

Legislative
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de l'Ontario

Office of the Provincial Advocate for Children and Youth

**Submission to the Ministry of Children
and Youth Services
on the Review of the *Child and Family
Services Act***

Process of Review

The Child and Family Services Act (CFSA) must be reviewed every five years. For this review, the scope was communicated within weeks of the deadline for comments to be considered for the process, leaving a very short time frame to respond to the specific questions, for those already aware that a review would be required. It is likely even more difficult for the parents, children and youth who use the services under the CFSA to respond within the time frame given and could make one cynical about the Ministry's commitment to the process. For future reviews, specifying the scope much earlier would help to ensure that the review process itself is not causing a barrier to improving outcomes for children and their families.

Introduction to the Act

The United Nations Convention on the Rights of the Child (UNCRC) was adopted twenty years ago. In addition to detailing the 54 Articles that have been ratified by almost every country in the world, it promotes the interrelated nature of children's rights and the equal importance of every right.

In February 2009, the Government of Saskatchewan announced that it was adopting the *Children and Youth First Principles*, prepared by the province's Children's Advocate's Office, as part of its plan to strengthen the province's child welfare system. [see Appendix 1] This document illustrates how the UNCRC can be incorporated into and made central to provincial child welfare legislation. The Office of the Provincial Advocate for Children and Youth (OPACY) recommends that Section 1 of the CFSA be rewritten to include adherence to the articles of the UNCRC under the purposes of the Act.

Furthermore, OPACY urges that Ontario create its own "child first" policy which would be used to review all proposed legislation for its impact on children and youth and to speak more broadly to the expected outcomes for all children and youth of the province.

CAS Compliance with Provisions Related to Indian and Native Persons

Although this aspect of the review is occurring through a separate process, OPACY would like to make recommendations regarding the process of this part of the review. It should be a very open process for people who want to share their thoughts about CAS compliance and as a priority, must include children and youth, either as individuals or within groups of other children and youth. To do so effectively, they must feel safe and not at risk to share their ideas and must be supported by adults during and after the process.

The process should include community members, elders, band councils, chiefs, community based resource workers, teachers, nurses, doctors and mental health workers. The Ministry has stated that input will be sought through regional meetings, as well as written submissions. OPACY would encourage the Ministry to plan for smaller community meetings and to consider video conferencing whenever possible to allow people in smaller, remote communities to take part. It will be very important to hear from foster parents who are part of the formal system and customary caregivers, who may be providing formal placements through CAS auspices or informal care.

Specific Points of Comment within Scope of the Review

Outcomes

OPACY supports the development of measurable results for children and youth participating in programs and services under the CFSA. As well as the two stated outcomes of graduation from secondary school and building the ability to recover from adversity, OPACY would add the following practical outcomes for young people:

- Children and youth have a permanent home rather than a placement.
- Children and youth have permanent status in Canada.
- Children and youth have identification available to them and leave care with identification.
- Children and youth leave care with a source of income, in their own right when aging out of the system. When younger children are leaving to the care of an adult, CAS should ensure adequate financial support, through subsidies or other government programs, as needed.
- Connection to a caring adult or peer.
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Progress toward these outcomes can be included regularly in plan of care meetings and reports. The goals should be achieved in the eyes of the young person leaving care as well as the agency responsible.

Better Outcomes for Children and Youth

Contributing to Common Outcomes

EXTENDING THE AGE LIMIT

Currently, a proceeding to bring a child or youth into care must be commenced prior to the child's sixteenth birthday [**CFSA 37(1) and 47(3)**]. OPACY proposes that these sections be amended to allow children and youth to enter care up to their eighteenth birthdays or to reenter care if they have previously had wardship terminated. This extension would be subject to the spirit of **CFSA 27(1, 1)**, which requires consent for a service to be provided to anyone aged sixteen and over. OPACY would not support an amendment that allowed youth of sixteen and over to be apprehended and made wards without their consent, but does support the offer of child welfare services to them.

