention."³² To fulfill its international obligations, the government can include rights-respecting measures in the area of criminal justice; it can take an official stand on preventing bullying and responding to violent incidents; and, more specifically, it can coordinate efforts to avoid disparities in the application of human rights across the nation. A UNICEF report on Canada's implementation of general measures of the CRC notes the need for improved coordination between the federal government and the provinces. It gives examples of successful coordination efforts at the national level in the area of health, with the Health Council of Canada, composed of Ministers of Health of all the jurisdictions, and the Mental Health Commission of Canada, with members from federal and provincial governments, as well as from civil society.³³

²⁶ For the government's information efforts, see e.g. Canada, Royal Canadian Mounted Police, "Bullying and Cyberbullying" (Ottawa: RCMP, 16 April 2015), online: <rcmp-grc.gc.ca/cycp-cpcj/bull-inti/index-eng.htm> [perma.cc/6TEU-BBM3]; Canada, Government of Canada, "Bullying" (Ottawa: GC, 27 March 2015), online: <healthycanadians.gc.ca/healthy-living-vie-saine/bullying-intimidation/index-eng.php> [perma.cc/YTH2-ZQAB].

²⁷ See e.g. Canadian Red Cross, News Release, "Harper Government Preventing Youth Violence with New Online Tool" (30 April 2013), online: <redcross.ca/who-we-are/newsroom/news-releases/latest-news/harper-government-preventing-youth-violence-with-n> [perma.cc/4QD7-EXF2]; and Global Affairs Canada, Background, "Canada Announces Support to Help End Violence Against Children and Improve Children's Access to Education Worldwide" (20 November 2014), online:

<international.gc.ca/media/dev/news-communiqués/2014/11/20a_bg.aspx?lang=eng> [perma.cc/N9V4-JQFE].

²⁸ See e.g. Chinta Puxley, "MacKay says 'holistic' legislation to fight cyberbullying," *Global News* (26 September 2013), online: The Canadian Press <globalnews.ca/news/866068/mackay-says-holistic-legislation-to-fight-cyberbullying-coming/> [perma.cc/G9GR-3UQK].

²⁹ *Protecting Canadians from Online Crime Act*, RSC 1985, c C-46, s 3.

³⁰ *Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Periodic Report of Canada, adopted by the Committee at its sixty-first session*, 5 October 2012, CRC/C/CAN/CO/3-4 at para 69 [Concluding Observations 2012].

³¹ *Concluding Observations on the Committee of the Rights of the Child: Canada*, 24 and 26 May 1995, CRC/C/15/Add 37 at paras 9 and 20; *Committee on the Rights of the Child, Concluding Observations: Canada*, 17 September 2003, CRC/C/15/Add 215 at paras 10-11.

³² *Concluding Observations 2012*, *supra* note 30 at para 11.

³³ UNICEF, *Not There Yet: Canada's Implementation of the General Measures of the Convention on the Rights of the Child* (Florence: UNICEF Innocenti Research Centre and UNICEF-Canada, 2009) at 51-52 [Not There Yet].

Fiscal federalism also facilitates the role of the federal government to finance anti-violence measures beyond international development assistance in order to support consistent Convention implementation across the country and reduce violence in schools. In addition, the federal government can play a more robust role in relation to children's rights budgeting, not only in terms of allocations but also to track expenditures and facilitate evaluation of anti-violence outcomes for children's rights.³⁴ The federal government's failure to act in the area of violence in education can be considered a cause of harm to children.³⁵

2. THE PROVINCIAL GOVERNMENT RESPONSE

Examination of the text of policies and laws adopted by Canadian provinces shows that the vocabulary of child rights, or human rights, is used very sparingly by policy-makers. A rights-based vocabulary is not apparent generally, but it is more common in policies than in laws. The only province with a policy based explicitly on child rights is Saskatchewan. Its bullying prevention policy directly references the CRC, recognizing all rights of children, including the right to education, care, equitable opportunity, and freedom from discrimination.³⁶ Yukon also mentions the CRC among relevant legislation in its safe schools policy, specifically listing articles on non-discrimination, respect for the views of the child, freedom from violence, and education rights.³⁷ The rights included in these two policies are essential if one is to take child rights into account in anti-bullying efforts, but they are by no means an exhaustive list of relevant rights, nor are they presented in a detailed way to facilitate their application.

Other provinces do not mention child rights specifically, and refer to human rights instead. Moreover, they tend to adopt a narrow view of human rights, referring to their human rights codes. In these provincial codes, human rights are understood only as non-discrimination rights, as opposed to the range of human rights that are included in the international human rights conventions, including *inter alia* the rights to life, liberty, and security; privacy and reputation; freedom of expression and access to information; and health and education; which are all relevant to children in the context of anti-violence initiatives.³⁸ Often, the policies also refer secondarily to the *Canadian Charter of Rights and Freedoms* (hereafter *Canadian Charter*). Therefore, across the provinces, references to human rights, understood narrowly as non-discrimination rights, are usually linked to provisions on equity and inclusive education, diversity, multiculturalism, and religious accommodations. One example is New Brunswick's policy on *Positive Learning and Working Environment*, promoting a learning environment that respects human rights and requiring schools to include a statement on respecting human rights

³⁴ *Ibid* at 24.

³⁵ General Comment 13, *supra* note 6 at para 32.

³⁶ Saskatchewan, Saskatchewan Learning, *Caring and Respectful Schools – Bullying Prevention: A Model Policy* (Regina: Saskatchewan Learning, 2006), online: <education.gov.sk.ca/CARS> [perma.cc/9DJE-KB9N] [*Bullying Prevention*].

³⁷ Yukon Education, *Safe and Caring Schools Policy 1011* (Whitehorse: Yukon Education, 2008), online: <education.gov.yk.ca/pdf/policies/safe_caring_schools.pdf> [perma.cc/38DA-JACA] [*Yukon Policy 1011*].

³⁸ In the international context, these rights are not only included in the CRC, but also in the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*Civil and Political Rights*] and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 (entered into force 3 January 1976).

and supporting diversity in their plans.³⁹ While this policy references the *Canadian Charter*, in addition to the New Brunswick *Human Rights Code*, it only cites the *Charter's* section 15 guarantee of equality. Another example is Ontario's *Accepting Schools Act* (amending the *Education Act*), which requires every school board to develop and implement an equity and inclusive education policy.⁴⁰ Further, according to a related policy memorandum, the requirement to develop, implement, and monitor such a policy at the board level is designed to promote fundamental human rights as described in the *Ontario Human Rights Code* and the *Canadian Charter*.⁴¹ There is thus an explicit link between anti-violence efforts and implementation of human rights, as understood by the provinces, with an important focus on non-discrimination.

