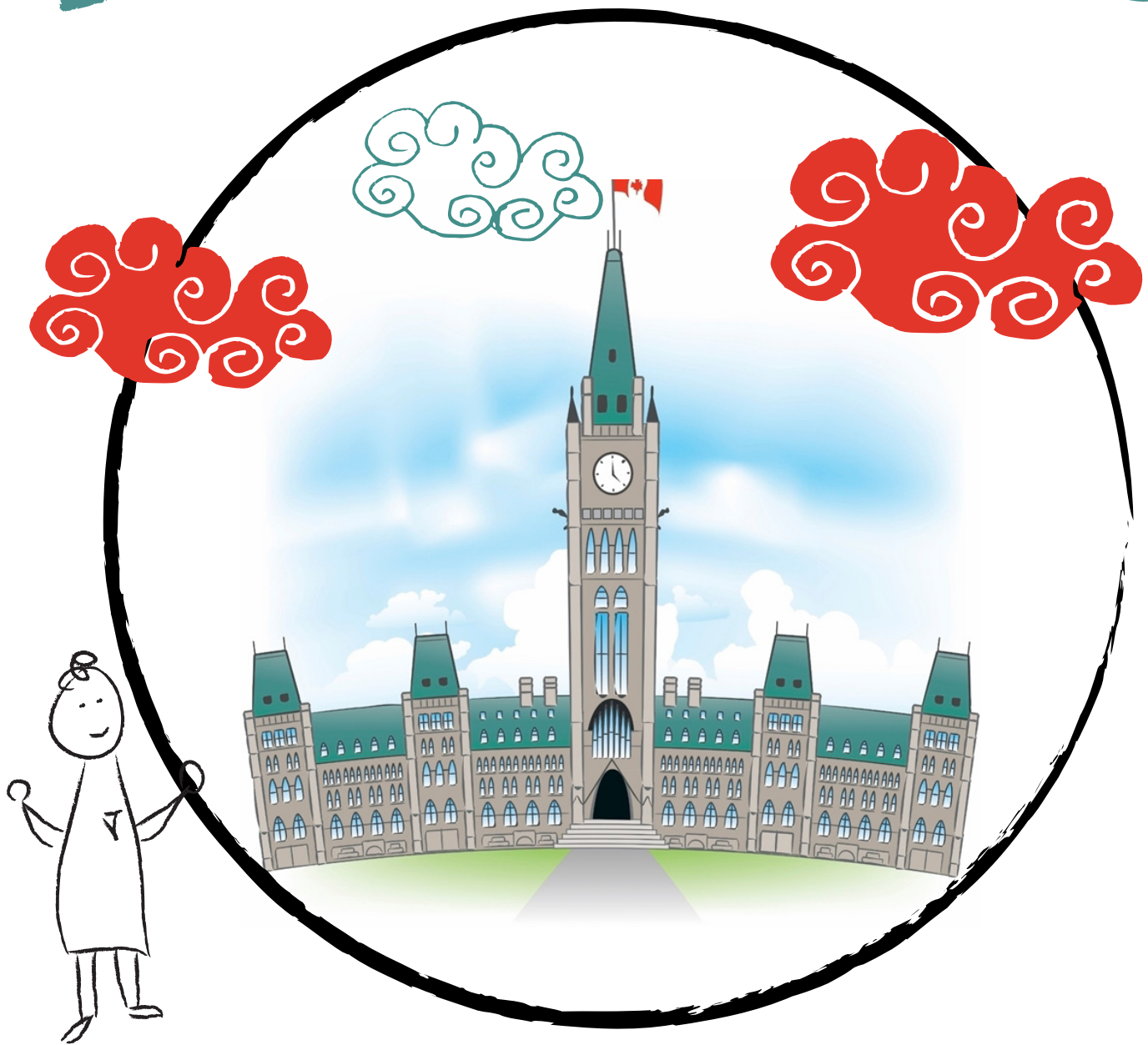


# Children's Rights in the Canadian Legal System



SOCIETY FOR  
**children**  
and **youth**  
OF BC

# SOCIETY FOR CHILDREN AND YOUTH OF BC

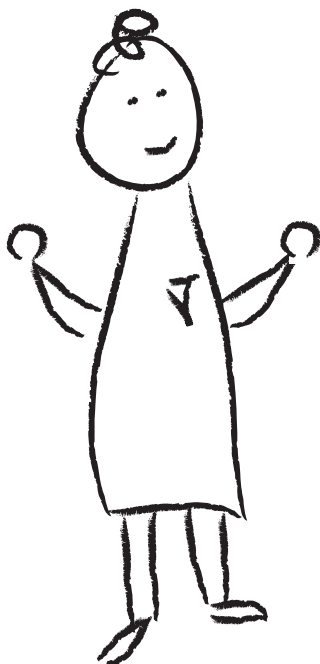
The Society for Children and Youth of British Columbia (SCY) is a provincial advocacy organization dedicated to improving the well-being of children and youth through education, advocacy, and community engagement.

SCY provides a forum for multi-disciplinary exchange and action for organizations and individuals working with and for young people.

This paper is part of a project of the Child Rights Public Awareness Program of SCY.

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# Children's Rights in the Canadian Legal System

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community organizations, firms, courts and tribunals under the supervision of qualified lawyers.

This program supported SCY and this publication by providing us with skilful and thoughtful student lawyers who researched and authored this report.

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# SCOPE AND LIMITATIONS

This series gives a snapshot of how the United Nations Convention on the Rights of the Child (UNCRC) is being implemented in the Canadian legal system.

The need for this report was precipitated by an interest in members of SCY's Child Rights Network who wanted updated information on how the UNCRC is being implemented in Canada's legal system.

Our last review "The UN Convention on the Rights of the Child—Does Domestic Legislation Measure Up?" was conducted in 1998 which was a thorough look at domestic laws, giving an assessment based on a 4 star rating system for Canada's compliance in implementing the UNCRC.

The initial iterations for this project was to do a complete review of Canada's progress in implementing the UNCRC by examining case law that mentions the UNCRC. This would give us a picture of how the UNCRC is being utilized in practice.

After an initial search on the Westlaw Canada database using the key words "Convention on the Rights of the Child" 485 cases were found. In order to make the research meaningful, 30 cases were excluded because they had negative treatments, meaning the cases had been

overturned for various reasons and are not part of current case law.

There were about 50 cases that have more than one judgment in the database, meaning that these cases went through different procedures from lower courts to the higher courts. We included these cases as part of our initial review as they show an evolution of how cases were decided from previous proceedings.

