



REPRESENTATIVE FOR
CHILDREN AND YOUTH

Select Standing Committee on Children and Youth

Review of the Representative for Children and Youth Act

Submission of the Representative
for Children and Youth

October 6, 2011

Overview

The *Representative for Children and Youth Act (RCY Act)* was enacted in May 2006 with all-party support, following the government's acceptance of recommendations made in the *BC Children and Youth Review (April 2006)* ('the *Hughes Review*').

While the *RCY Act* passed in May 2006, it did not come into force at that time. The Act was phased in through three stages.

In the first phase, in November 2006, the first Representative for Children and Youth was appointed and certain administrative functions of the Representative were brought into force to enable the hiring of staff and creation of the office.

The second phase occurred on March 30, 2007 (following clarifying amendments made earlier in March 2007), when the Representative's advocacy and monitoring functions were brought into force.

In the final phase, on June 1, 2007, the Representative's critical injury and death review and investigation function was brought into force.

This statutory process is being undertaken pursuant to Section 30 of the *RCY Act*. Section 30 requires the Select Standing Committee on Children and Youth to undertake a comprehensive review of the Act or portions of the Act within five years after Section 6 came into force. As noted above, Section 6 has been partly in force since March 30, 2007 (advocacy and monitoring) and fully in force since June 1, 2007 (critical injury and death reviews and investigations).

On Sept. 7, 2011, the Clerk of Committees invited the Representative to make a presentation to the Standing Committee on Oct. 6, 2011, as well as to provide this written submission for the consideration of the Committee.

Review Mandate

Section 30 of the *RCY Act* provides:

30. To determine whether the functions of the representative described in section 6 are still required to ensure that the needs of children are met, the standing committee, within 5 years of the coming into force of section 6, must undertake a comprehensive review of this Act or a review of portions of this Act.

Section 30 outlines the litmus test the Standing Committee is to apply in undertaking this review. That test is exclusively child-centred. Consistent with the whole nature and purpose of the Representative's office – and in the context of the history of changes to oversight of the child-serving system – Section 30 wisely places the Select Standing Committee's focus squarely on whether the area or areas under review are required to *ensure that the needs of children are met*.

Section 30 is also noteworthy for assigning this task to the Standing Committee as opposed to some other body. The Legislature's decision in Section 30 to have the Standing Committee undertake this review recognizes its unique role and its accumulated and collaborative experience with the Representative, as envisioned in the *Hughes Review*, p. 29:

I am also recommending that the Legislature strike a new standing committee on Children and Youth, and that the Representative and Deputy Representatives report to this committee at least annually. I believe that the establishment of this standing committee will help Members of the Legislative Assembly to understand that their relationship with the Representative should be a collaborative one. It should also help to develop a greater awareness and understanding among legislators and the public, of the child welfare system in our province. It is my fervent hope that it will encourage Government and the Opposition to work together to address some of the very real challenges facing the child welfare system now and in the near future.

The Representative has appeared before the Standing Committee more than 20 times over the past five years. This is a strong accountability mechanism for the operation of the Representative's Office, and in the view of the Representative, has enriched the work and provided a solid footing for deeper considerations of issues facing children and youth in British Columbia.

The Standing Committee's familiarity with the Representative and her work, as well as the extensive public record of Committee meetings in Hansard, can only assist in ensuring that this review is meaningful and well-informed.

The BC Children and Youth Review

The Hughes Review

As the Standing Committee looks to the future, it is helpful to recall the past. To properly assess the Representative's current functions, it is necessary to recall the situation that existed before the office of Representative was created, and to remember the specific concerns that gave rise to the creation of the office.

As is well known, the *RCY Act* was enacted following government's acceptance of reform recommendations made in the *Hughes Review*, which was commissioned by government in the wake of public criticism of the child-serving system.

The *Hughes Review* is a comprehensive and even visionary document. While the Representative encourages all Standing Committee members to re-read the report as part of the review, this part of the submission outlines its key findings and recommendations as they pertain to the *RCY Act*.

The situation following the core services 2001–02 review

Hughes summarized the reforms that had been enacted following the core services review:

*The plan was that the Coroner would assume a child death review function that it had not had before, but which would be more limited than that carried out by the Children's Commission; the Ombudsman would continue to monitor fairness issues; and a new Child and Youth Officer, reporting to the Attorney General, would replace the two former children's agencies as the external oversight body for the child welfare system.*¹

In setting Hughes' terms of reference, government identified three areas in which the core services reforms had given rise to serious concerns:

- the system for reviewing child deaths, including how these reviews are addressed within the Ministry,
- advocacy for children and youth, and
- the monitoring of government's performance in protecting and providing services for children and youth.²

Hughes found serious deficiencies in each area.

¹ *BC Children and Youth Review*, p.7.