In addition to the right to be free from discrimination as a protected human right, some provincial policies recognize the right to be safe. This is enshrined in Ontario's *Code of Conduct* policy.⁴² It is not specifically mentioned as a children's right, but as one that concerns the whole school community. British Columbia's (BC) diversity policy is an interesting document in this regard. This policy refers to human rights as a key concept and defines them.⁴³ According to the diversity policy, elements of human rights include equality, fair treatment, non-discrimination, inclusion, and access. More specifically, it defines human rights as, "the provision for every individual to have the right to live, work, and learn in an environment free from fear, discrimination and harassment,"⁴⁴ freedom from fear corresponding to safety. Similarly to Ontario's *Code of Conduct*, the right to be safe thus applies to the school community as a whole. Particularly, the policy expressly recognizes safety as a human right, and combines it with non-discrimination. One can therefore assume that other BC policies, such as the *Safe, Caring and Orderly Schools* policy, refer to human rights in the same vein.⁴⁵ New Brunswick's policy on *Positive Learning and Working Environment* also groups safety, human rights, and non-discrimination with its related concepts (diversity, inclusiveness), but without clearly identifying safety as a right.⁴⁶ In Saskatchewan, policies also emphasize the right to safety, and suggest that all schools explicitly affirm the right of all children and youth to a caring, respectful, and safe

³⁹ New Brunswick, Department of Education and Early Childhood Development, *Policy 703: Positive Learning and Working Environment* (Fredericton: NB Department of Education and Early Childhood Development, 1999), revised in 2013, online:

<web1.nbed.nb.ca/sites/ASD-W/HR/Policies/Policy%20703%20-%20Positive%20Learning%20and%20Working%20Environment.pdf> [perma.cc/NTA9-V9Q5] [*Policy 703*].

⁴⁰ Bill 13, *An Act to amend the Education Act with respect to bullying and other matters*, 1st Sess, 40th Leg, Ontario, 2011 (assented to 19 June 2012) SO 2012 c 5 [Bill 13].

⁴¹ Ontario, Ministry of Education, "Developing and Implementing Equity and Inclusive Education Policies in Ontario Schools," Policy/program memorandum 119 (Toronto: Ontario Ministry of Education, 22 April 2013), online: <edu.gov.on.ca/extra/eng/ppm/119.pdf> [perma.cc/46UF-CW7C] [PPM 119].

⁴² Ontario, Ministry of Education, "Provincial Code of Conduct," Policy/program memorandum 128: (Toronto: Ontario Ministry of Education 5 December 2012), online: <edu.gov.on.ca/extra/eng/ppm/128.pdf> [perma.cc/CWJ8-JQKL] [PPM 128].

⁴³ British Columbia, Ministry of Education, *Diversity in BC Schools: A Framework*, November 2008 update (Vancouver: BC Ministry of Education, 2004), online: <bced.gov.bc.ca/diversity/diversity_framework.pdf> [*Diversity in BC Schools*].

⁴⁴ *Ibid* at 11.

⁴⁵ British Columbia, Ministry of Education, *Safe, Caring and Orderly Schools: A Guide*, (Vancouver: BC Ministry of Education, 2008), online: <bced.gov.bc.ca/sco/guide/scoguide.pdf> [perma.cc/3347-KT3M] [*Safe, Caring and Orderly Schools*].

⁴⁶ *Policy 703*, *supra* note 39.

school environment.⁴⁷ Together with the principle of non-discrimination, the right to safety is thus expressly recognized in policy documents, and it is the only right that has been consistently identified by government representatives interviewed for this project. It is interesting to note the multiple references to the right to be safe, as this right is not expressly included in international treaties or in domestic human rights legislation. Referring to safety may indicate a common understanding of the essence of relevant rights, such as freedom from discrimination, and the right of the child to be free from all forms of violence.⁴⁸ It also points to a protectionist approach to child rights, which may negate the legal protection of children's rights as human rights.⁴⁹

Another way in which Canadian anti-violence policies depart from most international human rights instruments is that they give members of the school community an important role in defending and respecting human rights. In international law, rights-based approaches imply the understanding that individuals are rights-holders while States are duty-bearers.⁵⁰ Responsibilities of individuals thus have an insignificant place in the protection of human rights, except in some regional contexts.⁵¹ Most Canadian policies studied here outline the responsibilities of individuals in return for the recognition of their rights. As mentioned, Ontario's *Code of Conduct* recognizes the right to be safe for all members of the school community. It then links this right to a corresponding responsibility to contribute to a positive school climate. The same policy document requires that students be treated with respect and dignity, dignity being an essential concept supporting human rights. "In return [they] must demonstrate respect for themselves [and] for others."⁵² Similarly, in New Brunswick it is a duty of a student to respect the rights of others.⁵³ Other examples include the BC safe schools policy, which states: "All members of the school community are informed about and exercise their rights and responsibilities as school citizens."⁵⁴ It suggests that the statement of purpose to be included in all codes of conduct be "to establish and maintain appropriate balances among individual and collective rights, freedoms and responsibilities."⁵⁵ In addition, members of the school community

⁴⁷ Saskatchewan, Saskatchewan Learning, *Caring and Respectful Schools – Ensuring -Student Well-Being and Educational Success*, (Regina: 2004), online: <education.gov.sk.ca/CARS> [perma.cc/3ZKT-EGJE] [*Caring and Respectful Schools*] recognizes the right of all members of the community to a safe school environment, while *Bullying Prevention*, *supra* note 36, focuses on the rights of children specifically.

⁴⁸ CRC, *supra* note 2, art 19.

⁴⁹ Some authors find that positive rights, or the rights enshrined in the CRC, are not the best way to protect children (for discussions that followed the adoption of the CRC, see Onora O'Neill, "Children's Rights and Children's Lives" (1988) 98:3 *Ethics* 445; Laura M Purdy, "Why Children Shouldn't Have Equal Rights" (1994) 2 *International J Children's Rights* 223; Michael King, *A Better World for Children?: Explorations in Morality and Authority* (London: Routledge, 1997); Bruce Hafen & Jonathan Hafen, "Abandoning Children to their Autonomy: the United Nations Convention on the Rights of the Child" (1996) 37:2 *Harv Intl L J* 449). It could be stated that the right to be safe is not a positive right, as it is not expressly protected by human rights law. It could be considered as a moral or a natural right, thereby falling outside of the ambit of the legal protection of children's rights.

⁵⁰ See e.g. "The Human Rights Based Approach: Statement of Common Understanding," Developed at the Inter-Agency Workshop on a human rights based approach in the context of UN reform, 3-5- May 2003, online: <undg.org/main/undg_document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/> [perma.cc/6E7V-CYLD].