In order to ensure the variety of the cases that most embody the UNCRC, we included cases that consider provisions of the Convention (for example, considering the best interests of the child) that have been considered or referred to.

The case summaries related to the areas of criminal penalty, evidence, custody and access, child protection, adoption, education, and immigration issues with different UNCRC rights and provisions have been considered or referred. We deemed a more narrow focus through a narrative approach to be more fruitful and informative rather than reviewing laws on a case-by-case basis.

Using the aforementioned methodology, select cases inform this series and are told through the lens of three key rights: every child's right to life, survival, and development.

# ABOUT THIS SERIES

This article is the first in a four part series discussing child rights in the Canadian legal system. We focus on rights violations that relate to the second guiding principle of the United Nations Convention on the Rights of the Child, found in Article 6: the rights to life, survival, and development.

**Part 1** An introduction to child rights and the Canadian legal system

**Part 2** A child's right to life: an adequate standard of living and medical care

**Part 3** A child's right to survival: protection from physical violence and protection from sexual exploitation and abuse

**Part 4** A child's right to development: culture, identity, family connections, and education

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# ABOUT THIS SERIES

This four part series will focus on how the UNCRC has been used in legal cases, rather than on specific legal outcomes in each case. The cases come from various provinces and different levels of court. This series discusses several cases in which Canadian courts have considered children's rights related to the second guiding principle, found in Article 6 of the UNCRC.

## *ARTICLE 6 OF THE UNCRC PROVIDES THAT:*

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

While these rights may seem straightforward, it will become clear from the cases that they are often more nuanced and complex in practice. Children's rights can come into conflict with other rights and interests, and decision-makers must balance the competing factors. The rights guaranteed in the UNCRC are by no means absolute. For example, as we shall see, parental rights can outweigh a child's right to protection from harm in the context of corporal punishment. Another complication comes from the role of international treaties in Canadian decision-making.

