

TABLE OF CONTENTS

<i>Foreword</i>	<i>iii</i>
<i>Dedication</i>	<i>vii</i>
<i>Foreword to the Second Edition</i>	<i>ix</i>
<i>Foreword to the Third Edition</i>	<i>xiii</i>
<i>Preface</i>	<i>xvii</i>
<i>About the Authors</i>	<i>xxiii</i>
<i>Table of Cases</i>	<i>xxxix</i>
1—AN INTRODUCTION TO THE <i>CHILD, YOUTH AND FAMILY SERVICES ACT</i>	1
WHAT IS CHILD PROTECTION LEGISLATION?.....	2
Recent Legislative Developments.....	3
(a) 1999 Amendments	3
(b) Bill 210 Changes and the Transformation of the Child Protection Regime	5
(c) <i>Child, Youth and Family Services Act</i>	7
(i) Preamble.....	8
(ii) Key Amendments	8
(iii) Terminology Changes.....	8
(iv) Part II — Children’s and Young Persons’ Rights (ss. 3-23).....	9
WHEN IS A CHILD IN NEED OF PROTECTION?	10
(a) Statutory Protection Headings.....	11
(b) What Constitutes Harm?	13
(c) Legal Standards	18
(d) When to Report.....	19
(e) Child Protection Agency Investigations and Evaluations	20
(f) Removing the Risk Rather Than the Child.....	21
JURISDICTION.....	23
CHILD PROTECTION DIFFERS FROM CUSTODY	24
(a) “Best Interests of the Child” Test	25
(b) Statutory Pathway.....	25
(c) Deemed Custody Orders Under Child Protection Legislation	28
(d) Involvement of the State in the Private Sphere	29
(e) Evaluating Best Interests.....	33

CHILD PROTECTION IS NOT A CRIMINAL MATTER.....	34
(a) Definition of “Child”	34
(b) Protection from Persons in Charge.....	35
HOW DOES A SOCIETY ANALYZE A REPORT OF ABUSE?	36
VOLUNTARY INTERVENTION	37
(a) Temporary Care Agreement	39
(b) Voluntary Youth Services Agreement.....	40
INVOLUNTARY INTERVENTION — PART V OF THE CYFSA	41
DISPOSITIONS	45
PLAN OF CARE.....	47
TIMELINES	48
ALTERNATIVE DISPUTE RESOLUTION	49
SECTION 102 CUSTODY ORDERS.....	51
OPEN ADOPTION	54
FIRST NATIONS CHILDREN PROVISIONS.....	56
DUTY TO REPORT	58
IMPORTANCE OF THE DUTY TO REPORT AND CONSEQUENCES OF NOT REPORTING.....	63
CONCLUSION	69
2—THE EVIDENCE OF CHILDREN.....	71
RULES OF EVIDENCE	71
EVIDENCE IN FAMILY LAW.....	74
COMPETENCE EXAMINATION: IS A CHILD LEGALLY COMPETENT TO TESTIFY?.....	75
(a) Family Cases	75
(b) Criminal Cases	76
THE GENERAL APPROACH OF THE LAW TO CHILDREN’S EVIDENCE	78
RULES OF EVIDENCE IN FAMILY LAW	79
PROCESSING A CHILD’S EVIDENCE	80
(a) An inquiry	80
(b) Assessing Competency to Take an Oath or Affirmation....	82
(c) Ability to Communicate: Testimonial Competence.....	83
(d) Promise to Tell the Truth: Unsworn Testimony	84
(e) The Role of the Trial Judge.....	88
(f) Preventing Questioning by Self-Represented Accused: Section 486.3	90
(g) Court Assessment of Children’s Evidence	94

ADMISSION OF HEARSAY EVIDENCE OF A CHILD	99
(a) Children’s Hearsay — Criminal	99
WEIGHT OF OUT-OF-COURT STATEMENT — CHILD NOT TESTIFYING.....	103
(a) Was the Statement Made?	103
(b) The Need for Caution	104
CHILDREN’S VIDEOTAPED EVIDENCE	105
(a) Evidence of Victim or Witness Under 18.....	107
(b) Order Prohibiting Use	108
(c) Evidence of Victim of Witness Who Has a Disability	108
DEMONSTRATIVE EVIDENCE (ANATOMICAL DOLLS).....	109
SCREENS.....	109
BILL C-2 — PROTECTION OF CHILDREN AND OTHER VULNERABLE PERSONS	111
(a) Part XV — Special Procedure and Powers	111
VOIR DIRE	114
CROSS-EXAMINATION.....	117
CREDIBILITY OF CHILDREN.....	119
CHILDREN’S WISHES	120
CHILDREN’S VOICE IN FAMILY LAW PROCEEDINGS.....	120
JUDICIAL NOTICE	122
VICTIM IMPACT STATEMENTS.....	127
(a) Children and Victim Impact Statements	128
TESTIMONY AND RELIABILITY	129
(a) Are Children Reliable?.....	129
(b) Do Children Lie?	130
CONCLUSION	130
3—THE CHARTER, CIVIL RIGHTS AND CHILDREN	133
THE FAMILY	137
(a) Best Interests of the Child.....	137
THE FAMILY AND THE CHARTER.....	139
CHILD PROTECTION.....	155
SEXUAL ASSAULT	159
SCHOOLS.....	161
CIVIL LITIGATION.....	164
CHILD ABUSE	165
SEXUAL ABUSE OF CHILDREN	168
(a) Allegations of Sexual Assault and Schools	169