The UNCRC states that childhood ends at the 18th birthday, "unless, under the law applicable to the child, majority is attained earlier". [UNCRC Article 1] Article 19 provides that "States parties shall take all ... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" [UNCRC].

The Centre of Excellence for Child Welfare provides a comparison across Canada, showing five provinces or territories that have already defined 18 or 19 as the maximum age of protection for child welfare. In Ontario, other provincial Acts recognizing 18 as the age of majority include the Election Act, The Education Act, the Age of Majority and Accountability Act and the Children's Law Reform Act. By setting the age of protection at 16, the CFSA is inconsistent with other legislation and creates a barrier to service for those between 16 and 18 who may not qualify for adult service systems and are legally barred from the child welfare system. Currently, youth aged 16 to 18 have very limited access to financial support from Ontario Works and no access to the Ontario Disability Support Program and are required to in school so cannot work to support themselves. Youth aged 16 to 18 living in an abusive situation may have no choice but to stay because they are unable to access either the adult or child system.

EXTENDED CARE AND MAINTENANCE

CFSA 71.1 states that agencies *may* provide extended care and maintenance under the regulations. The maximum age for Extended Care and Maintenance (ECM) is currently set by policy as attainment of age 21. According to feedback from young people across the province, the provision of ECM varies greatly, with inconsistencies in the amount and type of service provided. OPACY would advocate for the Act to be changed to state that agencies *will* offer ECM to any youth where the outcome measures have not yet been attained. The flexible nature of ECM could be retained by continuing to state that ECM may also be provided to youth where outcome measures have been attained but other reasons exist for continuing care with the society.

A current case example illustrates the arbitrary nature of the ECM policies. OPACY has as a client an 18-year-old former Crown Ward of a Children's Aid Society who left care because his wardship expired. He has a serious, unstable mental illness and was discharged from care with no source of income and no housing. The CAS involved has declined to offer ECM as a temporary measure to transition him to mental health and support adult services, stating that ECM is within their discretion and their standard is "higher than most".

EXTENDED CARE AND MAINTENANCE – AGE

The maximum age for ECM should be revised to 25 years. While flexibility of ECM can be maintained through policy, the mandatory requirement to offer it to those youth who have not yet met the expected outcomes and the new age limit of 25 must be included in the Act itself to give the policy the weight required. In the United States and the United Kingdom, extended care and support to youth leaving care has been already been mandated through legislation. [McEwan-Morris, 2006]

For most youth in Canada, the transition to adulthood is a process that occurs over a number of years, well into the twenties, and allows for mistakes, growth and movement between independence and support from family. Youth within the care system are faced with an arbitrary age limit which signals absolute independence and self sufficiency. [Reid and Dudding, 2006] A number of reports over the past 20 years have made recommendations to extend the transition period of youth well past the legal age of majority, recognizing the impact of traumatic events, disruptions in placement and education , and need for gradual acquirement of independence skills. [Raychaba, 1987, Martin, 1996, Ontario Association of Children's Aid Societies, 2006] At the same time, the trend for other youth in Canada has been to live in the parental home for increasing periods of time. In 2002, 60% of young people aged 20 to 24 lived with their parents, which was an increase of 4% since 1992. [Canadian Council on Social Development, 2006]

The *Midwest Evaluation of the Adult Function of former Foster Youth* is a longitudinal study of youth in three American states, comparing youth in care to their peers not in care. In general, youth in care are "less likely to have a high school diploma, less likely to be pursuing higher education, less likely to be earning a living wage, more likely to have experienced economic hardships, more likely to have had a child outside of wedlock, and more likely to have become involved with the criminal justice system." [Courtney 2007, p. 84] The study has already shown that extending care for even one year past age 18 is associated with an increase in postsecondary attendance. The ongoing study will continue to collect data from the same young people at ages 23 and 25 and the researchers are assuming that the data will show continued educational gains over time. They conclude that in extending care to youth, the potential benefits in increased education and potential earnings and decreased dependence on other systems, will more than offset the costs to government. [Peters 2009]

EXTENDED CARE AND MAINTENANCE – RATES

Rates paid to foster parents are set by local societies and may vary across the province. Youth have reported to OPACY that ECM provides a lower rate of financial support than foster care allowances. This may act as a disincentive for foster parents to continue to provide care in their homes to youth over the age of 18, as they can receive only a portion of the EMC allowance, with no additional funds for clothing or transportation as are available to foster parents of younger children. OPACY supports the extension of foster care rates to foster parents in situations where the foster parents, youth and society are in agreement that that it would be in the youth's best interests to continue to live in the foster home.