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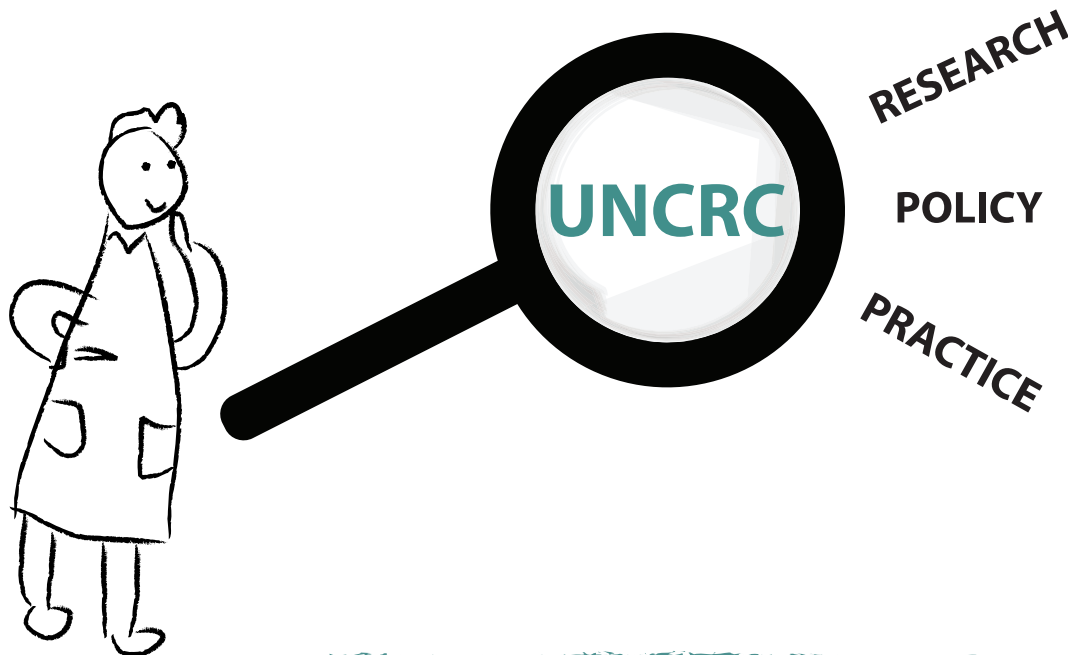
# CHILD RIGHTS IN PRACTICE

Despite its limitations, the UNCRC can be an effective advocacy tool in cases involving children. The BC Supreme Court has recently stated that “Canada has positive obligations to prevent violations of the UNCRC. These positive obligations are heightened with regard to the UNCRC as children are, of course, inherently less able to advocate on their own behalf”. Children cannot ensure that their rights are respected on their own, since children are often under the jurisdiction of parents and other caregivers and lack the resources

**IT IS UP TO CHILDREN’S RIGHTS ADVOCATES TO MAKE ARGUMENTS ON BEHALF OF CHILDREN**

and access to the court system needed to make a complaint. Thus, it is up to children’s rights advocates to make arguments on behalf of children in order to enforce their rights recognized under the UNCRC.

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# PART 3

## A CHILD'S RIGHT TO SURVIVAL: PROTECTION FROM PHYSICAL VIOLENCE AND PROTECTION FROM SEXUAL EXPLOITATION AND ABUSE

Children have a right to protection from all forms of physical and mental violence under Article 19 of the UNCRC. In addition, Article 37(a) provides that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”

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It is a crime in Canada to assault a person. However, section 43 of the Criminal Code provides an exception to the crime of assault for parents and teachers who use corporal punishment against children:

*Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.*

In 2004, the Canadian Foundation for Children, Youth, and the Law challenged this provision of the Criminal Code, arguing that it violated children's Charter rights.

The Foundation argued that this provision violates children's Charter rights: the right to security of the person (section 7), the right not to be subjected to any cruel and unusual treatment or punishment (section 12), and the right to equal protection and equal benefit of the law without discrimination based on age (section 15).





