

Special Legal Status for Children and Youth

1

LEARNING OUTCOMES

Introduction	4
Overview of Canadian Law.....	5
Administrative Law.....	11
Court System and Hierarchy	12
Historical Perspective.....	13
Special Stages, Special Rules	15
The Roots of Law as a Tool for Child and Youth Protection	16
Key Terms.....	20
Review Questions	20
Suggested Sources	20
References	20

After reading this chapter, you should be able to:

- Outline the various sources of law.
- Outline Canada’s Constitution.
- Understand the Canadian court system and hierarchy.
- Summarize the evolution of social and cultural views of childhood.
- Explain the concepts of age-based legal capacity, age of majority, and age-based lack of criminal responsibility.
- Explain the concepts of duty of care and fiduciary duty.
- List statutes and classes of legislation that grant protected status to, or impose special rules on, children and youth.
- Provide examples of statutes designed to protect the rights of children and youth.

Introduction

Children and youth in Canada have legal rights and protections that come from international conventions, the Canadian legal system, the common law, and statutes and regulations.

According to UNICEF Canada:

Human rights are basic standards to which every person is entitled, to survive and develop in dignity. The United Nations set a universal standard for human rights with the adoption of the Universal Declaration of Human Rights in 1948. Since then, a number of human rights treaties have been developed to recognize the basic rights of all persons. Children have these rights, too. Children (under age 18) also have specific rights, recognized in the 1989 Convention on the Rights of the Child, given their vulnerability and dependence. All children's human rights apply to all children at all times, without exception. The provision and protection of children's Convention rights is the primary responsibility of governments at all levels, and realizing the promise of the Convention is an ongoing, progressive commitment. (UNICEF Canada, n.d.)

HIGHLIGHT

The Preamble for the Convention on the Rights of the Child

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance.

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

Recognizing that the child, for the full and harmonious development of her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

Source: *Convention on the Rights of the Child* (1990).

Canada ratified the Convention on the Rights of the Child on December 13, 1991, and “since then, a number of laws, policies and practices affecting children have advanced children's rights to protection, development and participation in decisions affecting their lives. ... The Convention makes clear the idea that a basic quality of life should be the right of all children, rather than a privilege enjoyed by a few” (UNICEF Canada, n.d.).

Overview of Canadian Law

Introduction

Laws and policies that relate to children and youth are relevant to social service work. They can be found in case law, in federal and provincial or territorial statutes and regulations, in municipal by-laws, in the written and unwritten policies of all three levels of government, and in the by-laws and policies of private and quasi-private organizations, such as charities and not-for-profit corporations.

As a worker who cares for children and youth,¹ it is important for you to have a general understanding of all of these sources of law and policy, and how they fit together within the Canadian legal system. You also need to understand the structure of the justice system that applies the law, as well as the system of administrative tribunals that assists in the administration of myriad government policies.

Sources of Law

This section provides an overview of four sources of the law in Canada:

1. common law (case law) created by judges,
2. statute law (legislation) created by federal and provincial or territorial legislatures,
3. the Constitution, and
4. by-laws created by municipal councils.

Laws applicable to social services can be found in all four sources.

Common Law

The **common law** is a body of legal principles, established through court decisions (cases), that govern legal issues or subject areas that are not fully addressed by statutes. Many of these principles have been applied so frequently that they have become widely accepted and well-settled legal rules. Judges try to develop rules that can be applied over and over again in order to create certainty and predictability in the application of the law.

To achieve predictability, our common law system requires courts to make decisions in accordance with precedent. *Precedent* requires courts to decide like cases alike. Common law rules created in legal decisions bind the decision-makers in future decisions, at least where those decisions turn on the same or similar facts. The decisions of higher-level courts (provincial or territorial courts of appeal or the Supreme Court of Canada) must be respected and followed in lower courts unless the facts of the new case differ substantially.

Common law rules are sometimes the precursors of legislative provisions; that is, a legislature might create a statute that incorporates rules derived from the case law. The federal **Criminal Code**, for example, has generally supplanted the common law with respect to criminal law. It is statutes, created by the elected legislature, that primarily govern.

common law

a legal rule or a body of legal principles, established through judicial decisions, that deal with a particular legal issue or subject area

Criminal Code

the statute that describes the legislative component of Canada's criminal law

¹ A note about terminology: Throughout this text, the phrase “worker who cares for children and youth” is used in instances where the information is relevant to various positions, including child welfare workers, child and youth workers, social workers, social service workers, and others.

Statutory provisions, in turn, can be interpreted by common law rules. For example, a provision in the *Criminal Code* (s. 215) that requires parents to provide “necessaries of life” for a child has been interpreted by the courts to include the provision of medical treatment. Even though medical treatment is not mentioned in the statutory provision, the next time a case involving a parent withholding necessary medical care for a child comes up, the court will likely find that, according to the common law, medical care is a necessary of life for the purposes of the legislative provision.

Statute Law and Regulations

STATUTES

statutes
written laws passed
by a parliament

Statutes (also called *acts* or *legislation*) are written *codes* of law. Statutes typically deal with a particular subject matter, and the subject is often identified in the title of the statute (e.g., the *Child, Youth and Family Services Act, 2017* [CYFSA] or the *Mental Health Act*). Many statutes are accompanied by regulations, which are supplementary rules that fill in the details of how the provisions of the statute are to be implemented.

