

Bill C-27

Digital Charter Implementation Act, 2022

FEBRUARY 2023

*This is a submission to the House of Commons Standing Committee on **ACCESS TO INFORMATION, PRIVACY AND ETHICS (ETHI)** prepared by the **CANADIAN NATIONAL COMMITTEE FOR UNICEF (UNICEF CANADA)***



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INTRODUCTION

The Government of Canada is updating the legislative framework governing the protection of personal information and the use of artificial intelligence (AI) in digital technology through the introduction of Bill C-27, the *Digital Charter Implementation Act, 2022*.¹ The purpose of this Bill is to update Canada’s privacy legislation to meet the requirements of an increasingly digital world. Specifically, Bill C-27 aims to increase control and transparency over the way digital services collect personal data from Canadians, require services to receive consent for the collection and certain uses of personal data, and ensure companies “meet the highest standards of responsibility” when developing and deploying AI systems in Canada.

UNICEF Canada welcomes the Government’s efforts to update Canada’s privacy legislation for the digital age. We are further encouraged to see that Bill C-27 specifically states that “the personal information of minors is considered to be sensitive information.” This is an improvement on the previous version of this Bill, which failed to differentiate the personal data of children in any way.

Neither the term “minor” nor “sensitive information” is defined in the current text of Bill C-27. This is appropriate to the extent that the proposed legislation will interact with a wide variety of legislative frameworks and service systems across Canada’s 13 provinces and territories, and therefore requires some room for judicial interpretation. However, further amendments are recommended to ensure that future interpretations of the Act are consistent with the distinct rights, needs and perspectives of children and youth.

A growing body of literature documents global best practices in the protection and promotion of children’s rights online. In particular, General Comment No. 25 (2021) of the United Nations Committee on the Rights of the Child, soft law addressing children’s rights in relation to the digital environment, provides guidance to this effect and informs the majority of recommendations found in this submission. Further recommendations derive from UNICEF’s global experience in advancing digital children’s rights governance.

SUMMARY OF RECOMMENDATIONS

¹ The full title of Bill C-27 is “An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts.”

Recommendation #1: Conduct a Child Rights Impact Assessment to ensure the *Digital Charter Implementation Act, 2022* best achieves the interdependent rights protected in the United Nations Convention on the Rights of the Child.

Recommendation #2: Include reference to the United Nations Convention on the Rights of the Child (UNCRC) in the *Digital Charter Implementation Act, 2022*.

Recommendation #3: Specify that the “Best Interests of the Child” be considered as a guiding principle of the *Digital Charter Implementation Act, 2022*, and make reference to it in subsequent articles that concern decision-making that may affect children.

Recommendation #4: Include in the Preamble to the *Digital Charter Implementation Act, 2022* a recognition of the Government of Canada’s commitment to universal access and equal participation on the internet.

Recommendation #5: Wherever possible, a child or young person should be directly consulted before a representative is authorized to access data or exercise rights on their behalf.

Recommendation #6: Representatives exercising rights and recourses under the proposed Bill on behalf of a minor should do so in the child’s best interests.

Recommendation #7: Develop appropriate informational material and outreach to promote the digital rights literacy of both children and their caregivers.

Recommendation #8: Explicitly prohibit the use of personal data in the development of marketing targeted towards children and young people.

Recommendation #9: Require the Office of the Privacy Commissioner to develop specific strategies and processes to ensure that the accountability mechanisms proposed under Bill C-27 are accessible and understandable to children and young people, and actively promote their participation.

ABOUT UNICEF CANADA

UNICEF Canada is a Canadian non-governmental organization (NGO) first established in 1955, and is one of 34 National Committees for UNICEF located in countries around the world. UNICEF Canada builds awareness, raises funds, and mobilizes Canadians

across the country to help save and protect the world's most vulnerable children. We promote public policy and practices in the best interests of children, informed by our global experience and international best practice, to contribute to the fulfillment of children's rights in Canada and around the world.

As a UN agency, UNICEF is active in 190 countries and we have saved more children's lives than any other humanitarian organization. UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by the United Nations Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. The only organization named in the United Nations Convention on the Rights of the Child as a source of expertise for governments, UNICEF has exceptional access to those whose decisions impact children's survival and quality of life. We are the world's advocate for children and their rights. For more information about UNICEF, please visit www.unicef.ca

A. CHILDREN'S RIGHTS AND BEST INTERESTS

Recommendation #1: Conduct a Child Rights Impact Assessment to ensure the *Digital Charter Implementation Act, 2022* best achieves the interdependent rights protected in the United Nations Convention on the Rights of the Child.

Child Rights Impact Assessment (CRIA) is an approach to consider the impacts of proposed legislation on diverse children and youth and ensure their best interests. It supports decision-makers to take into account the potential positive, negative and/or inequitable impacts of a proposal on a range of rights and achieve the best balance or potential to fulfill these rights.