Advocacy for children and youth in the child welfare system

One serious concern identified in the *Hughes Review* concerned the limited advocacy mandate of the former Children and Youth Officer:

*The Office also had a limited mandate that restricted its ability to advocate for individuals, which is a function that children, youth and families in the child welfare system clearly want and need.*³

*Advocacy for children, youth and families in the child welfare system will be an important function for the new Representative for Children and Youth. Child and family advocacy has suffered in recent years. The Child, Youth and Family Advocate was eliminated, as was the Child and Youth Mental Health Advocate and the Family Advocate program in the Ministry of Attorney General, and legal aid funding for family matters was cut. Some rationalizing of government-supported advocacy programs may have been appropriate but the pendulum has swung too far for the good of the most vulnerable in our society – our children and youth. Among the individuals and groups I heard from there is broad support for the provision of advocacy services for individuals as well as systemic advocacy, which I define as working towards positive change in policies, practice and service delivery in the child welfare system.*⁴

*The Ombudsman continues to have a role to play but does not fill the gap: the Ombudsman's mandate is to review administrative fairness issues, not to help individuals to have their voices heard. The Ombudsman responds to complaints of individuals about practices and services of public bodies, including the Ministry, and resolves some complaints informally through negotiations.*⁵

² *BC Children and Youth Review*, pp. 8–9.

³ *Ibid*, p. 45.

⁴ *Ibid*, p. 15.

⁵ *Ibid*, p. 33.

Child death reviews and investigations

A second concern identified by Hughes was the inability of government and the Coroner to adequately review and investigate the deaths of children in care:

The Ministry came under intense criticism after it released its internal review of the death in Port Alberni of a Nuu-chah-nulth child. Media reports followed about other children who had died in suspicious circumstances: the Ministry's internal reviews had not yet been released, nor had there been a review by the Coroner's Service such as would have been done by the Children's Commission. (See Chapter 2 for a description of this process.) When it became clear that the second-stage reviews that the Children's Commission would have done, did not take place on hundreds of files due to the transition, the government's decision to transfer the death review function to the Coroner's Service came under fire. These concerns ultimately led the Minister of Children and Family Development to ask me to undertake this review.⁶

Hughes considered whether, even without the transition issues that gave rise to the review, the death and critical injury review function would properly lie with the Coroner. Hughes answered that question in the negative:

I have considered whether this role should reside with the Coroners Service and I have decided that it should not. The Coroners Service is a forensic, fact-finding organization. It has important attributes that support its traditional statutory role of investigating unexpected, unanticipated deaths, but it does not have the necessary expertise in the child welfare system.

The Coroner does investigate all unexpected, unanticipated deaths, including those of children in the child welfare system. The Coroner's role is to answer the questions: who died, and how, when, where and by what means? The focus is on the circumstances of the death itself. In contrast, the Representative's investigation will include an examination of the child's life in relation to the child welfare system. The Representative's objective is to determine whether the system may have contributed in any way to the child's death and, if it did, to recommend improvements to service, practice or policy that might prevent future deaths.⁷

⁶ BC Children and Youth Review, p. 8.

⁷ Ibid, p. 36.

Lack of public confidence in MCFD service delivery

A third concern identified by Hughes was the lack of public confidence that the Ministry of Children and Family Development was effectively delivering the services it was required to deliver:

Most government ministries are not subject to formal oversight by an external body and it may be that in the future, there will be no need of an independent office for children. The Ministry's own performance measurement, quality assurance programs, and public reporting may in themselves be sufficient to assure British Columbians that vulnerable children and youth are being protected as they should be.

But at this time, to meet public concerns, an external agency remains necessary as the Ministry continues to enhance its ability to measure, monitor and report on its own performance. The public needs to know that the child welfare system is accountable for what it does and how it does it....

The second part of the office's mandate will be to monitor, review, audit and investigate the performance and accountability of the child welfare system. In this second aspect of its role, the Representative will focus not on the day-to-day operations of the child welfare system (such as reviewing all plans of care, as was done by the Children's Commission), but on broader, system-wide issues.

It may not always be necessary to have an external body overseeing the functioning of the child welfare system, although at this time, the need for public confidence in the system demands it.⁸

Mandate of the Representative for Children and Youth

In proposing a solution to these concerns, Hughes did not recommend that government turn back the clock. He did not recommend that the Legislature restore the complex oversight system that grew up in the 1980s and 1990s during and after the Gove Report. Instead, his solution was to recommend a single legislative innovation, tailored to the specific areas of concern identified by both Hughes and by government in his terms of reference.

⁸ *Ibid*, pp. 33-34

That legislative innovation was the creation of a Representative for Children and Youth, whose statutory mandate was carefully designed to track precisely with the areas of concern identified above, and as presently reflected in Section 6 of the *RCY Act*:

- (6) The representative is responsible for performing the following functions in accordance with this Act:
- (a) support, assist, inform and advise children and their families respecting designated services, which activities include, without limitation,
 - (i) providing information and advice to children and their families about how to effectively access designated services and how to become effective self-advocates with respect to those services,
 - (ii) advocating on behalf of a child receiving or eligible to receive a designated service, and
 - (iii) supporting, promoting in communities and commenting publicly on advocacy services for children and their families with respect to designated services;
 - (b) monitor, review, audit and conduct research on the provision of a designated service by a public body or director for the purpose of making recommendations to improve the effectiveness and responsiveness of that service, and comment publicly on any of these functions;
 - (c) review, investigate and report on the critical injuries and deaths of children as set out in Part 4;
 - (d) perform any other prescribed functions.

The need for stability

Hughes was acutely conscious of the need for stability, and the need to avoid adding to what he strongly felt was "a child welfare system that has been buffeted by an unmanageable degree of change."⁹ Hughes saw the creation of the Representative's office as providing much-needed stability:

During the past 10 years, British Columbia has tried three approaches to making sure that vulnerable children, youth, and their families receive the child welfare services they need, that they are treated fairly by the child welfare system, and that particular attention is paid to child deaths and critical injuries.