Statutes are created by a legislature, either the federal Parliament in Ottawa or the legislature of a province or territory. The legislature is the elected arm of government, accountable to the *electorate* (citizens entitled to vote). In creating statutes, legislatures may refer to the case law and enact provisions that embody, or codify, well-known and settled common law rules. Sometimes, however, legislatures may choose to override a principle set out in the case law by clearly stating a different rule in the statute, provided that the statutory rule does not violate constitutional principles (as discussed below).

Many statutes affect how workers who care for children and youth do their job. These statutes will be discussed throughout this text. For an overview, consider the statutes listed in Table 1.1 and the situations they may address.

As Table 1.1 illustrates, legislatures have been quite active in codifying rules in statutes for different areas of the law. But it must be remembered that statutes are not the only source of law. Where a statute is silent on a particular issue, the common law will still apply. Also, courts may make decisions about the proper interpretation of statutory provisions, and this body of case law becomes part of the law under that statute.

REGULATIONS

regulations
rules made by an authority
provided in a statute
that helps guide the
application of the statute

Many statutes authorize the creation of **regulations**, subordinate forms of legislation that clarify how the statute is to be implemented. Regulations cannot exist on their own without a parent statute. For a regulation to lawfully exist, the statute must include a provision that designates regulation-making authority. Under that authority, regulations are prepared by legal and other administrative staff in the responsible department or ministry. Unlike statutes, regulations do not have to be passed by the legislature.

Regulations tend to be very practical and can include lists, schedules, diagrams, forms, and charts. The information contained in regulations is important in understanding the requirements for compliance with the statute; for example, regulations under the CYFSA establish the housing standards to be met (e.g., room sizes and number of children to a room) for children in care.

Table 1.1 Examples of Statutes Applicable in the Social Services Context

Area of Law	Statute	Example of Application
Child protection	<i>Child, Youth and Family Services Act, 2017</i>	Everyone has a duty to report suspicion of child abuse.
Family law	<i>Family Law Act</i>	Parents have an obligation to support their children to the extent that they are able.
	<i>Children's Law Reform Act</i>	Determination of custody and access is based on the best interests of the child.
Income maintenance	<i>Ontario Works Act, 1997</i>	Generally, a recipient of benefits under the Act must demonstrate continued efforts to find employment.
Employment	<i>Employment Standards Act, 2000</i>	Generally, an employee is entitled to return to his job after taking unpaid parental leave.
Immigration	<i>Immigration and Refugee Protection Act</i>	Fear of persecution is a ground for claiming refugee status, but famine is not.
Housing	<i>Residential Tenancies Act, 2006</i>	Tenants are entitled to a hearing before they may be evicted.
Human rights	<i>Human Rights Code</i>	Ontario employers are responsible for ensuring that employees are not sexually harassed in the workplace.
	<i>Canadian Human Rights Act</i>	Federally regulated employers may not discriminate against candidates for employment on the basis of religion.

Regulations are published separately from the statute and may be revised when changes are made to the statute. If you need to consult a statute in the course of your work, you must also consult the regulations made under that statute.

Canada's Constitution

THE DIVISION OF POWERS

The **Constitution** is the supreme law of the land. It is the basic framework under which all other laws are created, and it establishes the basic principles to which all other laws must conform. Canada's *Constitution Act, 1867* creates a federal system of government, according to which law-making powers are divided between the national (or federal) government and the provincial or territorial governments according to subject matter. The federal government has jurisdiction over matters of national and international interest that affect Canadians from coast to coast. It also has law-making jurisdiction with respect to the territories. The provincial and territorial governments have jurisdiction over matters of provincial and local importance, including the creation of municipalities with local governing authority.

The division of powers is set out in the *Constitution Act, 1867*. Federal powers include the authority to regulate defence, currency, and criminal law. The basic

Constitution

the statute that establishes the political structure of a nation and sets out its fundamental laws

rule is that matters that require a national standard are within the jurisdiction of the federal government. The federal government also has a residual power to make laws for the peace, order, and good government of Canada in all matters that do not come within a provincial or territorial head of power. This means that any matters not specifically delegated to the provinces or territories are matters over which the federal government has jurisdiction. An example is the law applicable to immigrants and refugees. The decision as to who may enter and take up residence in Canada is a matter of national and international significance and requires a uniform set of legal rules and standards to be applied across the country. Therefore, this responsibility falls within federal jurisdiction.

Provincial and territorial powers include authority to make laws governing property, civil rights, and other matters of local concern (such as public works and education).

This division of powers means that the provinces and territories have legislative responsibility over many more aspects of daily life than the federal government. As a result, there are more provincial and territorial statutes, and accompanying regulations, than federal statutes and regulations.

Statutes created by both levels of government may be applicable in a particular area of the law. For example, with respect to children's rights, the federal *Youth Criminal Justice Act* (YCJA) will govern rights in the context of criminal offences, while Ontario's CYFSA will govern a child's civil rights.

Occasionally, one level of government passes a law that appears to intrude on the jurisdiction of the other. Censorship is a good example. Controlling the sale of sexually explicit literature and images can be viewed as either a provincial or territorial concern (trade and commerce within a province) or a federal concern (the distribution of obscene matter as a criminal offence).

Where someone alleges that a law is outside the jurisdiction of the government that passed it, courts are often called upon to settle the issue. If a law does not fit squarely into one camp or the other, the federal government takes jurisdiction.