⁵¹ See especially the *African (Banjul) Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, c 2, (entered into force 21 October 1986), and the *American Convention on Human Rights "Pact of San Jose, Costa Rica,"* 22 November 1969, art 32 (entered into force 18 July 1978).

⁵² PPM 128, *supra* note 42 at 6.

⁵³ *Policy 703*, *supra* note 39.

⁵⁴ *Safe, Caring and Orderly Schools*, *supra* note 45 at 13.

⁵⁵ *Ibid* at 17.

are required to defend human rights. Linking rights with responsibilities, and especially emphasizing responsibilities, is symptomatic of the school context in Canada.

3. MOVING BEYOND LIMITED APPROACHES

Canada has missed many opportunities to better root its anti-violence laws and policies in a human rights-based approach. The federal government has failed to provide any leadership in this area. Some provinces, such as Alberta and Newfoundland and Labrador, fail to mention human rights in their anti-bullying policies. Others mainly refer to their provincial human rights codes, and simply link rights with non-discrimination and its related concepts, instead of relying on the relevant procedural and substantive guarantees present in human rights instruments.⁵⁶ British Columbia provides an exception, as it is the only province that not only defines human rights, albeit restrictively, but also has a policy that outlines a human rights-based approach. BC's diversity policy recognizes that "human rights emphasize the rights of the individual, the responsibilities of employers and service providers, and the need for preventive action."⁵⁷ Furthermore, it explains that "human rights policy goals generally focus on prevention, remedial action and correction."⁵⁸ This approach has many similarities with human rights-based approaches at the international level.⁵⁹ However, no province has established a requirement for human rights education or for anti-violence efforts to be specifically respectful of human rights, other than the required conformity with the provincial human rights code and with some regard to section 15 of the *Canadian Charter*. There is clearly a lack of knowledge of international law at the provincial level and misunderstanding of the fact that the CRC applies to all Canadian jurisdictions, not only to the action of the federal government. While only the federal government can be held responsible for failure to implement a treaty under international law, the CRC applies to the whole Canadian territory. It would be rendered meaningless if the governments responsible for the areas covered by the CRC, such as education, had a secondary role in its implementation. In fact, the federal government consults with provinces and territories before ratifying an international treaty, and all jurisdictions examine the general conformity of their laws before giving their assent to ratification. As the aforementioned UNICEF report underlines:

Most issues relating to children fall under provincial jurisdiction, so there is a concern that the federal government may not fulfil its responsibility However, provincial governments – once they have signalled their assent to ratification, and in spite of the fact that they continue to prepare regular reports that are included in the federal government's periodic reports to the Committee on the Rights of the Child – tend to see the Convention as a federal, rather than a provincial responsibility.⁶⁰

This first part of the study demonstrated that child rights and human rights are used sparingly, albeit increasingly, in literature, and in laws and policies related to bullying across the

⁵⁶ At the minimum the fundamental freedoms and the legal rights in the *Canadian Charter*, and corresponding rights in the *International Covenant on Civil and Political Rights*, *supra* note 38.

⁵⁷ *Diversity in BC Schools*, *supra* note 43 at 11.

⁵⁸ *Ibid.*

⁵⁹ See e.g. CRC, *supra* note 2, art 19(2).

⁶⁰ *Not There Yet*, *supra* note 33 at 58.

country. When the terms appear, they are not used in a systematic way, and they tend to be interpreted in a limited manner. They are not embedded in a holistic, human rights-based approach that requires human rights education for all and that views children as rights-holders and governments as duty-bearers; instead, rights are sometimes considered as conditional upon children respecting their responsibilities. However, the simple examination of the presence of human rights language is not sufficient to evaluate the conformity of laws and policies to children's rights, and the use of substantial child rights principles is necessary to examine the contents of government documents.

II. THE GENERAL PRINCIPLES OF THE RIGHTS OF THE CHILD AS A BASIS FOR LEGAL ANALYSIS OF ANTI-BULLYING LAWS AND POLICIES

All Canadian laws and policies that address bullying have been reviewed as part of this study, and they are analyzed here, inasmuch as they relate to the principles of the rights of the child: non-discrimination, the best interests of the child, the child's survival and development, and respect for the views of the child. These are rights that have been identified by the Committee on the Rights of the Child as guiding principles that must inform the implementation of all children's human rights.⁶¹ Given the status of these rights as general principles, and most being legal principles in Canada, we therefore suggest that they can be effectively used as a basis for a legal analysis of anti-bullying laws and policies.

A. NON-DISCRIMINATION

Article 2 of the CRC asks States to ensure the rights protected by the convention to all children without discrimination, "irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status," and to protect the child against all forms of discrimination or punishment "on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."⁶²

Among the principles of the CRC, it would seem logical to expect non-discrimination to be the one that is most present in anti-violence legislation and policies. After all, each province has an anti-discrimination law, and thus the right to non-discrimination enjoys quasi-constitutional and constitutional protection, as well as strong protection by the courts. Surprisingly, direct references to non-discrimination are few in bullying-related laws across the provinces, while many indirect references are present in policies.

The concept of non-discrimination is mostly found in reference to diversity and inclusion. Examples of such indirect references to non-discrimination include New Brunswick's previously mentioned policy on *Positive Learning and Working Environment*, and one on *Inclusive Education*.⁶³ More explicitly, British Columbia's ERASE bullying strategy aims to ensure that

⁶¹ First identified in Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content of Initial Reports*, UN Doc CRC/C/5, 1991, and used in all subsequent documents.

⁶² CRC, *supra* note 2, art 2.

⁶³ Respectively, *Policy 703*, *supra* note 39, and New Brunswick, Department of Education and Early Childhood Development, *Policy 322: Inclusive Education* (2013), online:

every child feels safe, accepted, and respected, regardless of their gender, race, culture, religion, or sexual orientation.⁶⁴ Laws sometimes mandate school boards to develop an equity and inclusive education policy or, more generally, to promote a positive, safe, and inclusive school environment. For example, Manitoba's *Public Schools Amendment Act* requires school boards to establish a human diversity policy to promote a safe and inclusive learning environment with acceptance and respect for others and to address strategies for promoting respect for human diversity.⁶⁵ When developing a respect for human diversity policy, boards must have due regard for the principles of the *Human Rights Code*.⁶⁶ In Ontario, in addition to developing and implementing an equity and inclusive education policy, school boards must also promote a positive school climate "that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability."⁶⁷ Thus, diversity and inclusion are well-established principles, and their use seems to be the preferred way to include the principle of non-discrimination in preventive anti-bullying strategies.