⁹ *Ibid*, p. 3

The Advocate for Children, Family and Youth; the Children's Commission; and the Office for Children and Youth each have had their own successes and though none were able to fully meet the challenges set before them, each performed valuable services that are still needed today.

I am proposing a new body – a Representative for Children and Youth – that will build on the strengths of its predecessors and on the lessons learned from their experience. It will resemble in significant respects the current Office for Children and Youth, but it will have the independent status that was held by the Advocate, and will perform some of the functions that were carried out by the Commission. Further, its reporting process will be designed to help depoliticize the debate around child welfare issues.¹⁰

I recognize that this new body represents another change in a system that I have said requires stability. However, I believe that it is not a departure but rather a progression in the direction that the child welfare system has already embarked upon.

Stability requires credibility

Hughes recognized that stability would not be possible unless the Representative was able to exercise her assigned functions in a way that was credible both in fact and perception. That credibility was not possible without three fundamental characteristics of the office. The three essential characteristics of the office were succinctly summarized by the British Columbia Supreme Court in 2010:

The text of the *Hughes Report* and the comments in the Legislature on introduction of the office of the petitioner emphasized the need to restore public confidence in the child welfare system. The creation of the office of the petitioner was intended to help achieve this through the petitioner's independence, authority to collect information, and public reporting process.¹¹

Each of those essential characteristics identified by the Court – independence, authority to collect information and public reporting – is discussed in the following sections.

¹⁰ *Ibid*, p. 21.

¹¹ *Representative for Children and Youth v. British Columbia*, 2010 BCSC 697 at para. 61.

Independence and Accountability

Hughes recognized that a body charged with ensuring accountability by providing a credible external review of government – particularly in an area as historically contentious and emotive as the review of child protection – must have a high degree of independence from any particular government or political party.

As with offices such as the Ombudsperson or the Auditor General, Hughes concluded that the necessary independence would only be possible if the Representative was an Officer of the Legislature:

The public's trust can only be earned if there is obvious independence. The Representative that I have recommended will demonstrate independence through the method of appointment; the term of appointment; and its independent powers of investigation, consultation and public reporting.¹²

The current Office for Children and Youth [which office reported to the Attorney General] has performed its duties independently, but if public confidence in the child welfare system is to be restored, the independent body that speaks for children and youth must have a status that puts that independence beyond question. That is why I am recommending that the new Representative for Children and Youth be an independent Officer of the Legislature, with the same standing as the Ombudsman and the Auditor General.¹³

The Office for Children and Youth has played an important role in bringing to the attention of the legislature and the child welfare system, important issues such as suicide among Aboriginal youth, and child and youth mental health.

She has collaborated with other public bodies to combine information from multiple sources to lead us to better understanding of the lives of children and youth. These are the kinds of initiatives that I encourage the new Representative to undertake.

The Office did not have the status of an Officer of the Legislature and this may have hampered its ability to engender public confidence.¹⁴

As recognized by the British Columbia Supreme Court: "Reading the RCYA as a whole, it is clear that the Legislative intention was to provide the petitioner with structural independence from the Executive Branch."¹⁵

¹² *Hughes Review*, p. 31.

¹³ *Ibid*, p. 21.

¹⁴ *Ibid*, p. 45.

¹⁵ *Representative for Children and Youth v. British Columbia*, 2010 BCSC 697 at para. 69.

Observers sometimes wrongly confuse independence from the Executive Branch with a lack of accountability. The Representative is accountable, but not to the particular minister or government whose conduct she is required to examine. Rather, she is accountable to the Legislature as a whole (duty to provide the Speaker with an annual service plan and annual report), to the Standing Committee (duty to appear before Standing Committee for appropriations and financial matters) and even to the Auditor General (who must audit the Representative's accounts at least once each year).¹⁶ She is also accountable to the courts if she exercises her powers in a way that exceeds her jurisdiction.

This model of accountability reflects the wisdom that there are certain types of functions in our democracy where accountability is best exercised in an open and bi-partisan legislative process rather than through the less transparent Executive Model. As the *Hughes Report* emphasized, and as reflected in the establishment of the Standing Committee, there is a place in our democracy for structures that reflect transparency, and that require members of all political parties to come together and interact constructively and collegially:

*Front and centre among those whose cooperation I invite, are the elected Members of the Legislative Assembly. I am recommending a key role for them in leading the way towards changes I see as essential to the safety and well-being of our children and youth – our leaders of tomorrow.*¹⁷

To encourage our legislators, who have ultimate responsibility for our child welfare system, to engage in constructive discussion of these important issues, the Representative and the two Deputy Representatives that I recommend later in this report will be required to appear annually before an all party committee of the Legislature.

*This will be an opportunity for the Representative to make a full report to the members and answer their questions. That committee will table the Representative's annual report before the House.*¹⁸

*This all-party committee will contribute to a greater understanding among legislators and the public, of the province's child welfare system and will encourage Government and the Opposition to work together to address the challenges facing the system.*¹⁹

¹⁶ *RCY Act*, ss. 17, 18, 19, 21.

¹⁷ *Ibid*, p. 5.

¹⁸ *Ibid*, pp. 21–22.

¹⁹ *Ibid*, p. 31.