Globally, CRIA are considered best practice in the implementation and monitoring of children's rights under the UN Convention on the Rights of the Child (UNCRC, the Convention). The Government of Canada, led by the Department of Justice, is currently developing a suite of tools, training, and resources for the use of CRIA across federal government departments. Bill C-27 would make an excellent candidate for a "test run" of the CRIA process within the federal government, and would lead to a stronger Bill in the process.

As well, the views of young people on how a proposal might affect them are an extremely valuable contribution to the evidence base, particularly in circumstances such as this where the evidence base is emergent, somewhat conflicting and has gaps. A consultation with young people would respect children's rights to have their views taken into consideration in decisions affecting them and support the due diligence of parliamentarians in relation to Bill C-37.

All Convention rights are interdependent, but the following articles are most directly engaged in consideration of Bill C-27:

Article 2 (non-discrimination): States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3 (best interests of children): 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.

Article 12 (the views of children): 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. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13 (freedom of expression): The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

Article 16 (privacy): 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. The child has the right to the protection of the law against such interference or attacks.

Article 17 (information): States Parties recognize the important function performed by the mass media and shall ensure 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.

Article 28 (education): States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity...

Article 31 (culture): States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Recommendation #2: Include reference to the United Nations Convention on the Rights of the Child (UNCRC) in the *Digital Charter Implementation Act, 2022*

In addition to ensuring that Bill C-27 as currently constructed is consistent with the UNCRC as per recommendation #1 above, it is further recommended that specific reference to the Convention be included in the text of the Bill to ensure that all future interpretation of the legislation is guided by children's rights.

As mentioned in the introduction to the present submission, the definition of "minor" and "sensitive information" has been left to judicial interpretation. This is appropriate insofar as such interpretation is guided by the rights and best interests of children. The inclusion of a specific reference to the Convention can act as a reminder of the duty-bearer's obligation to consider the range of children's rights that can be affected by the practices that Bill C-27 seeks to address, including what may constitute "sensitive information" in relation to children, and interpret legislation in their best interests. Such a reference could be included in either the Preamble of the Bill, or in the Interpretation section under s.2(2).

Recommendation #3: Specify that the "Best Interests of the Child" be considered as a guiding principle of the *Digital Charter Implementation Act, 2022*, and make reference to it in subsequent articles that concern decision-making that may affect children.

The best interests of the child is a standard for legal decision making that:

- a) considers their rights in the UNCRC;
- b) prioritizes the child's physical, emotional, and psychological safety, security, and well-being, and;
- c) incorporates the child's views and wishes, to the extent that they can be ascertained.

The consideration of a child's or children's best interests would be prompted by the inclusion of a reference to the UNCRC in Bill C-27 as per recommendation #1 above. A separate reference to the best interests of the child is recommended in the event that recommendation #1 is not adopted.

Even if recommendation #1 is adopted, a separate reference to the best interest of the child should be considered. This is because the the best interests of the child has established jurisprudence in Canadian law as both a principle and as a matter of procedure, and will help ensure it is operationalized in a consistent fashion.

Subsequent articles in the proposed Bill that concern the making of decisions by or for children may include reference to the child's or children's best interests in order to guide judicial interpretation of these articles (see for example proposed changes to s.4 under recommendation #6 below).

B. UNIVERSAL ACCESS

Recommendation #4: Include in the Preamble to the *Digital Charter Implementation Act, 2022* a recognition of the Government of Canada's commitment to universal access and equal participation on the internet.

The short title of Bill C-27 is the *Digital Charter Implementation Act*, yet it is silent on the first and most important principle of Canada's Digital Charter:

1. Universal Access:

All Canadians will have equal opportunity to participate in the digital world and the necessary tools to do so, including access, connectivity, literacy and skills.

Children and young people in Canada continue to face significant challenges in consistently accessing the Internet. Some of these challenges are shared by their households, such as the cost or availability of high-speed broadband connections, especially in rural areas. But other challenges are unique to children and their position within their households. Especially with more parents and siblings working and studying at home, access to bandwidth, electronic devices, and private space to use them are often limited for children, especially in low-income households. All of this contributes to a growing "Digital Divide" in a society where the ability to consistently access the Internet has become essential to educational and vocational success as well as an environment in which privacy and other protections must be strengthened.

C. CONTROL AND CONSENT

Recommendation #5: Wherever possible, a child or young person should be directly consulted before a representative is authorized to access data or exercise rights on their behalf.

Recommendation #6: Representatives exercising rights and recourses under the proposed Bill on behalf of a minor should do so in the child's best interests.

One area for potential conflict within the proposed Bill concerns the inherent tension between a child's right to privacy on the Internet and the interests of their parents, caregivers, and teachers in monitoring their Internet usage. s.4(a) of Bill C-37 addresses this issue to a certain extent by specifying that "authorized representatives [including] a parent, guardian or tutor" may exercise the rights and recourses provided under the proposed Bill on behalf of a minor, "unless the minor wishes to personally exercise those rights and recourses and is capable of doing so."