In addition to the general enunciation of the values of inclusion and diversity, some provincial laws and policies support specific preventative activities that are founded in the principle of non-discrimination. Specifically, student-led activities that focus on respect for others are encouraged, including promotion of gender equity, anti-racism, and respect for persons with disabilities and people of all sexual orientations. Ontario legislation specifically states that boards must support such activities that students want to establish and lead, and in particular gay-straight alliances must be allowed.⁶⁸ Similarly, the human diversity policies adopted by school boards in Manitoba must support students who want to establish activities that promote gender equity, antiracism, and respect for people with disabilities and people of all sexual orientations and gender identities. As in Ontario, the Manitoba law also clarifies that the name "gay-straight alliance" must be accepted.⁶⁹ In some provinces, such as in Nova Scotia and Newfoundland and Labrador, the requirement that the government support the development of gay-straight alliances is included in policies.⁷⁰

Prohibited grounds of discrimination that are apparent in provincial human rights acts are thus targeted by preventive activities that promote a positive and inclusive school environment. They also feature *a fortiori* in policies that address negative behaviour. For example, Quebec's Action Plan 2008-2011 provides for the preparation of reference tools on issues such as racism

<www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/policies-politiques/e/322A.pdf> [perma.cc/PMR6-56W9] [Policy 322].

⁶⁴ British Columbia Ministry of Education, ERASE (Expect Respect and a Safe Education) Bullying Strategy (2012), "Vision: Fostering Safe Schools and Preventing Bullying," online: <erasebullying.ca/policy/policy.php> [perma.cc/P4X9-4NMJ].

⁶⁵ Bill 18, *Public Schools Amendment Act (Safe and Inclusive Schools)* 2nd Sess, 40th Leg. Manitoba, 2012-13, s 41(1.6) [Bill 18].

⁶⁶ *Ibid*, s 41(1.7).

⁶⁷ Bill 13, *supra* note 40, s 2(1) and s 169.1(1).

⁶⁸ *Ibid*, s 12.

⁶⁹ Bill 18, *supra* note 65, s 41(1.8).

⁷⁰ See Nova Scotia, *Speak Up: An Action Plan to Address Bullying and Cyberbullying Behaviour* (2013), online: <antibullying.novascotia.ca/sites/default/files/R1240223-AntibullyingActionPlan-WEB2.pdf> [perma.cc/MUW7-ND45] [*Speak Up*] and Newfoundland and Labrador, Department of Education, *Safe and Caring Schools Policy* (2013), online: <ed.gov.nl.ca/edu/k12/studentsupportservices/publications/scs_prov_policy.pdf> [perma.cc/3P36-QKHU].

and homophobia.⁷¹ Quebec legislation also targets acts of violence that are based on prohibited grounds of discrimination. The law prescribes that anti-bullying and anti-violence plans adopted in schools must include, *inter alia*, preventive measures to put an end to all forms of bullying and violence, particularly those “motivated by racism or homophobia or targeting sexual orientation, sexual identity, a handicap or a physical characteristic.”⁷² Yukon’s safe schools policy links a safe school environment and non-discrimination by stating the need to address “any unwelcome behavior that degrade a person on the basis of personal characteristics, gender, sexual orientation, race or disability ... in order to maintain a safe and caring school environment.”⁷³ Explicit references to discrimination are also found in PEI’s school board policies, which challenge prejudice and discrimination.⁷⁴ One policy specifically requires that the school consistently convey messages to prevent bullying based, *inter alia*, on race, sexual orientation, sex, disability, ethnic origin, and socio-economic status.⁷⁵

These same grounds of discrimination are sometimes found in definitions of bullying. The laws of Ontario and the Northwest Territories are the ones that make the most direct reference to discrimination, as they connect bullying to power imbalances based on factors such as size, strength, age, intelligence, peer group power, economic status, social status, family status, religion, political belief, political association, sexual orientation, gender, gender identity, race, colour, ethnic origin, or disability.⁷⁶ These factors are certainly drawn from research findings on motivational bases of bullying.⁷⁷ However, only three interviewees mentioned power imbalances, and only one referred to bias-based discrimination.⁷⁸ This is perhaps because most provinces have not made the link between bullying and discrimination as clear. The Quebec Human Rights Commission has expressed disappointment at the absence of prohibited grounds of discrimination in the definition adopted in the *Act to stop and prevent bullying and violence in schools*, which also mentions power imbalances.⁷⁹

⁷¹ Quebec, Ministère de l’Éducation, du Loisir et du Sport, *Violence in the Schools: Let’s work on it together!* (2009), online: <mels.gouv.qc.ca/fileadmin/site_web/documents/dpse/formation_jeunes/ViolenceEcole_a.pdf> [perma.cc/P8WD-L676] [Action Plan].

⁷² Bill 56, *An Act to prevent and stop bullying and violence in schools*, 2nd Sess, 39th Leg. Quebec, 2012, s 24 [Bill 56].

⁷³ *Yukon Policy 1011*, *supra* note 37 at 1.

⁷⁴ See Eastern School District, *Race Relations, Cross Cultural Understanding and Human Rights Learning*, (7 April 2011), online: <gov.pe.ca/edu/elsb/files/2013/03/ihac_r.pdf> [perma.cc/3PPD-9ARY]; and Commission scolaire de langue française, *Équité ethnoculturelle et droits de la personne* (2009), online: <edu.pe.ca/cslf/documents/Les%20politiques/300%20-%20G%C3%89N%C3%89RAL/G%C3%89N-305.pdf> [perma.cc/75X6-ECCA] [Équité ethnoculturelle et droits de la personne].

⁷⁵ Commission scolaire de langue française, *Milieu scolaire exempt d’intimidation* (9 January 2013), online: <edu.pe.ca/cslf/documents/Les%20politiques/500%20-%20INSTRUCTION/INS-503.pdf> [perma.cc/25UC-C9CF].

⁷⁶ Bill 13, *supra* note 40, s 1(1) (b); and The Northwest Territories, Bill 12 *An Act to Amend the Education Act* (2013), s 2(1) (c).

⁷⁷ See e.g. Paul Smith & Katerina Ananiadou, “The nature of school bullying and the effectiveness of school-based interventions” (2003) 5:2 *Journal of Applied Psychoanalytic Studies* 189; Andrea Daley et al, “Traversing the Margins: Intersectionalities in the bullying of lesbians, gay, bisexual and transgender youth” (2007) 19:3 *Journal of Gay and Lesbian Social Services* 9; Bell Carter & Vicky Spencer, “The Fear Factor: Bullying and Students with Disabilities” (2006) 21:1 *International Journal of Special Education* 11.

⁷⁸ One government representative and two civil society representatives mentioned power imbalances, while one member of academia mentioned bias-based discrimination.

⁷⁹ Aurélie Lebrun & Karina Montminy, Commentaires sur le Projet de loi No 56, “*Loi visant à lutter contre l’intimidation et la violence à l’école*,” Commission des droits de la personne et des droits de la jeunesse (2012), online: <cdpdj.qc.ca/publications/memoire_pl_56_intimidation_violence_ecole.pdf> [perma.cc/K5WB-W528].