In the United States, child welfare legislation falls under state responsibility, with some federal funding agreements. The Child Welfare League of America has summarized the state policies for young people turning 18, indicating that many states allow foster rate payments to continue when youth remain in foster homes beyond their 18th birthdays.

ADOPTION

Raising Expectations, the 2009 report of the Expert Panel on Infertility and Adoption to the government of Ontario, contains numerous specific recommendations regarding permanency planning and adoption. OPACY supports the recommendations of this report, particularly the provision of post-adoption subsidies and supports to facilitate permanent homes for children.

KINSHIP/CUSTOMARY CARE

A review of the literature regarding kinship care revealed large gaps in Canadian research and development of policy frameworks. From necessity, practice has moved in the direction of increased kinship placements and has outstripped research and policy. [Dill, 2007] The age and income of the caregiver, the stability of the relationship with the child's parent, financial and social supports, level of trust between caregiver and child welfare agency, and flexibility of the kin arrangement over time will all affect permanency and outcomes for the child. [Callahan , Brown, Mackenzie & Wittington, 2004] OPACY recommends at this time that while the CFSA does need to be revised to direct the increasing use of kinship/customary care placements, the legislation needs to be based on careful consideration of research and include the development of a clear policy framework.

Improving Outcomes by Working Together

Modernizing the Act

PLACES OF SAFETY AND CHILDREN'S RESIDENCES

With the Ministry focus on supporting youth and providing opportunities to reach their full potential, it is no longer appropriate for children and youth being brought into care to be placed in open temporary detention as a place of safety. **CFSA 40 (10)** and any related sections should be repealed. As well, specific wording should be added to the CFSA to disallow placements in hotels and youth hostels as residential placements for children. Under **CFSA 192 (h)**, a hostel intended for short term accommodation is specifically *not* included in the definition of a "children's residence" and **CFSA 14** requires that "No approved agency shall place a child in a residential placement except in accordance with this Act and the regulations." Yet OPACY continues to hear from CAS wards who are being housed in hotel rooms or told to go to youth hostels because the society has no other placement for them.

LANGUAGE

Being in the care system often carries a stigma for children and youth. The CFSA includes language that may add to this stigma. Substituting alternative language has been proposed previously by adult groups within the field. The children and youth living within the system are the best resources to identify more positive language and OPACY supports consultation with young people to modernize the language of the CFSA.

Improved Service Experience

STATUS REVIEWS

Being able to choose when they wish to receive service is important to youth in care. As important as it is to increase flexibility for young people coming into care, it is also important to allow children and youth to have the ability to make choices about leaving care. Currently, the legal process makes it difficult for children and youth to initiate a Status Review on their own, although they have the legal right to do so. Revising the CFSA to state that a child initiating a status review is *entitled* to legal representation [**CFSA 64 (4,1) and 65.1 (4, a)**] would assist children to have their wardship reviewed more easily. As well, **CFSA 64 (2) and 65.1 (2)** should be amended to add that a society *shall* apply to the court for a review of the child's status when the child has stated that they wish to review their status, even when the society is not in agreement with this review. This would take the legal onus off of the child to initiate an application and still allow both society and child to present their cases.

AGE DISTINCTIONS

Age distinctions within the CFSA regarding legal processes should be removed. **CFSA 39 (4)** already allows for individual decisions to be made regarding children's notice and participation in legal proceedings and further distinction according to age is not necessary. This would also make the Act consistent with UNCRC Article 12, which does not support a lower age limit on the consideration of children's views.