# THE SUPREME COURT AND “USING FORCE” ON A CHILD



The majority of the Supreme Court of Canada rejected that argument and upheld section 43. The decision did, however, place a number of limitations on when using force against a child cannot be considered “reasonable in the circumstances”.

Based on the wording of the provision, social consensus, and expert evidence, the majority decided that it is always unreasonable to use force:

- (1) that is motivated by anger or frustration rather than corrective purposes
- (2) that results in harm or the prospect of bodily harm
- (3) against children under two years of age or children who are incapable of learning from the correction because of a disability
- (4) against teenagers
- (5) using any objects, such as a belt
- (6) using slaps or blows to the head

In addition, the majority decided that although it is acceptable for parents to use corporal punishment, it is not acceptable for teachers, though it may be reasonable for teachers to use force if necessary to remove a child from a room.

The majority referred to Article 19(1) of the UNCRC, which requires the state to protect children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation” and Article 37(a) which requires the



state to ensure that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. Based on these rights, the majority concluded that what is reasonable will seek to avoid harm and will never include cruel, inhuman, or degrading treatment.

However, the majority also referred to Article 5, which requires the state to “respect the responsibilities, rights and duties of parents . . . 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”.

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This illustrates how some provisions of the Convention can be used to support a decision that seems to be contrary to children’s right to protection from harm. The majority also remarked that the Convention does not explicitly ban all corporal punishment, and that the Human Rights Committee of the United Nations took the view that corporal punishment in schools engages Article 37’s prohibition of degrading treatment or punishment, but has not expressed a similar view of corporal punishment by parents.

# DISSENTING VOICES

Justice Arbour wrote a dissenting opinion in which she took the view that section 43 is unconstitutional because it violates children's right to security of the person. Justice Arbour also referred to the Convention in support of her position. The Committee on the Rights of the Child has commented on a provision in the UK similar to section 43 of the Criminal Code, stating:

*The imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner. Thus, the ... legislative and other measures relating to the physical integrity of children do not appear to be compatible with the provisions and principles of the Convention.*

Justice Arbour noted that the Committee has not recommended clarifying these laws, but abolishing them entirely:

*[P]enal legislation allowing corporal punishment of children by parents, in schools and in institutions where children may be placed [should be considered for review]. In this regard ... physical punishment of children in families [should] be prohibited. In connection with the child's right to physical integrity ... and in the light of the best interests of the child, ... the possibility of introducing new legislation and follow-up mechanisms to prevent violence within the family [should be considered], and ... educational campaigns [should] be launched with a view to changing attitudes in society on the use of physical punishment in the family and fostering the acceptance of its legal prohibition.*

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## REPEAL SECTION 43?

In addition, the Committee has expressed “deep concern” that Canada had taken “no action to remove section 43 of the Criminal Code” and recommended the adoption of “legislation to remove the existing authorization of the use of ‘reasonable force’ in disciplining children and explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed.” In light of these statements, Justice Arbour was of the opinion that striking down section 43 was necessary in order to comply with Canada’s international obligations.

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The majority and minority opinions in this case illustrate how the different judges can rely on the Convention to support completely opposite opinions. Since the rights in the Convention are quite broad, their meaning is not always clear-cut. Advocates on both sides of an issue can therefore make arguments based on how the Convention supports their position.

Since this case, the Committee has continued to urge Canada to repeal section 43 and to “explicitly prohibit all forms of violence against all age groups of children, however light, within the family, in schools and in other institutions where children may be placed.” There have been attempts to have section 43 repealed not only through the court system but also through the political process. Several private members bills have been introduced in the House of Commons over the years, but they have never passed into law. Many children’s rights groups continue to advocate for the repeal of section 43.