Other references to discrimination may be found in the choice of responses to bullying. A regulation pursuant to Ontario's *Education Act* addressing student safety and discipline requires taking into account mitigating factors when considering suspending a student, including whether the activity of the student was "related to any harassment of the pupil because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment."⁸⁰ The role of prohibited grounds of discrimination is thus to be considered in relation to the "bully" and not just the "victim." Moreover, the *Accepting Schools Act* (introducing reforms to Ontario's *Education Act*) stipulates that the purpose of behaviour, discipline, and safety in schools includes creating schools that are safe, inclusive, and accepting of all pupils, as well as encouraging a positive school climate, and preventing "inappropriate behaviour, including bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia and biphobia."⁸¹ Thus, the principle of non-discrimination justifies discipline and should also inform choices of discipline.

Examination of the contents of laws and policies against the principle of non-discrimination demonstrates that the principle is present in different forms. Most references are to equity, diversity, and inclusive education policies. Interviews with government representatives have confirmed that provinces increasingly resort to inclusive education policies as part of their anti-bullying efforts. Special attention is given to bias-based bullying that matches the prohibited grounds of discrimination in provincial human rights codes. However, the prohibited grounds of discrimination are generally and surprisingly not included in laws, and they are seldom mentioned as mitigating factors that should be taken into account when responding to bullying.

B. THE BEST INTERESTS OF THE CHILD

The best interest principle is perhaps the most influential of all child rights principles, as it ensures that: "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁸² This principle predates the CRC, and it is well rooted in Canadian law as a legal principle that applies to children. The Supreme Court of Canada has discussed the principle and its importance on multiple occasions. It has identified it as a universally recognized principle in family law, and has refuted claims that it may be unconstitutionally vague.⁸³ It has also affirmed that considerations of humanitarian and compassionate grounds in immigration and refugee procedures must take into account children's interests, not only because they are "central humanitarian and compassionate values in Canadian society,"⁸⁴ but also because their importance can be gleaned from international law.⁸⁵ However, the Court has failed to recognize the best interests principle as one of fundamental justice.⁸⁶ This may be due to a limited perception of the principle as one with having recognized content only in certain areas of law, instead of one with a wider procedural rationale, ensuring that children's interests are at least considered in all matters affecting them.

⁸⁰ O Reg 427/07, s 3 on *Behaviours, Discipline and Safety of Pupils*.

⁸¹ Bill 13, *supra* note 40, s 6.

⁸² CRC, *supra* note 2, art 3.1.

⁸³ *P (D) v S (C)*, [1993] 4 SCR 141.

⁸⁴ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para 67.

⁸⁵ *Ibid* at para 71.

⁸⁶ See *Canadian Foundation for Children, Youth and the Law v Canada*, 2004 SCC 4 at para 8-12.

The limited application of the best interests principle is apparent in the field of education, as it is rarely included in legislation and policies, and this may explain why only two government representatives referred to it in interviews. For example, the only reference to the best interests of the student that is relevant to violence in schools in Ontario legislation is in relation to the principal's obligation to notify a parent of a student who has been harmed, including through bullying. According to the *Education Act*, parents shall not be notified if the notification is not in the student's best interests.⁸⁷ In Quebec's *Education Act*, the only reference to the best interests principle is in relation to a particular aspect of disciplinary measures. When a principal considers suspension as a disciplinary measure in response to bullying, the student's best interests are to be taken into account when determining the duration of the suspension.⁸⁸ It is worth noting that these provisions in Ontario and Quebec preceded the anti-bullying legislation, and no provisions on best interests were included in amendments relating to bullying. Including the best interests principle in anti-bullying legislation that amends education legislation would have ensured that the principle is inserted into education statutes and that the best interests of each student is considered when responding to bullying.

When it comes to policies, Yukon's safe schools policy is the only one with a direct reference to the best interests principle. Yet, Yukon's policy does not specifically refer to a child rights principle, as it states that administrators "must make a decision in the best interests of all students and staff" when involving the police or other public agencies.⁸⁹ It is unfortunate that the policy does not address the potential problem of conflicting interests. The best interests principle ensures that the child's best interests specifically receive heightened attention when considering all interests involved.

However, despite the lack of express mention of the best interest principle, many policies contain components that point to a certain consideration of it. For example, in New Brunswick's policy on *Inclusive Education*, it can be gleaned from references to student-centred learning principles that the best interests of students are at the heart of the policy.⁹⁰ However, it is difficult to ascertain what provisions would indirectly refer to the best interests of the child, since the principle has not been defined in the education context. Even though the best interests of the child is not always defined in other laws either, such as in relation to family law, a simple reference in the law allows courts to develop criteria that may be used when applying the principle.⁹¹ The dynamic nature of the principle allows for its flexible application to each individual case, ensuring that children's substantial and procedural rights are respected.⁹² However, it is unlikely to be applied by the courts without express mention in the law.

C. THE SURVIVAL AND THE DEVELOPMENT OF THE CHILD

⁸⁷ *Education Act*, RSO, 1990 c E-2, s 300.3(3).

⁸⁸ *Education Act*, RSQ, c I-13.3, s 96.27.

⁸⁹ *Yukon Policy 1011*, *supra* note 37 at 5.

⁹⁰ Policy 322, *supra* note 63.

⁹¹ See *e.g. Young v Young* [1993] 4 SCR 3; *W (V) v S (D)* [1996] 2 SCR 108. See also Mona Paré, "Langage des accommodements raisonnables : Quelles perspectives pour l'égalité des enfants handicapés en milieu scolaire?" (2012) 46:3 *Revue juridique Thémis* 485 at 509.

⁹² Committee on the Rights of the Child, General Comment No.14 on the right of the child to have his or her best interests taken as a primary consideration, UN doc. CRC/C/GC/14, 29/05/2013.