Access to information and confidentiality

Hughes also recognized that credibility was dependent on public confidence that the Representative has access to all information that is necessary to enable her to undertake her specialized functions:

Recommendation 54

That the Representative for Children and Youth Act contain an authority to collect information that is at least equivalent to s. 11 of the Office of Children and Youth Act; provisions to ensure that the records it requests are delivered promptly and without charge to the Representative; and to permit public disclosure of personal information if it is in the public interest, necessary to support the findings and recommendations, and not an unreasonable invasion of privacy.

Reason

The Representative needs to have clear authority to obtain from other public bodies, who are subject to the Freedom of Information and Privacy Act, the information necessary to do the work required of the office. This information should be provided without charge because it is being used to further common goals – the safety and wellbeing of children and youth. It also needs the authority to report personal information, in limited circumstances, to fulfill its role in public accountability.²⁰

Public accountability assumes even greater importance in a decentralized system and here I address the government's responsibility to be accountable to the public for its performance in protecting and serving children and youth. Accountability requires measuring performance and then reporting on those measures in a meaningful way. I propose a child-centred approach, which means looking not at what was done, but what was the outcome for the child.²¹

This aspect of the Representative's mandate has also been emphasized by the Supreme Court:

The functions and mandate of the petitioner as set out in the *RCYA* are inextricably linked to restoring and maintaining confidence of the public in the functioning of the child welfare system. The *RCYA* grants the petitioner the powers and rights to access information necessary for the petitioner to perform her mandate.²²

²⁰ *Ibid*, p. 114.

²¹ *Ibid*, p. 16.

²² *Representative for Children and Youth v. British Columbia*, 2010 BCSC 697 at para. 70.

The Representative's broad right of access to government information requires stringent protections to ensure the security and confidentiality of personal information. *The RCY Act* has enacted such provisions in s. 23 of the Act. The strong confidentiality provisions also reflected a key *Hughes Review* recommendation.²³

Reporting: the power to propose, not impose

Hughes wisely recognized that independence and credibility are not inconsistent with government's ultimate authority to set public policy and administer its child welfare system. Drawing on the wisdom that has long governed offices such as that of the Ombudsperson, Hughes concluded that the Representative would be most credible in the area of child welfare policy and practice by proposing reasoned recommendations rather than by imposing policy:

The Representative will have the power to recommend, rather than order, change. The reason is simple: the Representative is not intended to replace or oppose government decision-making. Instead, it is there to assist, encourage and sometimes prod the government to be more aware and responsive to the individual concerns of children, youth and families; and to recommend changes that will address broader problems in the child welfare system.

Stephen Owen, former Ombudsman for British Columbia, in commenting upon the Ombudsman's ability to recommend, not order, change, has written:

This inability to force change may be the central strength of the office. It requires that its recommendations be based on a thorough investigation of all facts, scrupulous consideration of all perspectives and vigorous analysis of all issues.

This application of reason produces results that are more powerful than could be achieved through coercion. A coercive process may produce reluctant change in a particular instance, but it creates a "loser" who will be unlikely to embrace the change in future. By contrast, change that results from a reasoning process changes a way of thinking and the result endures, to the benefit of future users.

The application of reason, rather than coercion, does not detract in any way from the Representative's ability to be critical of a government policy or practice (or to be complimentary). But when criticism is supported by thorough investigation, consideration of all perspectives, and thoughtful analysis, it is much more likely to influence positive change.

²³ *Hughes Review*, Recommendation 58.

History of the Representative for Children and Youth Act

As has been noted by the British Columbia Supreme Court: "The objective and provisions of the *RCY Act* closely followed recommendations made in the *Hughes Report*."²⁴

Hansard

The *RCY Act* received First Reading on May 4, 2006 and was passed on May 18, 2006 with all-party support. Introducing the Bill on May 4, 2006, the Attorney General stated:

I am pleased to introduce Bill 34. The purpose of this bill is to establish authority for the Legislative Assembly to appoint the representative for children and youth as an independent officer of the Legislature to improve services for children, youth and families in British Columbia.

This bill follows through on the recommendations provided by the Hon. Mr. Ted Hughes in his recent report to government. Consistent with those recommendations, this new office builds upon the strong foundation laid by the child and youth officer and other relevant offices by creating an expanded and improved framework that will provide better and expanded advocacy opportunities to foster improvements to our system of services for children, youth and their families.

It will provide for the independent review and investigation of deaths and critical injuries that occur within the child welfare system, and it will provide for a strong system of accountability to the public through independent public reporting. Under this new model, the representative will have the full discretion to advocate for children and will be able to initiate reviews and investigations and to release reports independent from government and uniquely focused on the child welfare system.

The *RCY Act* received Second Reading on May 17, 2006. On that occasion, the Attorney General stated:²⁵

The representative's role covers three areas, as recommended in the Hughes review: (1) the advocacy role – to support, assist, inform and advise children and their families concerning designated services; (2) the monitoring role – to increase accountability by monitoring, reviewing and auditing the ministries and other public bodies responsible for designated services; and

²⁴ *Representative for Children and Youth v. British Columbia*, 2010 BCSC 697 at para. 4.

²⁵ *Hansard*, May 17, 2006 (pp. 4960-61)

(3) the review and investigation role – to review, investigate and report on children’s critical injuries or deaths in circumstances as outlined in the bill....

The provisions described respond directly to Hughes's recommendations....

They respond to recommendation four, which specifies that the representative's mandate should include monitoring, reviewing, auditing and investigating performance and accountability within the child welfare system...

