

CBA Child Rights Toolkit – Draft Outline
The Child’s Right to Privacy and Freedom of Information

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Chapter XVII The Child’s Right to Privacy and Freedom of Information

Section I – Summary

The Child’s right to privacy protected in Article 16 of the UNCRC is framed in nearly identical terms to the privacy protections enshrined in other international human rights instruments such as the UDHR, the International Covenant on Civil and Political rights, the Inter-American Human Rights Convention and the American Bill of Rights. It protects children against arbitrary and unlawful interference with their privacy, family, home or correspondence and against unlawful attacks upon their honour or reputation. It is a robust privacy right that is only partly reflected in the Canadian Charter’s section 8.

The Common Law in Canada has traditionally offered few remedies for invasion of privacy and several statutory remedies have developed, particularly in jurisdictions in western Canada. Initially the *Canadian Human Rights Act* contained a part dealing with privacy rights, but this was replaced with the adoption of the *Privacy Act*. The Quebec Civil Code however provides detailed remedies for invasion of privacy and protection of reputation and the Quebec Charter has privacy protection provisions modeled upon international human rights law. Following pressure from European trading partners, federal privacy regulation was extended to the private sector through PIPEDA, except where provinces had adopted their own legislation. Other jurisdictions have made statutory attempts at protecting Children’s privacy, such as the US *Children’s Online Privacy Protection Act* (COPPA), but no such standards have been developed in Canada and children continue to be prey to a host of rights violations online, from luring to child pornography, to on-line harassment and intimidation, to commercial exploitation of children’s online play and data mining of their online footprints. Children’s broader privacy interests, at home, at school, at work, in institutional settings are often lost in the deluge of online privacy threats and the legislative and policy responses thereto. However, these very rights are also increasingly at risk in a security conscious world where predation upon children and youth is at once denounced and sensationalized.

Canadian lawyers can materially advance the privacy rights of children and young people here by remaining alert to the scope and versatility of child privacy rights analysis. Child privacy interests are often in play whenever this right, this *handmaiden of liberty*, is considered in the context of other possible convention rights violations. A careful interpretation and application of privacy rights under Article 16 will often require an intersectional analysis in the context of other Convention rights, to education, to health, to freedom of information, freedom of expression or others. This is why the Chapter has been included in this section of the toolkit as a cross-cutting theme impacting many substantive areas of law.

Section II - The Law: rights that address the key elements (completed for each topic area)

1. **International Law** (used to help interpret domestic law)

- Relevant provisions from the UN Convention on the Rights of the Child

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

and

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

...

- (vii) To have his or her privacy fully respected at all stages of the proceedings.

Article 16 should be read in the context of other civil and political rights in Articles 13, 14, 15 of the Convention which immediately precede it and in the context of Article 17 which has no direct equivalent in earlier international human rights treaties but which stems also from the Freedom of expression guaranteed under Article 19 of the *International Covenant on Civil and Political Rights*. In the UNCRC this right is expressed separately and more emphatically as the child's right to freedom of expression guaranteed in Article 13 and the child's freedom of information rights as outlined in Article 17. Beyond a mere right to access and impart information Article 17 enjoins State Parties to ensure that the child's access to mass media will promote his or her social, spiritual and moral well-being and physical and mental health.

Privacy rights should be interpreted in keeping with the Convention's general principles in Articles 2, 3, 6 and 12 and with the several other rights where privacy interests are frequently in play, in particular Articles 7, 8, 9, 10, 11, 19, 20, 21, 22, 23, 24, 26, 27, 28, 32, 33, 34, 35, 36, 37 and 40.

- Relevant General Comments produced by the UN CRC

On the right of children and adolescents to privacy and confidentiality in relation to Health services see General Comment no. 4 on “Adolescent Health and Development” at paras 10 & 11, and also para 33 in relation to the consent of minors to medical treatment.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

On their right to privacy in health data and information management see General Comment 15 at para 118 and para 84 in relation to the role of the mass media in promoting children’s health and health information privacy.

On the need to balance risk and safety in the monitoring and surveillance of children’s play see General Comment 17 at para. 39 ; and ff at paras. 40 and 42 in relation to the child’s right to solitude in nature and freedom from overly structured and programmed schedules; and also at paras 45-47 on the encroachment of screen time on play time, the risks to children and their privacy online and the exploitation of children’s online play for marketing and commercialization purposes.

On the privacy protections for children in youth criminal justice matters and proceedings see General Comment no. 10 on “Children’s Rights in Juvenile Justice” at paras 64-67.

- Other key provisions from international instruments or case law

Article 16 is an affirmation of the human right to privacy of every person, including children proclaimed in the *Universal Declaration of Human Rights* in Article 12 and in the *International Covenant on Civil and Political Rights* (ICCPR), Article 17, which are virtually identical in wording to the UNCRC’s provision. Article 11 of the Pact of San Jose, the *American Convention on Human Rights*, uses the same broad language but introduces both clauses with the affirmation that “Everyone has the right to have his honour respected and his dignity recognized”.

http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm . Canadian Courts also pay close attention to the case law under the *European Human Rights Convention* which affirms a less broadly worded privacy right in its Article 8:

http://www.echr.coe.int/Documents/Convention_ENG.pdf .

The Supreme Court of Canada has commented frequently upon the nexus between privacy rights and liberty interests. In this regard Article 16 and Article 17 of the UNCRC should often be interpreted with reference one to the other and also with reference to Article 19 of the ICCPR which proclaims everyone’s right to Freedom of expression and provides that “this right shall include freedom to seek, receive and impart information and ideas of all kinds”

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> .