Article 6 of the CRC requires States to recognize children's inherent right to life, and asks them to "ensure to the maximum extent possible the survival and development of the child."⁹³ In the context of anti-violence efforts, the child's right to survival is directly linked to all efforts to prevent bullying and to provide supports to students who have been victims of bullying in order to create and sustain a safe learning environment, since education cannot be successful if children are subjected to, or fearful of, violence. It is therefore expected that all laws and policies would be guided by this principle, which is clearly linked to the child's right to be safe, mentioned in policy documents and by government representatives. The child's right to maximum development is less clear as a principle in this context. It is not explicitly recognized in provincial legislation, and it is perhaps the one right among the CRC principles that has the least legal significance in Canadian law. There are some direct references to the child's development in policies, however. Notably, Yukon's safe schools policy includes general provisions concerning the child's development. It recognizes in its policy statement that caring, respectful, and safe school environments are essential for children's "healthy personal and social development."⁹⁴ The goal of the education system is to "develop the whole child including the intellectual, physical, social, emotional, cultural potential of all students to the extent of their abilities."⁹⁵ The policy also states that school staff will "seek to develop the intellectual, physical, social, emotional, cultural and aesthetic potential of all students, to the extent of their abilities,"⁹⁶ thus recognizing different facets of children's development, similarly to the Committee on the Rights of the Child.⁹⁷ Social and emotional development was referred to most frequently by government representatives, while the majority of interviewees did not discuss the subject. Some confusion is to be noted about child development being part of children's rights. One government representative reflected: "I think it [child rights-based approach to violence in schools] has to go beyond child development. I think you want to have it based on reality: what are real rights?"⁹⁸

While laws do not refer to the child's development, many provisions contribute indirectly to the application of this CRC article. These provisions have to do mostly with supports and programs that are offered to students who have been exposed to bullying. For example, anti-bullying plans that Quebec schools have to develop must include support measures for any person who is a victim of bullying or violence, whether they are a witness or a perpetrator.⁹⁹ Quebec's ministerial action plan, which preceded the anti-violence law, also required the development of effective interventions targeting victims, witnesses, and perpetrators.¹⁰⁰ The plan made financial support available to school boards to encourage initiatives that allow early action in the interests of a child's development. Moreover, schools had to make sure that the conditions and measures are in place to provide assistance and support to all those involved in violent acts. In Ontario, school boards have the duty to provide programs, interventions, and supports to students who have been bullied, who have witnessed bullying, or who have engaged in

⁹³ CRC, *supra* note 2, art 6.2.

⁹⁴ *Yukon Policy 1011*, *supra* note 37 at 1.

⁹⁵ *Ibid* at 2.

⁹⁶ *Ibid* at 4.

⁹⁷ See e.g. Committee on the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports* UN Doc CRC/C/58, 1996 at para 40.

⁹⁸ Interview, 28 October 2014.

⁹⁹ Bill 56, *supra* note 72, s 24.

¹⁰⁰ *Action Plan*, *supra* note 71.

bullying.¹⁰¹ Independently from anti-bullying legislation, the *Education Act* also states that programs have to be provided specifically to students who have been suspended or expelled.¹⁰² Adding to these provisions, Ontario's policy memorandum on progressive discipline requires schools to use a range of interventions and supports that are developmentally and socio-emotionally appropriate, including learning opportunities for reinforcing positive behaviour.¹⁰³ This includes providing programs for students who have been expelled or are on long-term suspension. Provision for such programs indicates that the Quebec and Ontario laws are seeing beyond the dyadic victim/bully relationship.¹⁰⁴ They do not embrace restrictive approaches that provide assistance to the victim only, and that solely target the bully with disciplinary measures. Conversely, an example of such a restrictive approach is Saskatchewan's bullying prevention model policy, which provides sample language for proclaiming that all students have a right to a caring, respectful, and safe school environment: "All school staff will take steps to prevent bullying and to assist and support students who are being bullied."¹⁰⁵ Overall, provinces take into account some aspects of children's development needs, without defining these needs in the education context.

Since support provided to children involved in bullying must be varied in response to children's development needs, partnerships should facilitate the implementation of this child rights principle. In Ontario, support may be provided by social workers, psychologists, or other professionals.¹⁰⁶ In Quebec, more explicitly, the school board is to have agreements with institutions in the health and social services network for the provision of services to students after an act of bullying or violence.¹⁰⁷ Partnerships are an important part in the provision of support to students, and thus schools are directed to work with community-based service providers. This is in line with the whole-school and community approaches that are suggested by researchers as important elements of successful anti-bullying initiatives.¹⁰⁸ These approaches are also consistently mentioned by government representatives from the education sector.

Yet, measures that contribute to the development of the child are not restricted to supports for children involved in violence. Preventive approaches are one example. For instance, Nova Scotia's action plan suggests a variety of measures, including the creation of supportive environments for healthy eating and physical activity, such as after-school programming for youth, and free access to sport and recreation facilities.¹⁰⁹ Discipline is another area where the development of the child can be taken into consideration. In Ontario, one of the mitigating factors that has to be taken into account by the principal when considering suspension or expulsion is how that measure would affect the student's ongoing education and whether

¹⁰¹ Bill 13, *supra* note 38, s 5

¹⁰² Ontario *Education Act*, *supra* note 87, s 312.

¹⁰³ Ontario Ministry of Education, Policy/program memorandum 145: *Progressive discipline and promoting positive student behaviour* (2012), online: <edu.gov.on.ca/extra/eng/ppm/145.pdf> [perma.cc/T79N-TAW7] [PPM 145].

¹⁰⁴ See Paré, Collins and Ranjbar, *supra* note 4.

¹⁰⁵ *Caring and Respectful Schools*, *supra* note 47 at 6.

¹⁰⁶ Bill 13, *supra* note 40, s 5.

¹⁰⁷ Bill 56, *supra* note 72, s 16.

¹⁰⁸ See e.g. Dan Olweus, "Bully/victim problems in school: Knowledge base and an affective intervention program" (1997) 18:2 *The Irish Journal of Psychology* 170; Paul Smith, "Why interventions to reduce bullying and violence in schools may (or may not) succeed: Comments on this special section" (2011) 35:5 *International Journal of Behavioral Development* 419; Maria Ttofi et al, "Do the victims of school bullies tend to become depressed later in life? A systematic review and meta-analysis of longitudinal studies" (2011) 3:2 *Journal of Aggression, Conflict and Peace Research* 63.

¹⁰⁹ *Speak Up*, *supra* note 70.

suspension or expulsion is likely to result in an aggravation of the student's behaviour.¹¹⁰ Quebec law provides an example of a more punitive approach, with no special consideration of the child's circumstances or development when resorting to suspension and expulsion. However, the anti-bullying plans developed by schools in conformity with the law seem to take a more educative approach, preferring sanctions that focus on an inclusive environment, fostering a feeling of belonging, and finding equitable responses for all those involved.¹¹¹ This is in line with the law's requirement that schools provide "a healthy and secure learning environment that allows every student to develop his or her full potential."¹¹²

The child's right to a maximum development is thus addressed in varied ways in provincial laws and policies. Some deal with supports that are needed for children involved in bullying incidents. These supports are expected to address children's different development needs, especially as partnerships are sought with various institutions and the community. Unfortunately, most provinces have not expressly included such provisions in their laws and policies. Certainly, recognition of the child's right to a maximum development as a legal principle in Canada would ensure its more systematic and comprehensive application, and would encourage its definition in the context of education.