To enable the representative to carry out review and investigation responsibilities, the bill requires ministries and other entities to give the representative information about the critical injury or death of any child receiving designated services within the previous year. The representative also has a right to any information held by any public body or bodies that is necessary to carry out the office’s roles, functions and duties as Mr. Hughes advocated in recommendation 54.

As emphasized in Mr. Hughes's review, this bill gives the representative the power to recommend – rather than order – change. The reporting requirements outlined in the bill in the form of annual and special reports give the representative a mechanism to inform the children's standing committee, the Legislature and the public of the recommendations made to the ministries or to other public bodies and their compliance with prior recommendations.

This bill is a testament to this government's commitment to make changes that serve the interests of British Columbia's children.

The Opposition spokesperson stated at Second Reading:²⁶

In the system there is a fundamental need, when you're talking about the Ministry of Children and Family Development – just as there is with other institutions that have significant power in our society – for a second set of eyes, another place for people to go when they have concerns ... There are very few ministries of government or areas where government has so much potential power over the lives of individuals.

²⁶ *Hansard, May 17, 2006 (p. 4964)*

Legislative history

The Representative's five-year term commenced on Nov. 26, 2006, but the office has been exercising its full mandate for just over four years, since June 1, 2007.

This section summarizes the considerable legislative attention to which the *RCY Act* has been subject since its enactment:

- **May 18, 2006:** The *RCY Act*, as originally enacted, receives Royal Assent. Proclamation is delayed to enable the appointment of the Representative.
- **Nov. 26, 2006:** Representative appointed, and administrative provisions of the *RCY Act* are proclaimed into force, to enable the creation of the office and the appointment of staff, and allow a period to prepare for the exercise of the Section 6 functions in 2007.
- **Nov. 2006 – March 2007:** Transition team undertakes consultations to ensure that the *RCY Act* fully and properly responds to *Hughes Review*. Amendments to *RCY Act* are recommended to complete government's commitment to the Hughes Review, in which the Representative participated fully.
- **March 8, 2007:** The Attorney General, in introducing significant amendments in the *Child and Youth Statutes (Representation Improvement) Act*, S.B.C. 2007, c. 5, stated:²⁷

I'm pleased to introduce the Child and Youth Statutes (Representation Improvement) Amendment Act, 2007. The provisions in this bill complete the government's implementation of the Hughes review recommendations to establish the representative as a new officer of the Legislature, to wind up the office for children and youth, and to facilitate an orderly and timely transition from that office to the new office of the representative. The bill also completes the government's response to Mr. Hughes's recommendations for amendments to the Child, Family and Community Service Act.

A great deal has happened since the Representative for Children and Youth Act was passed in May 2006. We voted unanimously in this House in November 2006 to appoint Mary Ellen Turpel-Lafond as this province's first Representative for Children and Youth. Under the leadership of the Deputy Attorney General and the child and youth transition team, we have consulted widely with government's external partners and service providers. We have met with the public agencies and officials who play a vital role in child welfare and protection. We have listened to their concerns and addressed their issues in this legislation.

²⁷ *Hansard, March 8, 2007 (pp. 5983–84)*

The amendments in this bill confirm the representative has jurisdiction to oversee services provided by delegated directors under the Child, Family and Community Service Act, including directors within delegated aboriginal agencies. In this bill we have addressed the public disclosure of personal information for both the representative and director under the Child, Family and Community Service Act.

The bill that I introduce today marks the fulfilment of the government's commitment to implement key recommendations in the Hughes review and provides the framework for the new representative to carry out her responsibilities for the benefit and well-being of all children and youth in British Columbia.

- **March 30, 2007:** Representative's advocacy and monitoring mandates come into force: B.C. Reg. 88/2007.
- **June 1, 2007:** Representative's critical injury and death investigation mandate comes into force: B.C. Reg. 142/2007.
- **June 21, 2007:** a minor amendment to the Act consequential on the new Public Inquiry Act, S.B.C. 2007, c. 9 is proclaimed into force by B.C. Reg. 226/2007. This amendment changes the way the Act describes the Representative's power to compel evidence in an investigation.
- **Sept. 15, 2007:** an amendment to the Act consequential on the new *Coroners Act*, S.B.C. 2007, c. 15 is proclaimed into force by B.C. Reg. 298/2007. This amendment addresses the timing as between a Representative's critical injury or death investigation and the exercise of the coroner's mandate under the new *Coroners Act*.
- **May 29, 2008:** *RCY Act* is amended to allow the Representative to publicly confirm in some circumstances that she is performing one of her functions in respect of an individual: *Miscellaneous Statutes Amendment Act (No. 2), 2008, S.B.C. 2008, c. 42, s. 123.*²⁸
- **Oct. 27, 2008:** *Representative for Children and Youth Act Regulation* amends definition of "designated services" and "reviewable services" to include "the child in the home of a relative program, respecting which income assistance is provided under Section 6 of the Employment and Assistance Regulation."
- **Oct. 27, 2008:** *Representative for Children and Youth Regulation* amended to address the composition and appointment of the multidisciplinary team referred to in Section 15 of the Act. The multidisciplinary team's role is to provide advice and guidance to the Representative respecting the reviews and investigations of critical injuries and deaths of children conducted under Part 4 of the Act.

²⁸ Prior to the amendment, the Representative was prevented from even confirming publicly that she was reviewing a case which was otherwise in the public domain.

What the Office Does

The Representative's work is summarized in the four annual reports submitted to the Speaker of the House, covering the periods 2007-08, 2008-09, 2009-10 and 2010-11. The annual reports summarize the nature of the work undertaken by the office in each part of its mandate, and provide several examples of work undertaken in the exercise of each function.