(b) Offence	171
RIGHTS OF UNBORN CHILDREN.....	172
CRIMINAL PROCEEDINGS: ARBITRARY DETENTION	177
WAIVER OF <i>CHARTER</i> RIGHTS	178
<i>CHARTER</i> REMEDIES.....	179
(a) Section 24(1): Stay of Proceedings and Reduction of Sentence.....	180
(b) Section 24(2): Exclusion of Evidence.....	180
4—AN INTRODUCTION TO CUSTODY, ACCESS AND PARENTING	183
HOW CUSTODY AND ACCESS DIFFERS FROM CHILD PROTECTION	198
“BEST INTERESTS” TEST	201
DEVELOPMENT OF BEST INTERESTS AS PRIMARY TEST	201
CUSTODY AND ACCESS LEGISLATION	205
(a) The <i>Divorce Act</i>	205
(b) The <i>Children’s Law Reform Act</i>	206
(c) Applying the <i>Divorce Act</i> and the <i>CLRA</i> to Custody/ Access Matters.....	206
(d) “Deemed” Custody Orders Under Child Protection Law.....	207
WHO MAY APPLY FOR CUSTODY OR ACCESS?	210
BEST INTERESTS TEST UNDER THE TWO ACTS.....	211
(a) The Meaning of the Best Interests Test.....	213
COMMON RESTRICTION ON CONSIDERATION OF PAST CONDUCT	214
DOMESTIC VIOLENCE AMENDMENTS	217
DEFINING CUSTODY AND ACCESS	219
WHAT IS CUSTODY?	220
JOINT CUSTODY VERSUS SOLE CUSTODY	224
PARALLEL PARENTING.....	227
JOINT CUSTODY/SHARED PARENT AND CHILD SUPPORT DETERMINATION.....	237
DETERMINING CUSTODY: APPROACHES TO THE “BEST INTERESTS OF THE CHILD”	238
(a) The Traditional Approach	238
(b) The “Primary Parent” Model or “ <i>Status Quo</i> ”	238
(c) The “ <i>Status Quo</i> ” in Legislation.....	240

(d) Determining the “ <i>Status Quo</i> ” for the Purposes of Child Custody Awards.....	242
OTHERS MAY APPLY FOR CUSTODY.....	243
DE FACTO CUSTODY, INTERIM CUSTODY, FINAL CUSTODY	245
(a) <i>De Facto</i> Custody.....	245
(b) Formal Custody Arrangements: Separation Agreements and Orders.....	246
(i) Separation Agreements.....	246
(ii) Interim Orders Concerning Custody	246
(iii) Final Orders Concerning Custody	247
MATERIAL CHANGE IN CIRCUMSTANCES.....	248
WHAT DOES ACCESS MEAN?.....	249
TIME-SHARING.....	252
DECISION-MAKING DURING ACCESS	254
“SUPERVISED ACCESS” AND “SUPERVISED ACCESS CENTRE”	255
HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.....	256
PREVENTION	258
PARENTAL ABDUCTION	258
EXTRADITION.....	259
OTHER MECHANISMS FOR ENFORCING CUSTODY AND ACCESS ORDERS	260
ALTERNATIVE DISPUTE RESOLUTION	261
CONCLUSION	264
5—YOUTH CRIMINAL JUSTICE ACT.....	265
HISTORY.....	265
APPLICATION OF THE YCJA	267
APPLICATION OF THE CRIMINAL CODE	267
DIFFERENCES BETWEEN THE YCJA AND YOA	268
GUIDING PRINCIPLES.....	271
ORGANIZATION OF THE YCJA	272
EXTRAJUDICIAL MEASURES	273
(a) Extrajudicial Measures Defined	273
(b) When to Use Extrajudicial Measures.....	273
(c) The Aim of Extrajudicial Measures.....	274
(d) Who Considers Extrajudicial Measures?.....	274