SPECIAL NEEDS

OPACY endorses the recommendations made by the Family Legal Health Program at the Hospital for Sick Children regarding special needs. The CFSA should be strengthened to ensure access to the resources needed by children with special needs, through a single, coordinated process. As an interim measure, we support a change in policy to allow the use of Special Needs Agreements when there are no protection concerns.

COMPLAINT PROCESSES

Ensuring their ability to voice concerns and complaints about their care ties to the Ministry's strategic goals of every child and youth having a voice, receiving personalized services and developing resiliency. Access to existing complaint and review mechanisms is a critical part of creating a good service experience for children and youth in care. **CFSA 108** outlines the child's right to be informed of these complaint and review mechanisms upon admission to a residential placement. However, OPACY hears frequently from young people who state that either that they have not been informed, or that they were not aware of specific deadlines. OPACY recommend that the CFSA specify legislatively how and when rights are reviewed regarding the internal complaints process, the Office of the Provincial Advocate for Children and Youth, the Residential Placement Advisory Committee, the Child and Family Services Review Board and the Custody Review Board.

A comment heard frequently by Advocates from by children and youth who have attempt to use internal complaint processes, particularly within children's residences, is that they do not receive a reply to their complaints. The requirement of a service provider to "seek to resolve the complaint" [CFSA 109 (2)] could be extended by adding an additional requirement to provide a written report of the resolution to the person making the complaint.

In 2009, OPACY received 1091 calls from children and youth with complaints about child welfare agencies, custody facilities and children's residences, which were not being resolved through existing complaint mechanisms.

RESIDENTIAL PLACEMENT ADVISORY COMMITTEE

An application to the Residential Placement Advisory Committee (RPAC) is a first step for many youth who are objecting to the placement selected by the society. There is a perception that reviews are not allowed for foster care placements. **CFSA 34 (1, c)** should be rewritten to state explicitly that a review process under RPAC does apply to residential placements with foster parents. As well, OPACY recommends that **CFSA 34 (8)** be amended to state that an advisory committee *will* interview the child, unless the child declines the interview, when the review is initiated because a child objects to the placement [CFSA 34 (6, b)] or the child has requested a review [CFSA 34 (7)]. Finally, when RPAC requests information to carry out a review, there is currently no time limit on an agency's response to the request. **CFSA 34 (8, c and d)** could be amended to specify a time limit by which a service or society must respond to RPAC's request for information.

CUSTODY REVIEW BOARD

The Custody Review Board (CRB) is an option for young people within the youth criminal justice system to address their placement concerns. The CRB has a 30-day limit following a change of placement or decision regarding placement to apply for a review of the decision. OPACY has spoken with many young people who were unaware of the existence of the CRB and therefore missed the opportunity to apply for a review. Recent full-scale reviews of two direct operated secure custody facilities carried out by OPACY as well as preliminary findings based on youths' complaints at a third facility, indicate that problems with basic care, programming, staff-youth relations and safety have been serious and on-going. [OPACY, 2008, 2009, 2010] Limiting access to the CRB to 30 days will not help when the issue exacerbates over time, such as violence, or when there is a cumulative effect, as with inadequate quantity of food. **CFSA 97 (1)** should be amended to require that a young person be informed of the right to apply for a review through the CRB and to allow an application for a review at any time.

When the CRB carries out a review of a reintegration leave or placement decision, it makes a written recommendation to the provincial director, when is responsible for the final decision. The CFSA does not include any further steps to outline how the provincial director reports the decision to the youth or the CRB and gives no further process should the provincial director decide not to accept the recommendation of the CRB. [CFSA 97 (6)] A requirement to provide reasons for declining the recommendation of the CRB would assist in the ability of the provincial director and the CRB to work together and share information about clients, as well as OPACY, when complaints come to our office because there is no other mechanism in place.

CHILD AND FAMILY SERVICES REVIEW BOARD

Similarly, **CFSA 68.1 (7)** states that the Child and Family Services Board (CFSRB) may make orders to societies, but does not require the society to report on its compliance with the orders. Currently, the issuing of the order is the final involvement of the CFSRB in the complaint process, with no scope to review the implementation of the order. The addition to the Act of the requirement of societies to report back to the CFSRB would again provide a completion of the review process and clarify the roles and responsibilities of the CFSRB, the society, and OPACY in working together.

