

Privacy Rights for Children and Youth

*Children's Participation in Justice Processes:
Finding the Best Way Forward*
Calgary, Sept 2017

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Outline

- Youth Criminal Justice Records
- Health Care & Counselling
- School Records
- Social Media



Justice for Children and Youth

A child rights organization with a provincial mandate for legal representation and a national lens for test case litigation

Mission Statement: we strive to protect and advance the legal rights and dignity of children and youth in Canada

Funded by Legal Aid Ontario as a “Specialty Legal Clinic”



Justice for Children and Youth

- Staff of 7 lawyers who provide legal services to children and youth and the adults who support them.
- Experts on the legal issues as uniquely experienced by children and youth
- We represent children across a range of legal subjects, including criminal justice, education, health and mental health, human rights, privacy, family and child protection, housing, social and financial support, immigration



JUSTICE
FOR CHILDREN
AND YOUTH

ABOUT JFCY ASK A LAWYER DONATE FRANÇAIS

Legal information and services in Ontario for young people under 18 and homeless youth under 25

LEARN MORE

Legal Rights Wiki

I am a **victim** of a crime.
Help with **small claims court**.
I am in **child welfare court**.
A **civil suit** against me.
The **police** have charged me.
I have been **expelled**.

LEGAL RIGHTS WIKI

Ask a Lawyer

Free confidential legal advice for youth under 18 and living in Ontario

416-920-1633

ASK US ONLINE

Resources

For **Parents**
For **Youth Workers**
Links & External **Resources**
Publications & **Downloads**
Rulings & Case Studies

GO TO RESOURCES

AGE BASED LAWS

When can I change my name? Start working? Consent to sexual activity?

LEARN MORE

Shoplifting Demand Letters

Marv

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What can I take with me when I leave home or get kicked out?

What is a rights based framework?

- Move from a property rights to a human rights approach
- Recognition that children and young people are inherent rights holders - are entitled to respect for their rights and dignity
- Children and youth have personal agency
- Their views and preferences must be heard and considered, support child's participation in decisions that effect them
- Respect for evolving capacity
- We all have a duty of care, obligation to safe guard children's best interests – “duty bearers”



United Nations Convention on the Rights of the Child (UNCRC)

Fundamental principles:

- Non-discrimination (Article 2)
- Best interests a primary consideration (Article 3)
- Right to life, and maximum survival and development (Article 6)
- Right to be heard / voice (Article 12)

All articles of the UNCRC are inherent, interconnected, and indivisible



UNCRC – Adults

- Interaction of child's rights with the rights and responsibilities of adults / duty bearers
- Parent's rights / responsibilities / duties
- Social workers
- Teachers / Administrators
- Lawyers



UNCRC - Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, **to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.**



UNCRC - Article 14

1. States Parties shall respect the **right of the child to freedom** of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, **to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.**
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.



UNCRC – Duty bearers

- Recognise, support and advance children's rights
- Develop and support child's capacity for independent decision making
- Ensure child has meaningful participation in decisions that effect them

It is our duty to educate children about their rights, and support children in exercising their rights – including their rights to privacy



UNCRC & Right to Privacy

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home 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.



YOUTH CRIMINAL JUSTICE ACT



Youth Criminal Justice Act (YCJA)

- The youth criminal justice system is separate and apart from the adult system with special protections of young people's rights
- Youth are presumed to have a reduced moral culpability, increased vulnerabilities, decreased level of maturity, and increased capacity for rehabilitation
- YCJA provides special privacy protections – as a significant aspect of rehabilitation, limitation of stigmatization



YCJA – Unique Records & Privacy Rights

Involvement in the youth criminal justice system creates:

- Police records
- Government records
- Court records

There is a unique, specific and detailed privacy scheme for these records



YCJA – Records Protection

- Privacy is a critical underlying principle to YCJA
- Recognition that the identification of a young person's involvement in criminal justice system creates stigma – antithetical to rehabilitation and reintegration of young person
- Purposeful attention to scheme for protecting privacy interests
- Contrast to other contexts



YCJA – Records Protection cont.