Advocacy: The Representative's advocacy mandate is discussed in the 2010-11 Annual Report, submitted in September 2011:

Navigating government services isn't always easy. Even at the best of times, accessing services can be complex, confusing and frustrating.

The Representative's advocacy staff help ensure that children's rights are respected and they help young people in British Columbia overcome barriers they may face. Advocates respond directly when a child, youth or family requests their help, providing information, advice and support in dealing with the province's family-serving system. They also work to increase awareness of the services available to vulnerable children and youth across the province and to promote and encourage the development of community advocacy organizations through outreach, information, education and support.

Between April 1, 2010 and March 31, 2011, RCY advocacy staff took on 1,716 new cases. That's a four per cent increase from the previous year, mainly due to growing awareness of the Representative's Office and the services it offers children and youth, including advocacy.

November 2010 was the program's busiest month on record, with advocates taking on 192 new cases. During the year, the average number of new cases per month was 142.

Since the Office's inception in April 2007, RCY advocates have taken on 6,118 cases.

Monitoring: The 2010-11 Annual Report describes the monitoring, research, evaluation and audit role as follows:

In addition to advocacy and investigative roles, the Representative works to translate individual issues, reviews and circumstances into a larger understanding of how the system of supports works for children, youth and families. This is the responsibility of the monitoring, research, evaluation and audit program. It helps tie together the strands of individual cases, as well as the Representative's work with outside agencies, and provides important insight into how well the government is serving British Columbia's young

people. It also plays a role in gathering data, reviewing relevant literature and supporting the other units of the Office in their work.

The Representative reports publicly on broadly defined or systemic issues, including issuing update reports on the implementation of recommendations that have been previously received by the Select Standing Committee on Children and Youth. In addition, the Representative monitors very closely a broad range of issues that emerge from meetings, correspondence and public engagements. These are all opportunities to “take the temperature” of the systems of support for vulnerable children and youth.

The Representative issues reports on a broad range of subjects focused on the needs of children, in order to help the public understand how the child-serving system operates and to illuminate critical policy questions. These reports are tabled in the Legislature, discussed by the Select Standing Committee, and receive wide attention, generating frequent requests for re-prints, speaking opportunities and other forms of public outreach. Issues addressed include: services to special needs children and youth; screening and safety checks in the Child in the Home of a Relative program; youth justice experiences for youth in care; educational outcomes for children in care; progress reports on the Hughes Review recommendations; and, a report on key indicators of well-being for B.C.'s children and youth.

Preparation and production of these reports involves the participation of RCY staff, external consultants and academic experts. By examining B.C.'s experience and looking broadly at other jurisdictions, the Representative is able to bring a 'best practice' approach to the reports' recommendations, grounding them in pragmatic responses to the issues identified.

Critical Injuries and Deaths: Consistent with the *Hughes Review* recommendations, the Representative's function regarding critical injuries and deaths is more limited and focused than that of the former Children's Commission. Rather than receiving notice of all child deaths and critical injuries, the Representative receives notice of deaths and critical injuries where the child is in care, or the child or family was receiving a reviewable service within a year of the incident.

In the vast majority of cases, the Representative uses this information to inform aggregate reviews designed to identify patterns and recommend systemic reforms. The Representative's 2010-11 Annual Report provides an overview of the Critical Injuries and Death functions:

When a child dies unexpectedly or suffers a critical injury, along with the heartbreak come difficult questions: Why did this happen? What were the circumstances? And what, if anything, can be done to prevent this kind of tragedy from happening again?

In cases where the child or family had been receiving reviewable public services, including those related to child welfare, mental health, addiction and youth justice systems, those deeply personal questions take on an added, public dimension. That's where the Representative's Office comes in, providing independent, arm's-length oversight and seeking to ensure that, wherever possible, service providers and society in general advance their understanding of the needs and realities of vulnerable children and families.

Under the Representative for Children and Youth Act, the Representative has a mandate to review the deaths and critical injuries of children and youth who had at any time in the previous year received reviewable services.

The Ministry of Children and Family Development reports the death or injury to the Representative's Office. About 200 incidents have been reported each year by MCFD. During the period covered by this report, 88 deaths and 136 critical injuries of children and youth were reported to the Representative's Office.

In a small number of cases, such as where the Select Standing Committee for Children and Youth makes a referral, or where the test set out in Section 12(1) of the *RCY Act* is met, the Representative may determine that a full investigation, public report and recommendations would contribute to a better child welfare system:

- 12 (1) The representative may investigate the critical injury or death of a child if, after the completion of a review of the critical injury or death of the child under section 11, the representative determines that
- (a) a reviewable service, or the policies or practices of a public body or director, may have contributed to the critical injury or death, and
 - (b) the critical injury or death
 - (i) was, or may have been, due to one or more of the circumstances set out in section 13 (1) of the *Child, Family and Community Service Act*,
 - (ii) occurred, in the opinion of the representative, in unusual or suspicious circumstances, or
 - (iii) was, or may have been, self-inflicted or inflicted by another person.

There are several restrictions on investigations. An investigation cannot proceed during a criminal investigation or proceeding. If the coroner or the ministry is reviewing the death or critical injury, the Representative must wait for one year, unless the review is completed earlier.²⁹ During an investigation, evidence can only be compelled under oath according to the same standards that govern administrative tribunals.³⁰

²⁹ *RCY Act*, s. 13.

