

Did Corporal Punishment Survive Supreme Court Scrutiny?



J. PAUL R. HOWARD

I know that Paula – *Education Canada's* ever-patient editor, Paula Dunning – just loves it when I pull stunts like this.

Not only does Paula continually have to endure my pathetic excuses for why my articles for this column are always late, but this time around, after she had already graciously extended my deadline – and I in turn had left it, typically, until the very last day – I decided, on the very morning that my column was due, to scrap the previous work-in-progress, switch topics, and write about something entirely different. And I wonder why I have such a hard time convincing people that Shakespeare never meant to have Dick the butcher's line in *King Henry VI* taken literally. (“The first thing we do, let's kill all the lawyers.” *King Henry VI – Part Two*, IV, ii, 86)

But Paula knows a good news story when she sees one, and just that morning the Supreme Court of Canada had delivered a beauty.

In a judgment released January 30, 2004, the Supreme Court held, by a majority of 6–3, that section 43 of the *Criminal Code*, which justifies the reasonable use of force by way of

correction by parents and teachers against children in their care, does not violate the *Canadian Charter of Rights and Freedoms*.¹ This was the controversial “spanking” case; the case that, as it worked its way through the Ontario courts below, was widely expected to rule on the constitutional validity of corporal punishment.²

The various assault offences under the Criminal Code prohibit the intentional, non-consensual application of force by one person against another. As the Court noted, section 43 operates as a defence to a charge of criminal assault by “excluding reasonable physical correction of children by their parents and teachers”. The section states:

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

In November 1988, the Canadian Foundation for Children, Youth and the Law (the non-profit “Justice for Children” legal clinic) commenced a *Charter* challenge, seeking to have section 43 declared unconstitutional. Specifically, the Foundation argued that this particular exemption from criminal sanction: “violates s. 7 of the *Charter* because it fails to give procedural protections to children, does not further the best interests of the child, and is both overbroad and vague; ... and ... violates s. 15(1) of the *Charter* because

it denies children the legal protection against assaults that is accorded to adults”. Both the trial judge and the Ontario Court of Appeal rejected the Foundation's arguments and upheld the legislation.

The Canadian Teachers' Federation intervened before the Supreme Court of Canada in support of the validity of section 43, and clearly the position of the CTF influenced the Court considerably. The CTF has long maintained that “at times, measured physical intervention by a teacher in matters of discipline is warranted. While not supporting the use of corporal punishment by school personnel, the CTF has taken the position that removal of section 43 will significantly compromise the ability of teachers to maintain order and discipline in the classroom, will have a detrimental effect on a teacher's capacity to perform his/her job and ultimately on the quality of education that students receive”.³ Thus, while the CTF has, since 1986, supported the retention of section 43, it has also, since 1989, adopted a policy against corporal punishment. In the Federation's view, while section 43 cannot justify corporal punishment, it does provide “a protection for teachers who find themselves in situations where they have to use force to maintain school and classroom discipline”,⁴ examples of which include, the teachers would argue, situations where:

Despite repeated directions to proceed to the principal's office in order to deal with a matter of a breach of the school's

disciplinary code, a student refuses. The teacher leads the uncooperative student by the arm and escorts him to the office.

While students are in line waiting to proceed into the school auditorium for an assembly, a student repeatedly disrupts the lineup, moving out of the line and pushing other students out of their places. A teacher takes the student by the arm and directs him back into line, indicating that he is to remain in his place.

While supervising a corridor during lunch break, a school principal encounters two junior high boys who are wrestling and fighting forcefully in the corridor. The principal physically separates the two students and restrains them while admonishing them about their behaviour.⁵

On appeal to the Supreme Court of Canada, a majority of the Court, led by Chief Justice McLachlin, upheld the validity of section 43. For the majority, the most serious argument against the exemption was the Foundation's contention that section 43's reliance on the concept of what is "reasonable under the circumstances" was "simply too vague ... to pass muster as a criminal provision", and therefore offended the principle of fundamental justice enshrined in section 7 of the *Charter*. The doctrine of vagueness seeks to guard against the subjective, arbitrary and discriminatory application of legal standards, especially criminal laws. As the majority explained, "a law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. ... A vague law prevents the citizen from realizing

when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed".