The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* (the Charter) is part of the Constitution of Canada, enacted by the *Constitution Act, 1982*. The Charter expresses the fundamental values and principles of our society, centred on Canada's perception of itself as a free and democratic country. Essentially, the Charter provides a mechanism for balancing the rights and freedoms of individuals against the broader need to protect society, including its more vulnerable members.

The enactment of the Charter has had a profound impact on Canadian law. It entrenches specific rights and freedoms, including equality, freedom of religion, and freedom of expression, and it provides that government legislation and actions cannot infringe on those rights and freedoms unless the infringement can be reasonably justified in a free and democratic society.

Therefore, the Charter has two important effects:

1. If any law or government policy contravenes the provisions of the Charter, a court or an administrative tribunal may declare that law or policy to be unconstitutional and of no force and effect.
2. Any action of an agent or a representative of any level of government that contravenes any right or freedom protected in the Charter can be challenged.

REASONABLE LIMITS ON RIGHTS AND FREEDOMS

Section 1 of the Charter is a very important provision. It provides that all rights and freedoms are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Each time a court is asked to determine whether a law violates the Charter, it must consider whether the law imposes a reasonable limit as described in section 1. A law will be struck down only when both of the following conditions are present:

1. the law infringes on a Charter right or freedom, and
2. the law cannot be justified as a reasonable limit in the particular circumstances.

For example, consistent with the duty of society to protect children from sexual exploitation, the government has enacted laws prohibiting the production and distribution of child pornography. In cases where these laws are challenged as a violation of the right to freedom of expression under the Charter, the courts have generally concluded that the law does infringe on the Charter right but that the infringement is reasonable and justified.

SCOPE OF APPLICATION

The precise scope of the Charter’s application has been a matter of debate and litigation. Although it is clear that the Charter applies to the content and effects of statute law and to the nature and effects of government action, it has sometimes been difficult to define what is meant by “government” action. A multitude of organizations and regulated industries in Canada have some connection to government; many cases have been argued that turn on whether an action of a quasi-governmental organization is a government action.

Unregulated private activity within a province or territory is not intended to be subject to the Charter. For example, if an apartment building owner discriminates against potential renters by refusing to rent to people with children, this is not likely a Charter violation. The Charter would apply only if the discriminatory act resulted from the application of law or government policy. To protect equality rights in situations outside the scope of the Charter, the federal and provincial or territorial governments have enacted human rights legislation.

It is important for you as a worker who cares for children and youth to be aware of Charter rights and to be alert to circumstances where they may be infringed. Whether such infringement is justified is a matter for the courts to decide.

Some examples of Charter rights (see Table 1.2) are freedom of religion (s. 2(a)); freedom of expression (s. 2(b)); the right not to be unreasonably searched (s. 8); the right to a lawyer (s. 10(b)); the right to life, liberty, and the security of the person and to fundamental justice (s. 7); and equality rights (s. 15).

CASE IN POINT

Two Interesting Charter Cases

The case of a teacher in Alberta who was communicating anti-Semitic statements to his students about the Holocaust illustrates the balance between an individual's rights under the Charter (s. 2(b), freedom of expression) and the *Criminal Code* (s. 319(2), prohibiting hate propaganda). The teacher stated that the law infringed on his right to freedom of expression. The Supreme Court of Canada (SCC) held that the *Criminal Code* law infringement was reasonably justified in a free and democratic society.

Carter v Canada (AG) also illustrates the balance between society's laws and an individual's Charter rights. Section 241(b) of the *Criminal Code* prohibits persons from aiding or abetting another person to commit suicide, and section 14 of the *Criminal Code* prohibits persons from consenting to

death being inflicted upon them. Together these provisions prevent assisted dying in Canada. The SCC ruled that the *Criminal Code* provisions did infringe on the individual's Charter right to life, liberty, and the security of the person and to fundamental justice (s. 7) and that the infringement was not reasonably justified in a free and democratic society. It should be noted that the SCC outlined certain conditions that must be present in striking down the law. In this case the court gave the government 12 months to create new laws on physician-assisted dying in certain circumstances.

R v Keegstra, [1990] 3 SCR 697, 1990 CanLII 24; *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331.

Table 1.2 Some of the Rights Under the Charter of Rights and Freedoms

Section 1	The <i>Canadian Charter of Rights and Freedoms</i> guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
Section 2	(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.
Section 6	(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
Section 7	Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
Section 8	Everyone has the right to be secure against unreasonable search or seizure.
Section 9	Everyone has the right not to be arbitrarily detained or imprisoned.
Section 10	(b) to retain and instruct counsel without delay and to be informed of that right.
Section 11	(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
Section 12	Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
Section 15	(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Municipal By-Laws

The fourth source of law under the Canadian legal system is municipal **by-laws**, which are passed by municipal councils. Municipal councils are the government bodies responsible for municipalities (cities, towns, or regions). Provincial and territorial governments create municipalities by statute and provide specific designated powers to municipal councils. Municipal councils exercise these powers by making municipal by-laws. Municipalities are responsible for many basic local services, including sewage and water supply, police, public health, public transit, garbage collection and disposal, libraries, and arenas.

by-laws

rules created by a municipality, county, or other level of government smaller than a province

Administrative Law

Administrative law is the body of law that governs how government administrators and employees exercise the decision-making powers granted to them under statute. Generally, these decisions involve conferring some kind of benefit or right on citizens; as a result, administrative decisions may have important consequences for the individuals concerned.