³⁰ *RCY Act*, ss. 14, 14.1

The 2009–2010 Annual Report describes the investigation process:

All case-related records and relevant legislation, policies and standards are reviewed to develop a broader understanding of the circumstances. Interviews are conducted with numerous individuals under oath. The interviews are recorded and transcribed. In addition to case-specific information, relevant legislation, policies and service standards are fully reviewed. All of this information forms the basis for the analysis, findings and recommendations.

Draft materials are reviewed by the Representative's Multidisciplinary Team, established in Regulations, for advice and guidance about findings and recommendations prior to the completion of an investigation. The Multidisciplinary Team meets at least quarterly, and brings together expertise from the following areas and organizations:

- Policing
- BC Coroners Service
- B.C. Injury Research Prevention Unit
- Aboriginal community
- Pediatric medicine and child maltreatment/child protection specialists
- Nursing
- Education
- Pathology
- Special needs and developmental disabilities
- Public health
- Ministry of Children and Family Development, Child Protection

In some instances, other external experts are also consulted. When the draft report is completed it is sent, on a confidential basis, for an administrative fairness review by organizations and individuals who have been interviewed or who are affected. The results of this process are considered prior to finalization of the investigation report.

Once an investigation is complete the Representative produces a public report that includes recommendations for improvements to the child serving system. These recommendations are monitored for implementation on an ongoing basis.³¹

³¹ Annual Report, 2009–2010, pp. 10–11.

A critical feature of the Representative's investigation mandate is the power to make a recommendation to any public body whose services may have touched the child whose death or critical injury is being investigated. This is set out in Section 16(4)(a) of the *RCY Act*:

- 16(4) A report made under subsection (3) must contain the representative's reasons for undertaking the investigation and may contain the following:
- (a) recommendations for
 - (i) the public body, or the director, responsible for the provision of a reviewable service that is a subject of the report, or
 - (ii) any other public body, director or person that the representative considers appropriate;

This feature of the *RCY Act* recognizes that the child is a whole person, and that government services operating in silos do not always adequately respond to this reality. Section 16(4) recognizes that where other public services, affecting child safety, can improve their delivery of service to children, there is no good reason to artificially exclude those public bodies from constructive comment in an investigation report. The Representative's most recent investigation report, recommending that the Attorney General consider statutory forms to better protect children in private custody hearings, is an excellent example of this provision in action.³²

³² *So Many Plans, So Little Stability: A Child's Need for Security* (September 2011), pp. 31–36.

Administrative Challenges

There is an inevitable tension that results from an independent office providing oversight of a government ministry, even when the ultimate purpose of that oversight is to offer constructive suggestions for change. That tension is healthy and positive. In its most constructive aspect, it can ensure that each party communicates and respects the mandate of the other, even while agreeing to undertake the kind of cooperative action Hughes envisioned in his review:

An important by-product of this accumulation of experience could be requests by government institutions or ministries for the Representative to take part in the development of policies or practices that reflect a deeper understanding of the needs and interests of children, youth and their families.

Some might be concerned that the Representative's ability to comment impartially on the application of a policy that it has had a hand in developing could be compromised, but I don't share that view. The Representative should be engaged in constantly helping the system improve itself.³³

Where the tension can be unhealthy is when it results from an unwillingness to provide to the Representative the information to which she is entitled in order to adequately carry out her duties, or where there is reluctance to constructively consider the findings and recommendations of the Representative.

There were times in the first few years when, despite the best efforts of the Representative, necessary information has not been forthcoming. In those instances, the Representative has made the difficult decision that she could not compromise her mandate by accepting less, even though she was well aware of criticism that would arise in some quarters when she insisted that government comply with its legal obligations.

Two situations where these difficulties became most acute arose in connection with (a) the Representative's need to see Cabinet records in connection with an audit of the *Child in the Home of a Relative* Program, and (b) the Representative's concern that the critical injury review function was being compromised because the office was not receiving full notification of those critical injuries. In both cases, government had a legal duty to provide the information.

³³ *Hughes Review*, p. 33.

In the first case, concerning Cabinet records, having exhausted all alternatives, the Representative pursued the information in court, in an application to compel government to do its duty. Significantly, government did not attempt in court to defend against the position that it failed to comply with its legal duty. Government's position was solely that the Representative could not ask the Court to enforce the government's legal duty. The Court rejected this argument. In *Representative for Children and Youth v. British Columbia*, 2010 BCSC 697, the Court stated as follows at para. 74:

The rule of law is a fundamental premise of our legal and democratic system. It means that no one is immune from the law or excluded from the benefit of the law. For this reason, the notion that anyone, especially persons holding high public office, can breach their statutory duties without being accountable to a court of law is a highly exceptional proposition. The *RCYA* does not bear an interpretation that ousts the court from its ordinary role in providing a remedy for breach of the law.

As members of the Select Standing Committee will recall, the litigation arose in the midst of a proposed amendment that would have undermined the Representative's role by limiting the Representative's right to information. Following the Court's judgment and with the assistance of Mr. Ted Hughes, a Memorandum of Understanding was entered into between the Representative's office and government, which outlined how the Representative would treat the Cabinet records once received. With the signing of this Memorandum, the amendment was abandoned.