There is a complicated scheme that deals with publication, access, disclosure, and time periods for access:

- **Publication** is prohibited (s. 110)
- **Access** is limited and prohibited (s. 118 & 119)
- **Disclosure** is similarly limited and prohibited (s. 129)
- **Time limits are imposed** – extensions can only be made by order of a Youth Court (s. 119(2))



YCJA – Use of Records in Other Courts

- Access to, use of, and disclosure of YCJA records specifically limited
- Use of YCJA records is not permitted in other courts, without a specific Order from a Youth Justice Court
SL v NB, [2005] OJ No 1411, 252 DLR (4th) 508 (Ont CA)
- Not permissible in family or child protection court



Example: School / Board Access

125(6) A police officer, crown attorney or youth worker may disclose limited information about a young person's charges if it is necessary:

- (a) to ensure compliance by the young person with an order of the youth justice court;
- (b) to ensure the safety of staff, students or other persons; or
- (c) to facilitate the rehabilitation of the young person

Section 125(6) of the *Youth Criminal Justice Act*



Example: School / Board Disclosure

125(7) A person to whom information is disclosed under subsection (6) shall

(a) keep the information **separate** from any other record of the young person to whom the information relates;

(b) ensure that **no other person has access** to the information except if authorized under this Act, or if necessary for the purposes of subsection (6); and

(c) **destroy** their copy of the record when the information is **no longer required** for the purpose for which it was disclosed.

Section 125(7) of the *Youth Criminal Justice Act*



Access ≠ Disclosure

A person who is permitted access to any YCJA records (s. 119(1)) may not disclose that information any further without specific authorization in the YCJA or by Court order.

s.129 YCJA



HEALTH CARE & COUNSELLING



Privacy in Health Care & Counselling

The right to privacy in this context will involve:

- Capacity to seek care as individual rights holder, including access (legislation, common law)
- Duty of confidentiality & corresponding right to privacy (legislation, ethical duties, licencing regulation)
- Access to and right to limit access to records & information (Freedom of Information, legislation)



Laws Differs Across Provinces

Capacity in health care access and control:

- **No legislation regarding age of consent for health care:** AB, SK, MB, QC, NS, NL, NT, NU
- **Legislation specifying that consent is not age based, presumption of capacity:** ON, PE, YT
- **Legislation providing for child to consent to health care if child is capable and treatment is in the best interests of the child:** BC, NB



Example: Ontario

- Young people are presumed capable unless determined otherwise
- Capacity in health care is not aged based
- Capacity must be determined by a qualified health care practitioner and is dependent on the nature of the health care being sought or refused
- A young person may be incapable of making one decision and capable of another

Ontario Health Care and Consent Act, Section 4



Common Law - Health Care CAPACITY

- Ability to understand the information provided about the treatment;
- Ability to appreciate the reasonably foreseeable consequence of receiving or denying the treatment suggested
- May be capacity for one issue and not another – for a child may be different based on the complexity of the question, eg. flavour of medicine – inoculation – surgery

Eg. Ontario *Health Care and Consent Act*, Section 4 and 10



Privacy Rights in Health Care

- A young person who is capable can see a health care provider independently from parent / guardian
- Health care provider owes duty of confidentiality – child entitled to right to privacy
- Exceptions regarding children:
 - Child welfare legislation – duty to report; or
 - Possibly regarding imminent harm, eg. the young person says he or she has a plan to seriously harm themselves or someone else (see relevant professional obligations)



Privacy Rights in Health Care cont.

- If a young person is incapable of making a decision for a specific issue, the substitute decision maker (usually parent/guardian) is entitled to review the records corresponding only to that issue
- A capable person (child or substitute decision maker) is entitled to make all decisions regarding disclosure of information – including for instance who can be informed about what happened in an appointment

Eg. ON *Health Care and Consent Act*, Section 20
ON *Personal Health Information Protection Act*, Section 5



Health Care Providers

- Doctor
- Nurse
- Psychologist & Psychotherapists
- Dentist
- Emergency service / paramedic

ON Health Care and Consent Act, Schedule 1



Who Else Might be a Health Care Practitioner

- The Ontario *Personal Health Information Protection Act* governs the privacy rights related to health care information
- This legal obligation to safeguard information extends privacy protections to Social Workers engaged in care to treat, maintain or promote health (including mental health) are regulated like health care providers

ON *Personal Health Information Protection Act*, Section 2



If not Health Care, Is there none-the-less a duty of confidentiality?