(e) Extrajudicial Sanctions Defined	275
(f) Using Extrajudicial Sanctions	275
(g) Admissions for Purposes of Extrajudicial Sanctions as Evidence	276
(h) Extrajudicial Sanctions and Criminal Charges.....	276
(i) Success with Extrajudicial Programs	276
(j) The Role of Extrajudicial Measures in Youth Criminal Justice	277
COMMITTEES AND CONFERENCES	277
(a) Youth Justice Committees.....	277
(b) Conferences	278
YOUTH COURT.....	279
(a) Youth Court and Adult Court Differences.....	279
(b) Youth Court Jurisdictions and Powers	279
(c) Youth's Age Unknown at Time of Offence.....	280
(d) Enactments to Youth Court Proceedings.....	280
(e) Involving a Justice of the Peace in Youth Court	281
(f) The Role of the Court Clerk in Youth Court.....	282
JUDICIAL MEASURES.....	282
(a) A Young Person's Right to Counsel	282
(b) Specific Procedural Protections for Young People	283
(c) Privacy Protection for Young People	287
PRE-TRIAL DETENTION	288
COURT APPEARANCES.....	290
(a) First Appearance	290
(b) Pleading Guilty	291
(c) Bail <i>De Novo</i>	292
(d) Medical or Psychological Evaluation.....	292
(e) Assessing a Young Person	293
(f) Custody for the Purposes of Assessment	293
(g) The Assessment Report	294
(h) Involving Children's Aid or Child Welfare Agencies in the Youth Court Process.....	295
(i) Proceeding to Trial.....	295
(j) Mode of Trial	295
(k) Rules for Trial Conduct.....	296
SENTENCING UNDER THE YCJA	296
THE PURPOSES AND PRINCIPLES OF SENTENCING SET OUT IN THE YCJA	298

A VIOLENT OFFENCE	302
(a) Failure to Comply with Non-Custodial Sentences	302
(b) History That Indicates a Pattern of Prior Findings of Guilt or EJS or Both.....	303
(c) Exceptional Cases	303
SECTIONS 39(2) TO (5) OF THE <i>YCJA</i>	304
(a) Outside Help on Sentencing	305
(b) Pre-Sentence Report.....	306
(c) Other Sentencing Recommendations.....	307
(d) Custodial Sentences.....	308
(i) Deferred Custody and Supervision	308
(ii) Open Custody	309
(iii) Secure Custody	309
(e) Determining a “Reasonable Alternative to Custody”	310
(f) Records and Documents for Sentencing	310
(g) Length of Custody	311
(h) Alternatives to Youth Sentencing	311
ADULT SENTENCING	314
FACTORS TO BE CONSIDERED	316
(a) Sentencing Principles of the <i>YCJA</i>	317
(b) IRCS Orders in the Youth Sentencing Regime.....	323
(c) Secure or Open Custody Designation	325
INFORMATION AND PRIVACY.....	326
6—DEALING WITH CHILDREN AND THE BOUNDARIES	
OF USING FORCE.....	331
INTRODUCTION	331
SECTION 43 OF THE <i>CRIMINAL CODE</i>	333
HISTORY OF SECTION 43.....	336
JURISPRUDENCE RELATING TO THE EVIDENCE	340
(a) The Standard of Proof	340
(b) Circumstantial Evidence.....	341
(c) Expert Evidence.....	343
(d) Intentional Force	344
(e) By Way of Correction.....	345
(f) Deemed Consent	347
(g) Necessity	349
THE CURRENT APPROACH: THE CANADIAN FOUNDATION CHARTER CHALLENGE	350