Depending on the provisions of the particular statute, administrative decisions may be made quickly and routinely (as in the case of registration of a driver's licence), or they may be quasi-judicial, involving a hearing and an impartial decision-maker. Often decisions will start out as routine, but if a person who is denied a right or benefit chooses to challenge the decision, it will be reviewed by a more senior official and eventually by an independent board or tribunal.

Administrative decisions may also be reviewed by a court; however, it is a principle of administrative law that deference should be given to the government official or tribunal that made the decision, owing to their expertise in the particular regulatory regime. The rights of appeal and judicial review differ depending on the governing statute, so it is important to refer to that statute for the particulars.

The decisions of administrators are made within a defined scope of authority; laws and/or policies place limits on the range of decisions that an administrator can make. Within this range, an administrator's decisions must be guided by administrative discretion. Workers employed in government departments and agencies must make choices every day in responding to particular circumstances. This exercise of administrative discretion is called discretionary power. The principles of administrative law require that discretionary power be exercised in a fair and reasonable manner.

Many decision-making functions have aspects of procedural fairness built into the policies that guide them. For example, where the decision affects whether an individual will receive benefits (such as social assistance) or services (such as public transit services for persons with a disability), it is common for the agency's policies to require that clients who are denied access to benefits or services be given written reasons for the denial. This requirement makes it easier for a client to challenge the decision. A challenge of an administrative decision may proceed through several stages of review, from the level of the agency to a tribunal and ultimately to a court. The review process is described below.

administrative law

the body of law that governs how government administrators and employees exercise the decision-making powers granted to them under statute

Administrative Tribunals

Administrative tribunals are created by statutes. Their purpose is to provide a mechanism for resolving disputes over administrative decisions relating to the rights, entitlements, or duties described in the particular statute. A person who disagrees

with the decision of an administrator may apply for a review by the appropriate administrative tribunal.

For example, an applicant for Ontario Works benefits whose application is refused by the local Ontario Works office may challenge the decision by submitting a written request to the office for an internal review. The decision will be reviewed by an officer other than the original decision-maker. If the decision is confirmed, the applicant may apply to the Social Benefits Tribunal for a further, independent review. The Social Benefits Tribunal was created by the *Ontario Works Act, 1997* and the *Ontario Disability Support Program Act, 1997*, and has authority to review administrative decisions made pursuant to those statutes. Other examples of administrative tribunals that are often relevant to workers who care for youth, such as social service workers, and their clients are the Ontario Human Rights Tribunal, through the *Human Rights Code*, and the Landlord Tenant Board, through the *Residential Tenancies Act*.

An advantage of an administrative tribunal is that hearing procedures are generally much less formal than trial procedures, and matters can be resolved more quickly. However, tribunals vary widely with respect to the style and level of formality of their proceedings. If you are called upon to assist a client with a submission to an administrative tribunal, it's a good idea to obtain a copy of the tribunal's procedures so that you can talk to the client about what will happen at the hearing and how she can prepare. (But remember that your role is to provide information, not legal advice.)

Court System and Hierarchy

In broad terms, the hierarchy of Canadian courts consists of three main levels:

1. trial courts,
2. appeal courts, and
3. the Supreme Court of Canada.

This simplified picture is deceptive, since there are separate federal and provincial or territorial court systems that include courts to deal with specific areas of the law. For example, there are federal trial and appeal courts, special courts (such as the Tax Court of Canada), and even a military court system. For the purposes of this book, it is the provincial court systems that are most relevant, particularly the Ontario system. This will be the focus of the discussion here and in the chapters that follow.

Trial Courts

Provincial courts where a dispute is first heard are called trial courts, and these include specialty courts like the Small Claims Court, Family Court, and Youth Court.

In Ontario and some other provinces, there are two levels of trial courts. Generally, lower provincial courts deal with civil disputes and lesser offences, and more serious offences are tried in a superior court. Also, in some limited situations, a decision of a lower court can be appealed to a superior court; for example, decisions of a judge in the Small Claims Court may be appealed to a judge of the Ontario Superior Court of Justice.

Appeal Courts

The provincial court of appeal is the highest level of the provincial court system. Decisions made by trial courts can be appealed to the court of appeal. The appeal court will consider whether the trial court made any significant legal errors such

that the case was decided wrongly. The appeal court may reverse the trial decision, uphold it, or order a new trial.