# OMAR KHADR AND THE UNCRC

Another aspect of the right to protection from violence was dealt with in *Canada (Prime Minister) v Khadr*. Omar Khadr, a Canadian citizen, was arrested in Afghanistan in 2002 at the age of 15. He was accused of throwing a grenade that killed a US soldier, and was imprisoned at the US detention camp, Guantanamo Bay, awaiting trial. He was given no special treatment as a minor, and did not have the opportunity to speak to a lawyer until 2004. He was subjected to sleep deprivation techniques and isolation designed to induce him to talk, which Canadian officials became aware of and were implicated in. Canadian officials visited him, not to provide assistance, but to interrogate him a number of times in 2003-2004, and shared the information gained through these interrogations with US officials. Officials began checking on him with concern for his treatment and welfare beginning in 2005. The Canadian government did not attempt to have him returned to Canada.

Khadr argued that his section 7 Charter rights to life, liberty, and security of the person were infringed by the government's refusal to seek his repatriation to Canada. In determining whether his Charter rights were infringed, the Federal Court discussed Canada's obligations under the UNCRC at length, including the obligation to protect children from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19) and not to subject them to torture or other cruel, inhuman or degrading treatment or punishment (Article 37(a)). Although the government raised some concerns about his treatment, it condoned the sleep deprivation techniques by interviewing him while knowing that these techniques were being used.

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The Court also referred to the Optional Protocol on the Involvement of Children in Armed Conflict, which recognizes that children are inherently vulnerable to recruitment into armed conflict before they can apply mature judgment to the choices they face. The Court concluded that Canada had a duty to protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms, such as those in the UNCRC. This decision was upheld by the Supreme Court of Canada in 2010, which declared that his rights were violated but left it up to the government to decide on the appropriate course of action. Omar Khadr was repatriated to Canada in 2012.

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## **SEXUAL EXPLOITATION AND ABUSE**

Children have the right to protection from all forms of sexual abuse and sexual exploitation under Article 34 of the UNCRC. In particular, the state must take all appropriate measures to prevent the coercion of a child to engage in unlawful sexual activity, the exploitative use of children in prostitution, and the exploitative use of children in pornographic performances and materials.

An important aspect of protecting children from abuse is providing them with appropriate safeguards when they have to deal with the court system. In *R v LDO*, the Supreme Court of Canada considered the constitutionality of one such safeguard. Section 715.1 of the Criminal Code allows children's testimony to be videotaped and played for the court, so that children do not have to testify in person.

A man accused of sexual assault argued that section 715.1 violated his Charter rights to life, liberty, and security of the person (section

7) and to be presumed innocent until proven guilty according to law in a fair and public hearing (section 11(d)). The majority of the Court upheld the section because it “not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.”

One of the accused’s arguments was based on the fact that children up to 18 years are allowed to use this safeguard. He argued that the age limit of 18 years is arbitrary. The majority rejected this argument, and Justice L’Heureux Dubé explained in her concurring opinion that: Whether the complainant is a young child or an adult woman, all victims of sexual abuse who are required to relive, through detailed testimony, the horrendous events through which they have suffered, experience doubly what is already significant pain. . . . Section 715.1 is a legislative attempt to partly shield the most vulnerable of those witnesses, children and young women. . . . A young woman of 15, 16 or 17 years of age will, in most instances, be in a situation of power imbalance vis-à-vis the perpetrator, as a result of both her sex and her age. As well, there will be many instances where the accused is in a position of trust and this may often result in additional emotional turmoil and confusion.

Justice L’Heureux-Dubé referred to the UNCRC in support of her decision. The Convention applies to all children under 18 (Article 1), and Article 34 therefore protects all children under 18. The age of majority in all Canadian provinces is at least 18. Interpreting section 715.1 consistently with the Convention, she concluded that it is legitimate, and not arbitrary, to draw the line at age 18.

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# CHILD PORNOGRAPHY

Another issue related to protecting children from sexual exploitation is pornography. It is a crime in Canada to possess child pornography. The Supreme Court of Canada considered the constitutionality of the definition of child pornography, which includes “any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act”. In *R v Sharpe*, a man accused of possessing child pornography argued that this prohibition violates his Charter right to freedom of expression (section 2(b)). He accepted that criminalizing child pornography is justified in order to prevent harm to children, but argued that prohibiting written material goes too far.