The second case, concerning notification of critical injuries, had long been a concern of the Representative, reaching serious proportions when the Representative learned through the media, rather than from the ministry, about the case of a developmentally delayed girl left alone for several days with the body of a deceased parent. The Representative submitted a Special Report to the Legislative Assembly expressing concerns that the ministry was not complying with the legal duty set out in Section 11(1) of the *RCY Act*:

11 (1) After a public body responsible for the provision of a reviewable service becomes aware of a critical injury or death of a child who was receiving, or whose family was receiving, the reviewable service at the time of, or in the year previous to, the critical injury or death, the public body must provide information respecting the critical injury or death to the representative for a review under subsection (3).

The Special Report was filed in December 2010. The impact of more compliance in reporting has had a very significant impact on the workload of the Representative's office. From January 2009 through February 2011 an average of 18 reports a month were received. Since then, the number of reports has been at least double the previous averages. The increase is in reports of critical injuries and this underlines that many cases were previously being missed.

Recent leadership changes within MCFD have resulted in a sea change in the relationship with the Representative's office. These changes give cause for hope that healthy and long term stability is possible, and that this period of stability will allow the original vision for the office to be fully realized, and that the Representative's resources will not in future have to be expended to ensure that the office has the information it requires to undertake its duties.

Over the past five years, the Representative has, in each area of the mandate, engaged in countless problem-solving interactions with the ministry and other public bodies. Several memoranda of understanding with provincial and federal bodies (most notably concerning receipt of data) have been developed. There have been joint projects with other officials such as the Ombudsperson and the Provincial Health Officer. A significant recent achievement was the signing of a Joint Protocol between the ministry and the Representative concerning advocacy services.

Statutory Reform

As noted, the *RCY Act* has in its short life already been the subject of considerable legislative care and attention. By and large, the *RCY Act* in its current form works very well in application, and provides an effective statutory basis for practical fulfillment of the mandate.

The Representative suggests amendments only where experience shows that reform is truly essential to enable the Representative to properly do her job.

Youth services during transition to adulthood

The first area arises from a legal conflict within the *RCY Act* itself. The conflict arises because the Act simultaneously defines child as "a person under 19 years of age", but then defines "designated services" to include "services for youth and young adults during their transition to adulthood" (ages 19-24). Since the Representative is only permitted to advocate on behalf of a child eligible to receive a designated service, the concern is that there is no jurisdiction to assist this vulnerable needs group, even though they are receiving designated services as defined in the *RCY Act* itself.

The Representative does not believe that it was the intention to exclude a mandate over these persons, particularly for advocacy purposes. The problem appears to be a drafting issue, which would be solved if the definition of "child" were amended as follows:

- "child" means (a) a person under 19 years of age; or
(b) for the purposes of s. 6(a) or (b) of this Act, any youth or young adult receiving services during their transition to adulthood.

The amendment would enable the Representative to exercise her functions with regard to this group in her advocacy and monitoring roles.

It is not necessary to have the definition extended to deaths and critical injuries.

Children in Care and education

Children in care have several statutory rights recognized in Section 70 of the *Child, Family and Community Service Act*. These include the right "to be fed, clothed and nurtured according to community standards."³⁴ In the Representative's view, part of the right to be nurtured according to community standards includes the right to be educated according to community standards. In the case of a child in care, this may require consideration to be given to the individualized education planning undertaken for that child.

³⁴ *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 70(1)(a).

At the moment, the Representative's advocacy mandate is limited to advocacy "respecting designated services." The argument has been sometimes raised that since "education" is not a designated service, the Representative has no advocacy mandate in this area.

The Representative is not suggesting a mandate to review all individualized education plans for all children, or even all such plans for all children receiving any designated service. What she is suggesting is considerably more focused: a clarification of the mandate to advocate for children in care, to include education planning for such children. This is necessary to ensure that such a child's statutory right to be nurtured according to community standards in Section 70 of the *CFCs Act* is properly respected.

This change could either be an amendment to the *RCY Act* definition of "designated service", or a Regulation change which the definition of "designated service" also permits. If it were an amendment to the *RCY Act*, it might read as follows:

"designated services" means any of the following services or programs for children and their families provided under an enactment or provided or funded by the government:

- (a) services or programs under the *Adoption Act*, the *Child Care BC Act*, the *Child Care Subsidy Act*, the *Child, Family and Community Service Act*, the *Community Living Authority Act* and the *Youth Justice Act*;
- (b) early childhood development and child care services;
- (c) mental health services for children;
- (d) addiction services for children;
- (e) services for youth and young adults during their transition to adulthood;
- (f) individualized education plans for a child in care; and
- (g) additional services or programs that are prescribed under section 29 (2) (a);

Concluding Comments

Hughes would have excluded the Representative's advocacy mandate from the five year review,³⁵ but found it would be desirable after five years to determine whether there was sufficient confidence in the public welfare system to remove external review by the Representative, in the form of the monitoring function and the critical injury and death review and investigation function. As noted at the outset, Section 30 of the *RCY Act* requires the Select Standing Committee to answer this question by asking whether those parts of the Act it wishes to review "are still required to ensure that the needs of children are met."

This paper has attempted to assist the Standing Committee by reviewing the Act's background, purpose, history, the work of the Office of the Representative and suggestions for reform.

The Representative believes that the *RCY Act* has charted a stable course for positive measures to "ensure that children's needs are met" as required by the Legislative Assembly. The improvements identified are respectfully submitted for your consideration.

³⁵ *Hughes Review*, p. 30