Supreme Court of Canada

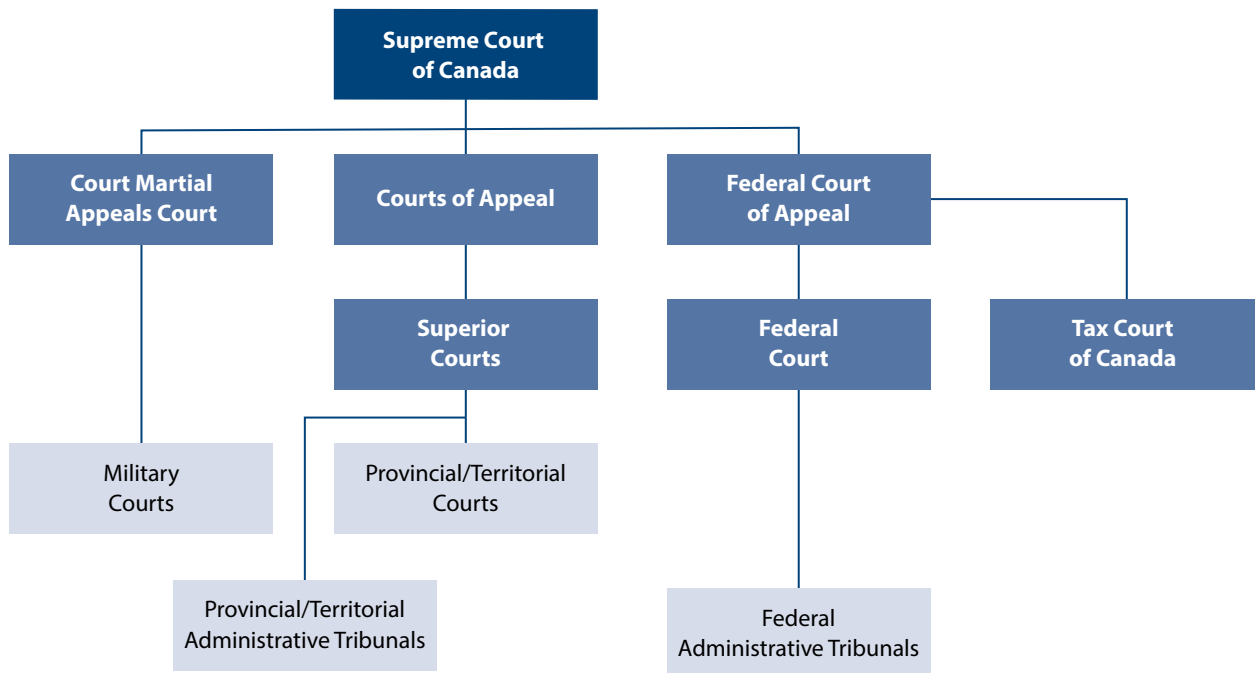
The Supreme Court of Canada is the court of final appeal and the highest court in the country. It decides only a limited number of cases every year, and there is no automatic right to appeal except in certain criminal matters. Otherwise, only parties with cases of national importance and general public interest are granted leave (permission) to appeal to the Supreme Court of Canada.

For information on federal statutes and regulations, visit the website of the Department of Justice at <http://www.justice.gc.ca>. Information on Ontario statutes and regulations is available at <https://www.ontario.ca/laws>. Information on federal and provincial statutes and on case law is available from the Canadian Legal Information Institute at <https://www.canlii.org>. Figure 1.1 illustrates Canada's court system.

Historical Perspective

Society's view of children was once very different from what it is today. Most of us now understand childhood and adolescence to be life stages that are distinct from adulthood, and we generally accept the idea that children and youth are in need of special protection because they are more vulnerable than adults. However, these ideas have not always been considered self-evident. Like most other social concepts and values, they are the product of a slow evolution in thinking.

Figure 1.1 Canada's Court System



Source: Adapted with permission from the Government of Canada, Department of Justice (n.d.). All rights reserved. Retrieved from <https://www.justice.gc.ca/eng/csj-sjc/just/07.html>

Until nearly the end of the 17th century, children moved straight from toddlerhood into adult society. Once a child was old enough to feed and dress herself, she was expected to begin contributing to the support and prosperity of the family and the community. Children as young as six or seven worked on farms, practised trades (sometimes as apprentices), and participated in commerce.

While people understood that a 7-year-old could, for example, carry less firewood in one load than a 27-year-old, society subjected children to the same general expectation: work as hard as you can for as long as it takes to get the job done. A child's work was not understood, as it often is today, as "doing her chores" or "helping his mom." Instead, the child was depended on as a full-status (if not always an equal) contributor to the family's survival.

Along with the early social integration of children went a related notion about competence. Because much of the work required to support a farming family was technically simple, children were able to master it before their physical and intellectual development was complete. And if the family members were tradespeople—carpenters, for example—children were simply taught the trade in the same way an adult learner would be taught. A lack of proficiency in the early stages was attributed to inexperience, not to incomplete physical or intellectual development. Today, we realize that children must complete their development before they will be fully competent workers, and we adjust our expectations accordingly.

Around the turn of the 18th century, things began to change. New scholarly thinking and writing about psychosocial development introduced the idea that children and adolescents were less than full grown, not only in the physical sense but also in the emotional, intellectual, and moral senses. People began to understand that children behaved (or misbehaved) as they did not simply because of flaws in character but also because their character and abilities were still developing.

The emergence of these ideas led to the increased segregation of children and adolescents from adults. Upper-class children were kept in school longer than ever before. Working-class children, for the first time, were denied full access to jobs. This happened for three reasons. First, the technological leaps of the 18th century meant that many types of work were becoming more complicated, and longer periods of apprenticeship were required to master the new skills and absorb the new knowledge. Second, as some kinds of work—such as manufacturing—became increasingly mechanized, the number of jobs decreased, and youth jobs were often eliminated first. Finally, as the dangers and health risks of factory and mining work became more widely known, a social movement emerged with the goal of protecting children by limiting their access to dangerous work and long hours.

For the first time, working-class teenage children whose families could not afford schooling were shut out of the working world. Without a role to play in society, with little to do, and with no way to earn money, some of these children became involved in (usually petty) crime. With the rise of urban youth crime, the term *juvenile delinquent* was coined, and society began paying attention to the unique developmental stage that we now recognize as adolescence.

Over the course of the 18th and 19th centuries, society's perception of children and youth shifted. New ideas about child development led people to understand that the immaturity of children and youth made them vulnerable and worthy of protection.