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The majority of the Court agreed that this prohibition violates freedom of expression, but held that the infringement is justified under section 1 of the Charter. The Court considered evidence that shows connections between child pornography and harm to children:

- (1) child pornography promotes cognitive distortions;
- (2) it fuels fantasies that incite offenders to offend;
- (3) it is used for grooming and seducing victims; and
- (4) children are abused in the production of child pornography involving real children.

Justice L’Heureux-Dubé wrote a concurring opinion in which she referred to the UNCRC in support of her opinion that prohibiting child pornography, including written material, is justified. She stated that the Convention affirms the importance of protecting children from harm, and that Canada’s ratification of the Convention “demonstrates this country’s strong commitment to protecting children’s rights.” The Convention (and the Optional Protocol on the

Sale of Children, Child Prostitution and Child Pornography) explicitly recognizes the harms of child pornography. Thus, the UNCRC provides a very strong basis for the government to justify bans on child pornography.

In general, Canadian criminal law only applies to offences committed within Canada. However, there are some exceptions in which citizens and permanent residents of Canada can be charged for acts committed outside the country. One such exception is found in the Criminal Code section 7(4.1), which deals with sexual offences against children. In *R v Klassen*, a man charged with sexual abuse of children in Colombia, Cambodia, and the Philippines challenged this provision, arguing that Canada does not have the authority to pass laws that apply outside the country.

The British Columbia Supreme Court rejected this argument, and held that Canada does have the authority to prosecute its citizens and permanent residents for acts that they commit elsewhere. The Court referred to the UNCRC to support the view that there is international consensus on the need to protect children from sexual abuse, and noted that when the Parliament of Canada enacted section 7(4.1), Canada's obligations under the Convention were cited as one of the reasons for the provision, which illustrates that the government does take the Convention into account when it enacts legislation dealing with children.

Furthermore, Canada signed and ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which specifically requires the state to pass criminal laws against the sale of children, child prostitution, and child pornography, whether the offences are committed by nationals within the country or not.

Section 810.1 of the Criminal Code provides another tool that can be used to deal with offenders who have committed sexual offences against children, whether in Canada or elsewhere. This provision allows for a person to be arrested and to have probation-like conditions imposed if he has committed a sexual offence against a child under 16, and if there are reasonable grounds to fear that he will commit another sexual offence. Recently, a BC man was arrested when he arrived in Canada after spending 5 years in a Thai prison for sexually abusing children in Thailand. He was placed on conditions for 18 months, including surrendering his passport, staying away from places where children under 16 would congregate, not having access to the Internet, frequently checking in with a probation officer, and attending a treatment center.

In 2011, the British Columbia Supreme Court was called upon to decide whether the criminal law against polygamy is constitutional. As part of the analysis, the Court considered whether the UNCRC, as well as three other international treaties, requires Canada to take all available measures to end polygamy. Since there is no specific mention of “polygamy” in the Convention, the Court considered other provisions that may be implicated in the practice of polygamy, including articles 19 and 34 (protection from violence and sexual exploitation).

The Court noted the observations of Committee on the Rights of the Child. Article 24(3) requires the state to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children,” and the Committee has commented on the importance of preventing teen pregnancy, which is an issue related to polygamy. The Committee has identified polygamy as a discriminatory tradition and has encouraged states to

discourage polygamy “by applying legal and administrative measures and conducting awareness-raising campaigns on its adverse effects on children.”

The Court decided that although the criminalization of polygamy infringes the religious rights of certain groups, it is justified because evidence showed endemic concrete harm to women, children, society and the institution of monogamous marriage. The Court identified the following harms to children: higher infant mortality, emotional, behavioural, and psychological problems, and lower educational achievement, which are “likely the result of higher levels of conflict, emotional stress and tension in polygamous families.” They also face an enhanced risk of psychological and physical abuse and neglect. Additionally, children in polygamous communities are exposed to harmful gender stereotypes. Girls are less likely to be educated, face higher rates of teen pregnancy, and some become victims of child trafficking, which involves moving the young girls across the border to the US for the purpose of marriage. Harms to women include higher rates of domestic violence and sexual abuse, higher rates of mental health issues, shorter lifespans, less autonomy, and worse economic situation.

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## UPCOMING

In part 4 of the series, you will read about court cases that touch on a child’s right to development: culture, identity, family connections, and education life.