PERMISSIBLE "CORRECTION" AFTER THE SECTION 43 CHALLENGE	357
MINIMAL PHYSICAL CONTACT AND SECTION 43	365
"DIRECTIVE" FORCE BY EDUCATORS AND THE CANADIAN FOUNDATION DECISION	367
SECTION 43 AND TEENAGERS.....	369
PRECEDENTS — ASSAULTS ON CHILDREN.....	379
(a) <i>R. v. Magoon</i>	382
(b) Bill S-206	385
7—CHILDREN AT SCHOOL	387
INTRODUCTION	387
LAWS GOVERNING SCHOOLS	391
HUMAN RIGHTS AND SCHOOLS	392
(a) Preamble of the <i>Human Rights Code</i>	394
(b) <i>Canadian Charter of Rights and Freedoms</i>	395
MANDATORY SCHOOL ATTENDANCE	405
A CHILD'S RIGHT TO ATTEND SCHOOL.....	407
ENFORCING ATTENDANCE.....	408
ENTITIES PROVIDING PUBLIC EDUCATION SERVICES.....	409
(a) Home-Schooling	409
(b) <i>Wisconsin v. Yoder</i>	410
WHAT IS A SCHOOL BOARD IN LAW?.....	413
SCHOOL BOARD DUTIES WITH RESPECT TO INSTRUCTION.....	414
SPECIAL EDUCATION.....	414
CATEGORIES AND DEFINITIONS OF EXCEPTIONALITIES.....	415
LIMITATIONS OF PARENTS' POWER.....	418
SCHOOL BOARD ADMINISTRATION.....	426
SPECIFIC STATUTORY DUTIES OF SCHOOL BOARD EMPLOYEES	427
SCHOOL BOARDS' STATUTORY DUTIES WITH RESPECT TO CHILD PROTECTION	427
(a) Duty of Care.....	431
STATUTORY DUTIES AND STUDENT RECORDS	439
THE SCHOOL BOARD EXCEPTION	444
SCHOOL BOARD DUTIES.....	446
A BOARD'S DUTY OF CARE TOWARD A STUDENT	446
(a) Elements of Tort Law	446

(i) Duty to Protect.....	447
(ii) Failure to Exercise a Reasonable Standard of Care.....	448
(iii) Proximate Cause	448
(iv) Actual Injury	451
(v) Contributory Negligence	453
THE DUTY OF CARE BEYOND THE CLASSROOM.....	454
RESPONSIBILITY FOR STUDENT ABUSE.....	457
(a) Vicarious Liability	458
SCHOOL BOARD HEALTH AND SAFETY	460
(a) Risk Management.....	460
SCHOOL BOARDS.....	462
(a) Bullying	463
(b) Cyber-Bullying	464
SUSPENSION AND EXPULSION	466
(a) Student Discipline.....	467
(i) Discretionary Suspensions.....	467
(ii) Mandatory Suspensions	470
(iii) Required Investigation of Mandatory Suspension.....	470
(iv) Recommending Expulsion After Mandatory Suspension.....	470
(v) Investigation and No Expulsion	471
(b) Expulsion Hearing by the Board	472
(i) Appeals of School Board Expulsion Decisions.....	475
(ii) Required Policies	476
(iii) Where Readmission to School Required.....	477
SCHOOLS AND THE POLICE.....	477
CYBER-BULLYING.....	478
(a) Bullying and Gender	486
(b) Bullying and Different Student Groups.....	487
(i) Students with Learning Disabilities.....	487
(ii) Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) Students.....	488
(iii) Gifted Students.....	488
(c) Race, Ethnicity and Immigration	489
(d) Effects of Bullying	489
LEGALIZATION OF CANNABIS	490

(a) Amendments to the <i>Education Act</i> and Policy/Program Memoranda	490
(i) Possession of Recreational Marijuana	491
(ii) Under the Influence off Marijuana	491
(iii) Possession of Marijuana Paraphernalia	491
(iv) Trafficking Marijuana	492
(b) Medical Marijuana.....	492
INDIGENOUS CHILDREN	492
RIGHTS OF CHILDREN AND PARENTS.....	496
WHAT ELSE?	496
8—AN INTRODUCTION TO CHILD SUPPORT	497
BACKGROUND	499
WHO IS ENTITLED TO CHILD SUPPORT?	501
DETERMINING THE AMOUNT OF SUPPORT	504
VARIATION	505
ADULT CHILDREN	510
DISCRETION REGARDING HIGH INCOME	516
HARDSHIP.....	522
AMOUNT OF INCOME IMPUTED.....	524
ADD-ONS/EXTRAORDINARY EXPENSES.....	524
DISCLOSURE	526
SPLIT CUSTODY.....	533
SHARED CUSTODY.....	534
HYBRID CUSTODY.....	537
RETROACTIVITY	539
PREDICTABILITY?	546
TAX CONSEQUENCE CHANGES	546
ENFORCEMENT	547
CONCLUSION	548
9—INFORMATION AND DISCLOSURE/ASSESSMENTS/ CHILDREN'S LAWYER	550
SUBPOENA OR SUMMONS TO ATTEND AT TRIAL	550
O'CONNOR APPLICATION (CRIMINAL).....	553
SOCIETY RECORDS.....	559
ASSESSMENT REPORTS	565
SELF-REPRESENTED LITIGANTS — JUDICIAL GUIDELINES.....	573

LEGAL REPRESENTATION OF CHILDREN	574
INTERVENTION OF THE CHILDREN'S LAWYER.....	579
CONCLUSIONS	580
<i>Appendix: Partial Table of Concordance for Child, Youth and Family Services Act, 2017</i>	<i>583</i>
<i>Index</i>	<i>587</i>