Often, the representation of a minor by their parents or guardians is assumed to be authorized. Similarly, the incapacity of a child to exercise their rights has historically been assumed without first speaking with the child in question. Finally, the proposed Bill fails to account for situations in which a parent or guardian may seek to access data or exercise rights on behalf of a child in a manner that is not in that child's best interests.

Two minor amendments to s.4 are therefore recommended. The first is to require that a child be consulted before an authorized representative is allowed to exercise rights or recourse on their behalf. Secondly, s.4 should clarify that representatives are required to act in the best interests of the child.

Recommendation #7: Develop appropriate informational material and outreach to promote the digital rights literacy of both children and their caregivers.

Recommendations #5 and #6 would be further supported by the efforts of relevant government actors, including the Privacy Commissioner, to educate and inform children, young people, parents, guardians, teachers, and educational institutions of the privacy rights of children. This should include the significant expansion of existing initiatives, such as the Privacy Commissioner's "privacy education for kids" program. Informational initiatives, like privacy legislation, should be guided by the principles of the best interests of the child and by the right of children to participate in decisions affecting them, including informed consent as far as it is possible to engage minors in consent. These principles apply to support the digital literacy of children and young people in a

way that empowers them to use the Internet in a safe and productive manner. As the UN Committee on the Rights of the Child writes,

States parties should disseminate information and conduct awareness-raising campaigns on the rights of the child in the digital environment, focusing in particular on those whose actions have a direct or indirect impact on children. They should facilitate educational programmes for children, parents and caregivers, the general public and policymakers to enhance their knowledge of children's rights in relation to the opportunities and risks associated with digital products and services. Such programmes should include information on how children can benefit from digital products and services and develop their digital literacy and skills, how to protect children's privacy and prevent victimization and how to recognize a child who is a victim of harm perpetrated online or offline and respond appropriately. Such programmes should be informed by research and consultations with children, parents and caregivers. (General comment 25, para. 32)

D. TARGETED MARKETING

Recommendation #8: Explicitly prohibit the use of personal data in the development of marketing targeted towards children and young people.

Children and young people are extremely vulnerable to advertising that employs their personal identities, experiences, and emotional states for commercial purposes. This was true before the Internet, but the rapid development of tools that can collect, manipulate, and deploy personal data about Internet users—often without direct human oversight—has taken this inequitable power dynamic to new heights.

While the limitations placed on the use of the sensitive information of minors may limit to some extent the use of such data for targeted marketing, a more explicit prohibition of such practices and of the use of AI is warranted by the scope of risk posed by current and future technologies. General Comment No. 25 provides strong language that could be adapted for this purpose:

States parties should prohibit by law the profiling or targeting of children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics, including group or collective data, targeting by association or affinity profiling. Practices that rely on neuromarketing, emotional analytics, immersive advertising and advertising in virtual and augmented reality environments to promote products, applications and services should also be

prohibited from engagement directly or indirectly with children. (General comment 25, para. 42)

E. CHILD-FRIENDLY ACCOUNTABILITY MECHANISMS

Recommendation #9: Require the Office of the Privacy Commissioner to develop specific strategies and processes to ensure that the accountability mechanisms proposed under Bill C-27 are accessible and understandable to children and young people, and actively promote their participation.

The rights and recourses provided under the proposed Bill to ensure that personal data are protected and digital service providers are held accountable are only meaningful to the extent that they are accessible, relevant and understandable to the people who will make use of them, including children and youth. To ensure that they are accessible, all recourses provided under the proposed Bill should be designed to be safe, confidential, gender-responsive and inclusive of children by design. This includes, but is not necessarily limited to, the process of filing a complaint under s.82; the investigation of a complaint by the Commissioner under 2.83 and the dispute resolution mechanisms under s.86; notification under s.88; the execution of inquiries under s.89 to s.93; and the appeals process under s.101 through s.103. The powers, duties and functions of the Commissioner should also be subject to a child-friendly design audit.

Even something as simple as the title of “Privacy Commissioner of Canada” can act as a barrier to access for a fifteen year-old who may be intimidated by the legalistic process implied by it. Simple and direct action-oriented language (“Something wrong? Say something”) can greatly increase the likelihood that young people will feel empowered to access these recourses. This is just one example of the small but meaningful steps that can be taken to make the recourses available under Bill C-27 more child-friendly.

The principles of child-friendly service design are too nuanced to be explored in this submission. Significant Canadian and international expertise across government, business and civil society partners is available to the Privacy Commissioner in the design and implementation of these processes. Above all, direct consultation with children, in accordance with their evolving capacities, should be considered essential to designing processes that are accessible and understandable to children.

Additional UNICEF resources for consideration:

<https://www.unicef-irc.org/research/child-rights-in-the-digital-age/>

<https://www.unicef.org/esa/media/3141/file/PolicyLab-Guide-DigitalConnectivity-Nov.6.18-lowres.pdf>

<https://c-fam.org/wp-content/uploads/Digital-Age-Assurance-Tools-and-Childrens-Rights-Online-across-the-Globe.pdf>

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