REPRISALS

The Human Rights Code of Ontario contains a reprisal clause, which specifies that people have the right to claim and enforce their rights under the Act, to participate in proceedings under the Act, and to refuse to violate the rights of another under the Act, without reprisal or threat of reprisal for so doing. [Part 1, Section 8] Adding similar wording to the CFSA under Part V would strengthen the Act and the ability of children and youth to assert their legislated rights.

STANDARDS OF CARE

Children and youth in care of the province deserve legislated standards to ensure a consistent quality of care across all residential placements. This would involve the development of strategies for continuous improvement of the service; a regular review of agency services; feedback regarding service quality from clients, family, staff, placing agencies and other stakeholders on a regular basis; and formally analyzing the information gathered to make positive change. [Office of Child & Family Service Advocacy, 2004]

PHYSICAL RESTRAINTS

Each person has the right to autonomy over one's one body, what is done to it and what is refused, as enshrined in Section 7 of the Canadian Charter of Rights and Freedoms. If service providers are going to limit these fundamental rights then there must be substantial procedural safeguards put in place for children and youth and these protections must be enshrined in law. Currently the section of the CFSA related to physical restraints is contained within the regulations of the Act. [**CFSA Reg. 109.1 and 109.2**]

OPACY receives calls from children and youth in all types of children's residences raising concerns about physical restraints, including techniques used, lack of less intrusive measures, amount of force used and lack of debriefing, all of which are specified clearly within the regulations. To assert even more strongly the seriousness of a decision to "lay hands" on a child or youth and the importance of following every standard, OPACY recommends that these regulations be moved into the Act itself.

Alignment with Other Legislation

HEALTH CARE CONSENT

The CFSA requires amendments to bring it into line with other legislation. **CFSA 28**, specifying consent to counselling and **132 (1)**, regarding consent for psychotropic medications, need to be repealed, as they do not align with the Health Care Consent Act [Section 4, *Capacity* and Section 10, *No treatment without consent*].

PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH

The Provincial Advocate for Children and Youth Act (PACYA) was proclaimed in 2007. Although it does not conflict with the CFSA, the PACYA contains more specific wording regarding the obligations of service providers regarding contact with the Advocate. OPACY recommends that **CFSA 103 (1, b)** be amended to adopt the clearer wording in **PACYA 18**.

Appendix 1

CAO ‘Children and Youth First’ Principles

- 1) *That all children and youth in Saskatchewan are entitled to those rights defined by the United Nations Convention on the Rights of the Child.*
- 2) *That all children and youth in Saskatchewan are entitled to participate and be heard before any decision affecting them is made.*
- 3) *That all children and youth in Saskatchewan are entitled to have their ‘best interests’ given paramount consideration in any action or decision involving them.*
- 4) *That all children and youth in Saskatchewan are entitled to an equal standard of care, protection and services.*
- 5) *That all children and youth in Saskatchewan are entitled to the highest standard of health and education possible in order to reach their fullest potential.*
- 6) *That all children and youth in Saskatchewan are entitled to safety and protection from all forms of physical, emotional and sexual harm, while in the care of parents, governments, legal guardians or any person.*
- 7) *That all children and youth in Saskatchewan are entitled to be treated as the primary client, and at the centre, of all child serving systems.*
- 8) *That all children and youth in Saskatchewan are entitled to have consideration given to the importance of their unique life history and spiritual traditions and practices, in accordance with their stated views and preferences.*

Principle 1)