D. RESPECT FOR THE VIEWS OF THE CHILD

Respect for the views of the child is mainly derived from article 12 of the CRC, which requires that: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."¹¹³ Among the four principles of the CRC, respect for the views of the child is the one that is most systematically present in provincial anti-bullying policies, as well as some laws. It is also consistently mentioned by government representatives when questioned about a child rights-based approach

¹¹⁰ O Reg 427/07, *supra* note 80.

¹¹¹ See *e.g.* the 2012-2015 action plans of: École secondaire Dr Alexis-Bouthillier, online: <bouthillier.e.csdhr.qc.ca/public/cd1a842c-c4ad-4012-9a19-e6b6e5466384/plan_daction.pdf> [perma.cc/7M88-EYM4]; École intégrée des Forges, online: <accueil.csduroy.qc.ca/integree-des-forges/Documents/Plan%20d%27action/Intimidation-violence-plan%20d%27action.pdf> [perma.cc/F9KT-V8AG]; École Poly-Jeunesse, online: <www2.cslaval.qc.ca/polyjeunesse/IMG/pdf_Plan_de_lutte_contre_lintimidation_et_la_violence_a_lecole.pdf> [perma.cc/7E6L-TRJK]; École secondaire Pierre-Laporte, online: <pierre-laporte.ecoles.csmv.qc.ca/files/2013/03/Plan-de-lutte-contre-lintimidation-et-la-violence-%C3%A0-l%3%A9cole.pdf>; École du Cap-Soleil et des Loutres, online: <capsoleil.csdps.qc.ca/fileadmin/user_upload/Sites_ecoles/Cap-Soleil_StPierre/Plan_de_lutte_violence_intimidation.pdf> [perma.cc/KDH6-EFUE]; École secondaire Odysée Lafontaine-Dominique-Racine, online: <csrsaguenay.qc.ca/odyssee/medias/odyssee/fichiers/babillard/plan_de_lutte_22_nov_2012.pdf> [perma.cc/5VW5-GWDY]; École Polyvalente des Îles, online: <csdesiles.qc.ca/fileadmin/documents/Ecole_Polyvalente_des_Iles/Documents/PLAN_DE_LUTTE_Polyvalente_15_janvier_2013.pdf> [perma.cc/K2PZ-G8K3]; École Curé-Brassard, online: <csriveraine.qc.ca/scriptorBD/documents/795148/CUR%C3%89-BRASSARD%20Plan%20de%20lutte%20contre%20l_intimidation%20et%20la%20violence.pdf> [perma.cc/NZW5-JLYW].

¹¹² Bill 56, *supra* note 72, s 15.

¹¹³ CRC, *supra* note 2, art 12.1.

to anti-bullying efforts. While children's participation may be more common in civil society-designed or led programs that are used by schools or boards, government initiatives also allow for the child's voice to be heard. Provisions on child participation focus mostly on the inclusion of children's voices through school climate surveys and the creation of reporting tools. In addition, most provinces promote student-led activities, and some specifically seek to empower students to become positive leaders. Many provinces provide for some consultation of students in the development or review of policies and the adoption of anti-bullying strategies. Finally, there are a few relevant provisions that relate to student discipline.

First, students are consulted in order to gather information on the general situation of violence at school, as well as specific instances of violence. This is the purpose of student surveys and reporting tools. In Ontario, school climate surveys are addressed in two different policy documents.¹¹⁴ Saskatchewan recognizes anonymous surveys as a way of engaging youth.¹¹⁵ Policy documents and discussions with government representatives also show that surveys have been used in Manitoba and in Nova Scotia.¹¹⁶ Quebec and Ontario laws provide for the adoption of reporting procedures that allow student confidentiality.¹¹⁷ Some policies provide for reporting tools more concretely, and British Columbia's ERASE strategy includes a reporting tool online.¹¹⁸

Second, students are encouraged to be leaders by establishing and leading anti-violence activities and by becoming mentors and role models. Laws in Manitoba, Ontario, and Quebec require that support be provided to students who want to conduct activities that promote a positive school climate and respect for diversity, and that are conducive to preventing violence.¹¹⁹ At the policy level, Saskatchewan's Action plan recommends that the government engage youth in creating solutions to address bullying and cyberbullying.¹²⁰ Engaging students includes responding positively to requests for school groups, such as gay-straight alliances, and mentoring older students to become role models for younger students. Other examples of student leadership development include Ontario's *Code of Conduct*, which identifies empowering students to be positive leaders in the school and community as one of the responsibilities of principals and teachers.¹²¹ Similarly, PEI's French Language School Board states that the principal should encourage the school personnel to help students become positive leaders at school and in the community.¹²² In Alberta, it has also been suggested that older students should

¹¹⁴ PPM 119, *supra* note 41, and PPM 145, *supra* note 103.

¹¹⁵ Government of Saskatchewan, Ministry of Education, *Action Plan to Address Bullying and Cyberbullying* (2013), online:

gov.sk.ca/adx/asp/adxGetMedia.aspx?mediaId=584fef2-c769-4c12-a91a-fa3e49353b11&PN=Shared [perma.cc/Y7J7-3RVM] [Action Plan to Address Bullying and Cyberbullying].

¹¹⁶ Manitoba Education, "Safe and caring schools. Manitoba's three-year anti-bullying action plan" (2012): online: edu.gov.mb.ca/k12/safe_schools/2-3.html [perma.cc/QG9U-EBFT] [*Safe and Caring Schools*], and interview with representatives of the Nova Scotia Department of Education, 5 December 2014.

¹¹⁷ Bill 56, *supra* note 72, s 4 and s 24, and Bill 13, *supra* note 40, s 4.

¹¹⁸ *Report Bullying BC: Student Online Reporting Tool*; ERASE Bullying, online: reportbullyingbc.edudata.ca/apps/bullying/ [perma.cc/2KYB-QHZ8].

¹¹⁹ Bill 13, *supra* note 40, s 12; Bill 56, *supra* note 72, s 10; Bill 18, *supra* note 65, s 41(1.8).

¹²⁰ *Action Plan to Address Bullying and Cyberbullying*, *supra* note 115.

¹²¹ PPM 128, *supra* note 42.