- Social worker / counsellor / community worker / child and youth worker
- Professional obligations
- Obligation to employer / organization

Ask: What was held out to the young person?

Rights respecting approach = provide clear information and boundaries at the outset, before sensitive information is shared



Capacity – Privacy - Information Sharing

- When asking for permission to speak to a service provider who owes a duty of confidentiality to gain information related to a child's health or well being; the child's consent may be required, not the parent's
- When offering social work or other supports to a child, the person who must consent may be the child, not the parent
- The person who owes the duty of confidentiality may not be in a position to disclose information to 3rd party, and/or to parents without the child's consent



Duty of Confidentiality = Privacy

- If confidentiality is owed by the service provider to the child, only the child can provide INFORMED consent to disclosure of information
- Child can withdraw consent to disclosure at any time



SCHOOL RECORDS



School / Board Records - Privacy

- Provincial / municipal freedom of information legislation will govern privacy of school / board records
- Provincial education legislation may also provide guidance (School Act in AB, soon to be replaced by Education Act)
- Generally privacy protections, and access provisions are provided
- There may be different kinds of records, managed in different ways



School / Board Records – Child Rights

Child rights consideration: What are the child's rights to access records, and limit or prevent others access to / protect privacy of records?

- In Ontario, a child is entitled access to their Ontario Student Record at any time with or without consent of parent
- A child cannot be denied access to their student records
- A child, 16 – 17 years old, who has “withdrawn from parental control” can prevent a parent from accessing school / board records because the parent no longer has custody / access to the child

Ontario Student Guidelines, Section 4

ON Education Act, Section 1, definition of “guardian”



School / Board Records

- Records in a student's file that are no longer relevant to their education should be removed, eg. records of involvement in child protection system
- A parent and child should be able to request that records be removed from their file
- Other legal considerations must be managed in the interests of protecting the child's rights, eg. custodial vs non-custodial parents, private information that should not be in the general school records



SOCIAL MEDIA & PRIVACY



Social Media & Privacy

- An emerging area of law
- Student's right to privacy in social media and of electronic devices has several components
- Reasonable expectation of privacy
- Judicial decisions evolving with increasing recognition of privacy rights
- Right to be free from unreasonable search and seizure:
 - By police / school administrators / parents
 - Different legal standards may apply in each context



Social Media & Privacy

Student privacy in school: there is a right to privacy, but reduced in school

- R v MRM, [1998] 3 SCR 393
- R v AM, [2008] 1 SCR 569

Search of cell phones by police: Police can search under certain circumstances

- R v Fearon, [2014] 3 SCR 621



Social Media & Privacy

Privacy interest in social media recent cases:

BCCA found that an accused had a privacy interest in messages he sent over a social media site “Nexopia”. Just because a message can be easily forwarded doesn’t mean that the sender has lost a reasonable expectation of privacy. Message was sent to only one person, not group forum, contained personal details.

R v Craig, 2016 BCCA
154

BCCA found that the accused had a reasonable expectation of privacy in text messages even after they were sent

R v Pelucco, 2015 BCCA 370



Privacy & Intimate Images

*Protecting Canadians from Online Crime Act SC 2014
c.31*

Section 162.1 of the *Criminal Code of Canada* creates an offence for the non-consensual distribution of intimate images.

Question: When / how can one withdraw consent?

Sexual / intimate images of someone under 18 is child pornography, even between consenting peers



THIS SLIDE TO BE REMOVED AFTER PRINTED FOR MB/EC

ALBERTA LEGISLATION

- **School Act** – will be replaced by Education when brought into force
- **Health Information Act** – access to information, privacy protection, health information and confidentiality. Over age 18 = presumption, under = capacity “understands nature of right or power, and consequences”
- **Mental health Act** – substitute decision maker for “minor” in secure setting
- **Child Youth and Family Enhancement Act** (child protection)
- **Children First Act** – info sharing, incl health info for planning and service provision! To education, police, program providers. “children are future”, “ensure opportunity to become successful adult”. Limits info to guardian IF child specifically objects – s. 4(3)(a) – puts obligation on child. Concerns = especially with **Protection of Sexually Exploited Children Act**, and **Protection of Children Abusing Drugs Act**