Special Stages, Special Rules

Before these shifts in the perception of childhood, the law typically applied to children and youth in the same ways it applied to adults. While a few legal rules—notably those relating to property ownership—suspended certain rights until adulthood, most laws designed to punish or protect the populace applied equally to children as to adults. The government held children of all ages responsible for the crimes they committed and provided children with the usual benefits of citizenship.

But as governments began to recognize the uniqueness of childhood and adolescence, things began to change. The idea of legal capacity evolved. **Legal capacity** is a concept that describes a person's ability to exercise legal rights and accept legal responsibilities. For example, in Canada today, a 12-year-old citizen lacks the legal capacity to vote, a legal right that other Canadian citizens enjoy. Historically, children were not the only group limited by the concept of legal capacity. Certain other categories of people were also excluded from the exercise of legal rights for various reasons. Women, for example, were often denied the right to own property and the right to vote in elections. People with cognitive deficits and those suffering from mental illness were judged incapable of making legal decisions for themselves. And children, once full participants in adult society, were deemed to lack legal capacity until they completed the physical, intellectual, emotional, and moral development that marked adulthood.

The notion that children and adults are different before the law endures today. While most governments have passed laws defining an **age of majority**—that is, an age at which children can exercise most legal rights—there are many exceptions that apply in different contexts. For example, while Ontario youth can vote from age 18 onward, they cannot buy alcohol until age 19. At age 16, however, they can get a job and even marry with their parents' consent. The different ages at which various activities are permitted are to some degree historical, but in general they reflect society's ideas about the average maturation rates of children.

A principle closely related to legal capacity is **criminal responsibility**. As the **criminal law** has evolved, so too has the idea that not all people who commit criminal acts should bear the usual legal consequences of those acts. For example, the verdict of “not criminally responsible on account of mental disorder” is available in appropriate cases under section 672.34 of Canada's *Criminal Code*. An appropriate case for such a verdict is one in which a person's exceptional mental state warrants absolution from criminal responsibility for otherwise criminal acts.

Eliminating criminal responsibility by establishing a mental disorder is a complicated legal affair. A much clearer bar to criminal responsibility is being underage. When it comes to crimes committed by children, section 13 of the *Criminal Code* succinctly provides:

No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.

Twelve years is the age of criminal responsibility in Canada; however, youths aged 12 to 17 are treated differently from people aged 18 and over. Where a crime—as defined by the *Criminal Code*—is committed by a person aged 12 to 17, the prosecution of the matter is governed by the YCJA. This statute, enacted by the Parliament of Canada, creates a comprehensive system for the management of young offenders. The system that the Act establishes is discussed in Chapter 3.

legal capacity

the ability of a person, based on her personal characteristics (e.g., age of majority), to take actions with legal effects (e.g., bring a lawsuit)

age of majority

the age at which a young person is given full adult rights or responsibilities with respect to a particular subject matter (the age varies depending on the subject matter)

criminal responsibility

the concept behind whether all people who commit criminal acts should bear the usual legal consequences of those acts

criminal law

laws designed to prevent behaviour harmful to society by punishing those who demonstrate it and by deterring others who might contemplate it

YOU DECIDE

Should the Age for Sentencing Youth as Adults Be Revisited?

There have been cases where children under the age of 12 have behaved in a very serious and violent manner. The case of one such youth who killed another boy on a Saskatchewan reserve is an example where there is no criminal liability for children under 12 years old, even in serious cases. Authorities have said the victim, who was not a member of the First Nation, was in the care of the Ministry of Social Services. His foster home was just off the reserve.

In Canada, under the YCJA, persons under the age of 12 years cannot be charged under the *Criminal Code*.

Questions

1. Do you think the age of 12 years is an appropriate age for criminal liability?
2. Should the age for criminal liability be lowered?
3. What consequences should a child under 12 years old anticipate for serious violent behaviours?

Source: The Canadian Press (2013).

The Roots of Law as a Tool for Child and Youth Protection

As ideas about child development flourished and society began to view childhood as a vulnerable stage of life, people became increasingly interested in child and youth protection.

Before the 18th century, protecting children was viewed as simply one facet of raising them and as being within the exclusive province of parents. While neglecting or harming children was often denounced as morally wrong, society generally gave parents broad authority over how children were provided for, supervised, and disciplined. In extreme cases of abusive treatment, a relative might intervene by taking a child into her own home, but the courts and the government were rarely involved.

Gradually, however, as the result of pressure from children's advocates—sometimes educators, clergy, or related organizations—the state began to set limits on the decision-making authority of parents.

In many **jurisdictions**, including Canada, the government's self-assigned authority over children's safety has steadily increased over the last several decades. Nowadays, if a child is at risk from parental harm, the decision to remove the child from the nuclear family is generally made not by extended family members or neighbours, but by government agencies. These agencies take responsibility for the care of children in need of protection.

jurisdictions

areas over which the legal authority of a particular statute or court extends

The Role of Legislation

The government's modern child protection role is defined, in large part, by **legislation**. A wide range of statutes now include government-mandated parenting standards, and many statutes include penalties for failing to meet these standards.

legislation

law passed by a parliament and codified in writing

HIGHLIGHT

Indigenous Child Welfare and the Legacy of Residential Schools

For almost a century, the Canadian government worked to aggressively assimilate Indigenous peoples. This included the mandatory placement of children into residential schools, which pulled children from their families and led to incalculable suffering and, in many cases, physical and sexual abuse. In 2008, the Government of Canada issued a formal apology and the Truth and Reconciliation Commission was established. Its 2015 report included 94 “Calls to Action,” the first five of which concern child welfare.