While the Committee on the Rights of the child has not yet produced a General Comment on Article 16 and the Right to Privacy, in 1988 the Human Rights Committee did produce a General Comment no. 16 on the Right to Privacy under Article 17 of the ICCPR which is helpful given the nearly identical wording of that provision and Article 16 of the UNCRC.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

Relevant comparative, regional and international case-law:

K.U. v. Finland, ECHR 2872/02, Court found in a case involving an anonymous posting to internet

exposing a 12 year old boy to the predation of paedophiles that the state had failed to take sufficient measures to protect the child's privacy rights under Art. 8 of the *European Human Rights Convention*. <https://www.crin.org/en/library/legal-database/ku-v-finland>

The Queen on the Application of HC (a child, by his litigation friend CC) v. The Secretary of State for the Home Department and Another [2013] EWHC 982 (Admin) UK HCJ. The UK Court struck down statutory provisions which allowed police to arrest and detain a 17 year old as an adult as a violation of Art. 8 rights to privacy and family life protected under the European Human rights Convention as interpreted in light of the UNCRC provisions.
<https://www.judiciary.gov.uk/judgments/oao-hc-a-child-v-sshd-judgment/>

Atala Riffo and daughters v. Chile, Inter-American Court of Human Rights Feb. 24, 2012, the Court held that the state's removal of the applicant's three daughters followign her decision to cohabitare with her same-sex partner constituted a violation of the children's right to privacy and family life as protected by Article 11 of the Inter-American Human Rights Convention http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf

2. Federal Legislation

Privacy Act <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-p-21/latest/rsc-1985-c-p-21.html>

Personal Information Protection and Electronic Documents Act

<http://www.canlii.org/en/ca/laws/stat/sc-2000-c-5/latest/sc-2000-c-5.html>

Youth Criminal Justice Act, Part VI, ss. 110-129 <http://www.canlii.org/en/ca/laws/stat/sc-2002-c-1/latest/sc-2002-c-1.html>

3. **Provincial/Territorial Legislation** (we will enlist the help of law students/ children's law committees across the country to fill in any missing jurisdictions)

Right to Information and Protection of Privacy Act <http://laws.gnb.ca/en/ShowTdm/cs/R-10.6//>

Personal Health Information Privacy and Access Act <http://laws.gnb.ca/en/ShowTdm/cs/P-7.05//>

4. **Case Law Summaries** that implement children's legal rights in the area

A.B. v. Bragg Communications Inc., [2012] 2 SCR 567, 2012 SCC 46 (CanLII)

<http://canlii.ca/t/fstvg> Exception to open court principle allowed to enable child applicant to bring suit anonymously to seek disclosure of the identity of her cyberbully. Court found that the privacy rights of young persons, as proclaimed in the UNCRC, and the need to protect children from cyberbullying prevailed over the open court principle. The Constitution protects the privacy of children not only via their Charter rights in sections 7 and 8, but as a principle of fundamental justice given the presumption of their diminished moral culpability, and this fosters respect for dignity, personal integrity and autonomy of the young person.

R. v. A.M., [2008] 1 SCR 569, 2008 SCC 19 (CanLII) <http://canlii.ca/t/1wnbf>

Use of sniffer dogs at school deemed a violation of student's privacy. Teenagers may have little expectation of privacy from the searching eyes and fingers of their parents, but they expect the contents of their backpacks not to be open to the random and speculative scrutiny of the police. Use of sniffer dogs by police may be charter compliant if used on the basis of a standard of reasonable suspicion. See also: *R. v. Kang-Brown*, [2008] 1 SCR 456, 2008 SCC 18 (CanLII) <http://canlii.ca/t/1wnbc>

R. v. M. (M.R.), [1998] 3 SCR 393, 1998 CanLII 770 (SCC) <http://canlii.ca/t/1fqg9>

Students have a reasonable expectation of privacy at school but it is a lessened expectation while attending school or school functions.

○ Key cases at Provincial/Territorial levels across Canada (fill in as much as you know to a maximum of 3 cases/jurisdiction – we will enlist the help of law students across the country to fill in missing jurisdictions)

For each case provide:

1) brief overview that can be plugged into a legal submission

e.g. *X v. X* involved [overview of facts] and at issue was [legal issue to be decided]. The Court held . . . [relevance for child rights issue];

2) elaborate on relevant findings/child rights analysis

Section III - Special considerations to highlight

e.g. – In Ontario children may participate in some proceedings with the assistance of the Children’s Lawyer depending on X. To access this service do Y.

e.g. – Indigenous Laws . . .

Section IV - Practice Essentials (focus on skills)

Provide a maximum of 10 points that must be done to effectively implement the child’s legal rights in this area

Section V – Additional Resources (max 10 – hyperlink if possible)

Precedents – Pleadings, Facta

Social Science Articles

Chung, G. and Grimes, S., *Data Mining the Kids: Surveillance and Market Research Strategies in Children’s Online Games* *Canadian Journal of Communications* Vol. 30 (no. 4) 2005 <http://www.cjc-online.ca/index.php/journal/article/view/1525/1653>

Grimes, S. *Kids’ Ad Play: Regulating Children’s Advergaming in the Converging Media Context*, *International Journal of Communications Law and Policy*, 1 Issue 12, Winter 2008, pp.161-178.

https://www.academia.edu/183317/Kids_Ad_Play_Regulating_Childrens_Advergaming_in_the_Converging_Media_Context

Resources