¹²² *Équité ethnoculturelle et droits de la personne*, *supra* note 74.

be given a leadership role, and students should be invited to speak at parent meetings and school assemblies.¹²³

Third, a few policies promote student consultation practices when developing policies and strategies. There are general provisions on such participation, and more specific ones. For example, Ontario's policy memorandum on equity and inclusive education policies requires that school boards establish partnerships that engage a cross-section of diverse students, in addition to other actors.¹²⁴ This document also specifies that boards must consult students when reviewing or developing their equity and inclusive education policy.¹²⁵ According to Ontario's *Code of Conduct*, the principal should seek input from students, among other stakeholders, when developing and reviewing the local standards of behaviour.¹²⁶ Similarly, PEI's French Language School Board requires that the school principal consult with student representatives on the elaboration of the school's code of conduct.¹²⁷ More generally, the board promotes an open and constructive dialogue between students, personnel, and the community.¹²⁸ In Manitoba, the Ministry of Education's actions include promoting student involvement in the evaluation of strategies and interventions in schools.¹²⁹ Similarly, Saskatchewan's action plan recommends that the government engage youth in creating solutions to address bullying and cyberbullying together with school divisions and community partners.¹³⁰ An example of a more specific initiative is Nova Scotia's action plan, which requires the government to re-establish the Nova Scotia Youth Advisory Council, providing a mechanism for engaging youth in government decisions on issues concerning them, including bullying.¹³¹ Alberta's strategy to prevent bullying also has specific examples of student engagement and consultation. The strategy requires involving students in working groups, student committees, workshops, and games in developing or supporting the plan; establishing the Alberta Prevention of Bullying Youth Committee; and organizing youth engagement activities across the province. An earlier policy on character education, also dealing with bullying, includes specific actions to involve students in bullying prevention.¹³² It suggests, among other options, including students as part of a working group on bullying prevention and developing a student committee for bullying prevention.

Giving children the opportunity to report instances of bullying, to give their opinion about safety at school and about the development and effectiveness of anti-bullying measures, and to initiate activities, seem to be well-represented in many of the government efforts to address bullying. In research interviews, government representatives consistently recognize children's participation and voice as an essential part of a child rights-based strategy. The reason behind the enthusiasm for this principle at the government level is unclear. It could perhaps be

¹²³ Alberta Education, *The Heart of the Matter: Character Education and Citizenship in Alberta Schools* (2005), online: <archive.education.alberta.ca/media/547951/heartmatter.pdf > [perma.cc/6KVL-3MQG] [*The Heart of the Matter*].

¹²⁴ PPM 119, *supra* note 41.

¹²⁵ PPM 145, *supra* note 103.

¹²⁶ PPM 128, *supra* note 42.

¹²⁷ Commission scolaire de langue française *Milieu scolaire accueillant et sécuritaire* (17 February 2010), online: <edu.pe.ca/cslf/documents/Les%20politiques/500%20-%20INSTRUCTION/INS-502.pdf> [perma.cc/6E4D-3PM2].

¹²⁸ *Équité ethnoculturelle et droits de la personne*, *supra* note 74.

¹²⁹ *Safe and Caring Schools*, *supra* note 116.

¹³⁰ *Action Plan to Address Bullying and Cyberbullying*, *supra* note 115.

¹³¹ *Speak Up*, *supra* note 70.

¹³² *The Heart of the Matter*, *supra* note 123.

the result of research on the benefits of child participation,¹³³ or the indiscriminate choice of one element to implement children's rights. Nonetheless, it ensures that the protective approach that transpires from "the right to be safe" does not negate children's other rights.¹³⁴ The integration of children's participation into legislation and policies is a welcome development. Yet, the provisions on student participation are very unequal from one province to the next. Inserting this principle in legislation would be important to ensure that it can be applied across all anti-bullying policies and programs.

III. CONCLUSION

Examination of laws and policies across Canada demonstrates an increased concern for bullying in schools, and also a rejection of one-dimensional approaches, such as the much maligned zero tolerance policies. Provinces and territories are well aware of the need to promote a positive school climate, and that it takes a multi-pronged approach to have a school environment where everyone is being respectful and respected.

However, several causes for concern remain. First, the federal government is not taking measures to comply with its international obligations to implement child rights. Not only has it not adopted a nation-wide anti-bullying policy, but its responses are limited and perplexing. Its legislative responses concentrate on criminal legislation that is likely to violate children's rights.¹³⁵ In the words of one government representative: "I always say that a 14 year old youth who has a photo of a 14 year old girl, it's not bad, it's between two youth. But the reality is that in the law, it is juvenile pornography, it is possession or it is distribution or it is production. Thus, it becomes serious."¹³⁶ Second, the responses from provinces and territories are very similar to anti-bullying literature in the sense that they rarely address children's rights, and when they do, it is in haphazard and limited ways. Not only do some laws and policies include language that is relevant to child rights, which is a significant step towards implementation, but many contain elements that already help implement the CRC, albeit indirectly, as seen in the analysis based on the general principles. However, there are great differences between jurisdictions, and even within each province or territory child rights principles are not applied uniformly and systematically at all levels of bullying prevention and intervention. Coordination mechanisms between jurisdictions are sorely missing. The federal government could play a leadership role to facilitate this coordination in support of child rights.

Examination of official documents shows that the adoption of broad anti-bullying laws, like in Quebec and Ontario, is more conducive to addressing child rights at the policy level in a comprehensive way. This speaks in favour of the express inclusion of child rights principles in

¹³³ See e.g. Roger Hart, *Child Participation. From Tokenism to Citizenship* (Florence: UNICEF ICDC, 1992); Gerison Lansdown, *Promoting Children's Participation in Democratic Decision-Making* (Florence: UNICEF Innocenti Research Center, 2001).

¹³⁴ Authors have divided children's rights into groups of rights, the "3 Ps": provision, protection and participation. See Thomas Hammarberg, "The UN Convention on the Rights of the Child – and How to Make It Work, The Symposium: UN Convention on Children's Rights" (1990) 12:1 *Human Rights Quarterly* 97 at 99-100. While these are distinct groups in terms of contents, they are interlinked in terms of effects: for example protecting children, and making sure they receive adequate provision of services, contribute to their empowerment and enjoyment of fundamental freedoms, and *vice versa* (see e.g. John Tobin "Justifying Children's Rights" in Michael Freeman, ed, *The Future of Children's Rights* (Boston: Brill-Nijhoff, 2014) 258 at 293).

¹³⁵ Paré, Collins and Ranjbar, *supra* note 4.

¹³⁶ Interview, 10 July 2014 (translation).

anti-bullying legislation across Canada. Including child rights principles into laws would ensure that they trickle down to policies and programs. According to one government representative: “There would need to be better understanding of human rights as a foundation, in consideration of laws, regulations, policies in the schools, sometimes just to name it, so that it’s there.”¹³⁷ The very first step in finding a place for children’s rights in governments’ anti-bullying efforts is the inclusion of the quintessential child rights principle of the best interests of the child in education acts. This can be done by means of anti-bullying legislation, as a common way to amend education laws today. More generally, government efforts should advance the role and influence of children’s rights consistently and comprehensively in order to support progress in countering bullying among children in Canadian schools.

¹³⁷ Interview, 24 March 2014.