CALLS TO ACTION

In order to redress the legacy of residential schools and advance the process of Canadian reconciliation, the Truth and Reconciliation Commission makes the following calls to action.

Legacy

Child Welfare

1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:
 - i. Monitoring and assessing neglect investigations.
 - ii. Providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.
 - iii. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the history and impacts of residential schools.
 - iv. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the potential for Aboriginal communities and families to provide more appropriate solutions to family healing.
 - v. Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.
2. We call upon the federal government, in collaboration with the provinces and territories, to prepare and publish annual reports on the number of Aboriginal children (First Nations, Inuit, and Métis) who are in care, compared with non-Aboriginal children, as well as the reasons for apprehension, the total spending on preventive and care services by child-welfare agencies, and the effectiveness of various interventions.
3. We call upon all levels of government to fully implement Jordan's Principle.
4. We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:
 - i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.
 - ii. Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.
 - iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.
5. We call upon the federal, provincial, territorial, and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families.

Source: Truth and Reconciliation Commission of Canada (2015).

Prescriptive Parenting Standards

Legislated parenting standards cover a wide range of topics. **Prescriptive standards** include those related to

- providing the necessities of life (*Criminal Code*; Ontario *CYFSA*);
- facilitating enrollment in public or approved private schools (Ontario *Education Act*);
- supervising young children (Ontario *Provincial Offences Act*; Ontario *CYFSA*);
- providing economic support from both parents, including the non-custodial parent, in the event of divorce or separation (Ontario *Family Law Act*); and
- facilitating immunization and providing appropriate health care for sick and injured children (*Criminal Code*; Ontario *Immunization of School Pupils Act*).

prescriptive standards standards that prescribe (require) specific action

However, governmental prescriptions for good parenting are not always free from controversy. Some parents object, for example, to compulsory school education and must obtain special exemptions before homeschooling their children. Other parents support public schooling but object to the compulsory immunization that is a condition of attendance.

It is useful to remember that the duties imposed on parents by governments reflect the subjective values of particular societies at particular times. In some countries, for example, legislation requires parents to support the imposition of mandatory religious worship on their children. In Canada, a large proportion of citizens who happily accept public education would likely oppose prescribed religious observance.

As the government's child protection mandate has grown, opponents of particular laws have often sought to restrict state incursions into what was previously the decision-making territory of parents. In responding to this opposition, governments and courts have attempted to be mindful of the primary child-raising role of parents and the enduring importance of the institution of the family. Courts have held that the state and its agents must reserve drastic measures (such as removal of children from the family home) for situations in which there is a clear need for protection. The judge in *Re B*, an Ontario County Court decision from the 1970s, offered the following comments:

The community ought not to interfere merely because our institutions may be able to offer a greater opportunity to the children to achieve their potential. Society's interference in the natural family is only justified when the level of care of the children falls below that which no child in this country should be subjected to (*Re B*, 1975, para. 189).

Proscriptive Limits and Prohibitions

proscriptive standards
standards that prohibit
particular actions

Besides prescriptive standards, various statutes impose **proscriptive standards** that limit the authority of parents. Proscriptive legislation often applies not only to parents, but also to other adults that a child may encounter, as in the following examples:

- adults are prohibited from engaging in sexual activity with children (*Criminal Code*);
- adults are prohibited from facilitating or encouraging children to have sex with other adults, and from exploiting children through pornography (*Criminal Code*);
- adults are prohibited, in certain contexts, from exposing children to corrupting influences, such as sex, gambling, and violence (*Criminal Code*; Ontario *Theatres Act*, for movie ratings);
- adults are prohibited from selling or granting children access to dangerous goods, such as alcohol, tobacco, controlled substances, and weapons (*Criminal Code*; Canada *Controlled Drugs and Substances Act*; Canada *Firearms Act*; Ontario *Liquor Licence Act*); and
- adults (and corporations) are prohibited from employing children of mandatory school attendance age during school hours, and underage children can be employed outside school hours only in limited contexts (*Canada Labour Code*; Ontario *Employment Standards Act*).

Again, proscriptive child protection rules can be controversial. Cultural and religious values can colour proscriptive rules. For example, male infant circumcision is currently legal in Canada and widely practised for both religious and secular reasons; however, female genital mutilation—a traditional practice in some cultures that is sometimes described as *female circumcision*—is illegal here.

Finally, many statutes that do not have a specific child protection purpose create special rules for children. These statutes recognize and incorporate either the concept of children's lack of legal capacity or the concept of children's vulnerability and need of protection. An example of a statute that recognizes age-based limits on legal capacity is the Ontario *Insurance Act*, which provides that a person 16 years or older is capable of making an insurance contract (the more commonly recognized age at which an adolescent can make a valid contract is 18). An example of a statute that recognizes the vulnerability of children is the Ontario *Highway Traffic Act*, which prohibits the issuance of drivers' licences to people under the age of 16.

Important examples of child protection legislation, such as the *Criminal Code*, the Ontario CYFSA, and the Ontario *Family Law Act* are discussed in detail in Chapters 4, 6, and 8, respectively.

Duty of Care

There are many common law rules that relate to children. One common law concept with special importance in the context of child protection is the duty of care.