United Nations, *Convention on the Rights of the Child*. (1989: Geneva). This is one of the Beliefs listed in the Saskatchewan's Action Plan for Children, Policy Framework, (1995). See also: Rae, J., *Indigenous Children: Rights and Reality: A Report on Indigenous Children and the U.N. Convention on the Rights of the Child*, (UN Sub-Group on Indigenous Children and Youth), University of Toronto: 2006, at p.7, where it is stated that "the concept of 'children's rights' in the UN *CRC* resonates deeply with many Indigenous peoples today as comparable to, or at least compatible with, their own concepts of human dignity and childhood." The *Convention* is legally binding at the international level and governments must take their obligations seriously to implement it in domestic practice, policy and legislation. In the absence of a clear conflict with domestic legislation, the UN *CRC* should be used as a contextual tool for statutory interpretation. For instance, in *Baker v. Canada*, [1999] 2 S.C.R. 817 and *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, the Supreme Court of Canada applied the presumption that an interpretation favoured by the *Convention* should be followed in domestic law. See also: Yoles, V., *The UNCRC: A Practical Guide for its Use in Canadian Courts* (Toronto: UNICEF Canada, 1998).

Principle 2)

This principle is consistent with Article 12(1) the United Nations *Convention on the Rights of the Child*, which provides 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." The African expression "Say Nothing about Me Without Me" embodies this principle.

Principle 3)

This principle is consistent with Article 3(1) of the United Nations *Convention on the Rights of the Child*, which states that "In 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." See also: Saskatchewan's Action Plan for Children, Policy Framework, refinement of one of the Principles listed. The 'best interests' of the child should take precedence over any jurisdictional or political considerations: *supra*, note 4, Statement of Jordan's Principle

Principle 4)

This principle is consistent with Article 2(1) of the United Nations *Convention on the Rights of the Child*, which provides that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, 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." This means that the minimum child protection bar under provincial child protection legislation is a constant and does not shift between different groups of children.

Principle 5)

This principle is consistent with Articles 24-29 of the United Nations *Convention on the Rights of the Child*.

Principle 6)

This principle is consistent with Article 19 of the United Nations *Convention on the Rights of the Child*, which provides that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect, or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

Principle 7)

This principle is consistent with Article 3(1) of the United Nations *Convention on the Rights of the Child*, *supra*, note 9. See Gove, Thomas (Judge), *British Columbia Report of the Gove Inquiry into Child Protection*, Volume 2, (Matthew's Legacy), (Ministry of Social Services, 1995) at pp. 245, 246, where he states that "the Province needs to be clear that the child is the paramount client of the child welfare system" and emphasizes the importance of "child-centredness" and placing the child "at the heart of" the child welfare system. See also Hatton, Mary Jane (Madam Justice), *Report of the Panel of Experts on Child Protection*, (Toronto: Ontario

Ministry of Community and Social Services 1998), where it was determined that the pendulum had swung too far in favour of parental rights, with the necessary child-focus being sacrificed in the process. See further: Bernstein, M., Regehr, C. and Kanani, K., *Liability for Child Welfare Workers: Weighing the Risks in Bala*, N. et al. (Eds.), Canadian Child Welfare Law: Children, Families and the State, 2nd ed. (Toronto: Thompson Education Publishing, Inc. 2004) at p. 405, where reference is made to the Jordan Heikamp Inquest – both to the finding of the Ontario Coroner’s Jury that the child protection worker’s focus in the case “was primarily on the mother and not on the child” and to the Jury’s recommendation that “It should be made clear to all Child Protection Workers and their Child Protection Supervisors that their client is the child in need of protection, not the parent or the family.” This will mean that in the event of a conflict between the best interests of a child and the interests of other family members, it is the best interests of the child that are paramount.

Principle 8)

This principle is consistent with Article 30 of the United Nations *Convention on the Rights of the Child*, which provides that “In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.” See also: supra, note 1, especially *Oyate Beyond ‘at Risk’ Systemic Issues Report*. Draft United Nations *Declaration on the Rights of Indigenous Peoples*, Resolution 1994/45, (approved by the United Nations Human Rights Council, June 2006, but not yet passed by the General Assembly), Preamble, where it is stated, among other things, that “Recognizing the urgent need to respect and promote the rights and characteristics of indigenous peoples ... which derive from their cultures, spiritual traditions, histories and philosophies ... “

Children’s Advocates Office of Saskatchewan

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