The **duty of care** applies in many different areas of the law, but especially in the law of **negligence**. Negligence law assigns legal responsibility and liability to people who cause harm to others or who allow harm to come to others, whether or not they mean to do so. Legal responsibility for the safety of others increases when the person who causes or allows the harm owes a duty of care to the person harmed. If, for example, a daycare worker leaves a child unattended beside a wading pool, the worker is negligent if the child drowns because he has breached his duty of care to the child. By contrast, if a passerby fails to notice that a child is unsupervised beside a pool and the child drowns, he is arguably not negligent since he owes no duty of care to the child.

Because we consider children to be vulnerable members of society, the law recognizes well-defined duties of care toward children. For example, adults have historically been held responsible for protecting children in situations where they might not necessarily be expected to protect other adults. Many of these situations are now governed by statute. For example, under the CYFSA, teachers are required to report signs of child abuse to the authorities, but they have no duty to report, for example, suspicious injuries suffered by a child's mother that they observed at pickup time.

Fiduciary Duty

A related concept is that of **fiduciary duty**. Some relationships—including that of parent and child—involve an element of special trust and dependency. The trust is created because one person depends on the other for protection or guidance. As a result of the relationship, the dependent person may be particularly susceptible to any wrongdoing or negligence on the part of the other person. The other person, who is known as a fiduciary, is therefore charged with a fiduciary duty of care toward the dependent person. Fiduciary duty is discussed in detail in Chapter 2.

The concepts of duty of care and fiduciary duty underpin all facets of child protection law. They are the basis of many statutory rules, and they guide the interpretation and application of statute law. Finally, when a novel legal issue appears—when there is no statutory answer to a particular question—the principles of duty of care and fiduciary duty serve as enduring touchstones for the courts.

duty of care

in negligence law, an obligation on the part of one person to take into account the effect of his actions on another person; usually arises based on a recognized relationship

negligence

the failure of a person to respect or carry out a duty of care owed to another

fiduciary duty

an enhanced duty of care that arises in a fiduciary relationship

KEY TERMS

administrative law, 11
 age of majority, 15
 by-laws, 11
 common law, 5
 Constitution, 7
Criminal Code, 5

criminal law, 15
 criminal responsibility, 15
 duty of care, 19
 fiduciary duty, 19
 jurisdictions, 16
 legal capacity, 15

legislation, 16
 negligence, 19
 prescriptive standards, 17
 proscriptive standards, 18
 regulations, 6
 statutes, 6

REVIEW QUESTIONS

1. Briefly outline the four sources of law.
2. What are the three main levels in the hierarchy of Canadian courts?
3. Which social and economic forces played a role in the segregation of children and adults that marked the 19th century?
4. Describe some of the statutes that treat children differently from adults.
5. List three prescriptive child protection rules and three proscriptive child protection rules.
6. What is a duty of care? What is a fiduciary duty?

SUGGESTED SOURCES

Canadian Legal Information Institute (information on federal and provincial statutes and on case law), <https://www.canlii.org>
 Department of Justice, <http://www.justice.gc.ca>
 e-Laws (information on Ontario statutes and regulations), <https://www.ontario.ca/laws>

UNICEF Canada, <http://www.unicef.ca>
 United Nations Human Rights, Office of the High Commissioner, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

REFERENCES

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (UK)*, 1982, c 11.

Canadian Human Rights Act, RSC 1985, c H-6.

Carter v Canada (AG), 2015 SCC 5, [2015] 1 SCR 331.

Child, Youth and Family Services Act, 2017, SO 2017, c 14, Schedule 1.

Children's Law Reform Act, RSO 1990, c C.12.

Constitution Act, 1982, being Schedule B of the *Canada Act 1982 (UK)*, 1982, c 11.

Convention on the Rights of the Child, 20 November 1989, resolution 44/25 at 3 (entered into force 2 September 1990). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

Criminal Code, RSC 1985, c C-46.

Department of Justice. (n.d.) The judicial structure: How the courts are organized. Retrieved from <http://www.justice.gc.ca/eng/csj-sjc/just/07.html>

Employment Standards Act, 2000, SO 2000, c 41.

Family Law Act, RSO 1990, c F.3.

Human Rights Code, RSO 1990, c H.19.

Immigration and Refugee Protection Act, SC 2001, c 27.

Immunization of School Pupils Act, RSO 1990, c I.1.

Mental Health Act, RSO 1990, c M.7.

Ontario Disability Support Program Act, 1997, SO 1997, c 25, Schedule B.

Ontario Works Act, 1997, SO 1997, c 25.

Re B, 1975 CanLII 547, 9 OR (2d) 185 (Co Ct).

Residential Tenancies Act, 2006, SO 2006, c 17.

R v Keegstra, [1990] 3 SCR 697.

The Canadian Press. (2013, September 3). Suspect in Saskatchewan six-year-old's death is under 12 and can't be charged: RCMP. *Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/national/suspect-in-saskatchewan-six-year-olds-death-is-under-12-and-cant-be-charged-rcmp/article14092975>

Truth and Reconciliation Commission of Canada (2015).

Truth and Reconciliation Commission of Canada: Calls to Action. http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

UNICEF Canada. (n.d.) *About the Convention on the Rights of the Child*. Retrieved from <http://www.unicef.ca/en/policy-advocacy-for-children/about-the-convention-on-the-rights-of-the-child>

Youth Criminal Justice Act, SC 2002, c 1.