The majority held that section 43 satisfies the constitutional requirement of precision because it delineates "a risk zone for criminal sanction" in a sufficient manner to provide the necessary guidance for citizens and the law enforcement state. The Court held that the section's requirement that the force be administered "by way of correction" yielded two informative limitations on the scope of the protected sphere of conduct:

First, the person applying the force must have intended it to be for educative or corrective purposes. ... Accordingly, s. 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour. The purpose of the force must always be the education or discipline of the child ...

Second, the child must be capable of benefiting from the correction. This requires the capacity to learn and the possibility of successful correction. Force against children under two cannot be corrective, since on the evidence they are incapable of understanding why they are hit A child may also be incapable of learning from the application of force because of disability or some other

contextual factor. In these cases, force will not be "corrective" and will not fall within the sphere of immunity provided by s. 43.⁶

The Court further ruled that the section's insistence that the force be "reasonable under the circumstances" gives rise to further limitations, the first of which is based on the fact that the provision provides an exemption for simple non-consensual application of force. "Section 43 does not exempt from criminal sanction conduct that causes harm or raises a reasonable prospect of harm. It can be invoked only in cases of non-consensual application of force that results neither in harm nor in the prospect of bodily harm. This limits its operation to the mildest forms of assault."⁷

In determining what is "reasonable under the circumstances", the Court was assisted by indications of the current social consensus and expert evidence on what constitutes reasonable corrective discipline. The Court noted that on the evidence before it there were significant areas of agreement among the experts on both sides of the issues, from which it extracted the following guidelines:

Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour. Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful. Corporal punishment which

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involves slaps or blows to the head is harmful. These types of punishment, we may conclude, will not be reasonable.

Contemporary social consensus is that, while teachers may sometimes use corrective force to remove children from classrooms or secure compliance with instructions, the use of corporal punishment by teachers is not acceptable. Many school boards forbid the use of corporal punishment, and some provinces and territories have legislatively prohibited its use by teachers ... Section 43 will protect a teacher who uses reasonable, corrective force to restrain or remove a child in appropriate circumstances. Substantial societal consensus, supported by expert evidence and Canada's treaty obligations, indicates that corporal punishment by teachers is unreasonable.⁸

The majority therefore concluded that section 43 does not violate the principle of fundamental justice that laws must not be vague or arbitrary.

The Court also dismissed the Foundation's challenge based on the equality rights guaranteed by 15 of the Charter. The Foundation contended that section 43 permits conduct toward children that would be criminal in the case of adult victims. More particularly, it argued that "this decriminalization discriminates against children by sending the message that a child is 'less capable, or less worthy of recognition or value as a human being or as a member of Canadian society'."

The majority readily acknowledged that children are vulnerable members of society and need to be protected from abusive treatment; at the same time, the Court observed, children need more than just a safe environment:

Children also depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process.

Section 43 is Parliament's attempt to accommodate both of these needs. It provides parents and teachers with the

ability to carry out the reasonable education of the child without the threat of sanction by the criminal law. The criminal law will decisively condemn and punish force that harms children, is part of a pattern of abuse, or is simply the angry or frustrated imposition of violence against children; in this way, by decriminalizing only minimal force of transient or trivial impact, s. 43 is sensitive to children's need for a safe environment. But s. 43 also ensures the criminal law will not be used where the force is part of a genuine effort to educate the child, poses no reasonable risk of harm that is more than transitory and trifling, and is reasonable under the circumstances. Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them. So Parliament has decided not to do so, preferring the approach of educating parents against physical discipline.⁹

Summing up on the section 15 equality analysis, Chief Justice McLachlin concluded:

I am satisfied that a reasonable person acting on behalf of a child, apprised of the harms of criminalization that s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child's dignity has been offended in the manner contemplated by s. 15(1). Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of s. 43 on a child's sense of dignity. Yet, as emphasized, the force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting. Section 43 is not arbitrarily demeaning. It does not discriminate. Rather, it is firmly grounded in the actual needs and circumstances of children. I conclude that s. 43 does not offend s. 15(1) of the Charter.¹⁰

Thus, in the end, the Court gave no blanket endorsement of spanking. While it affirmed the validity of section 43, it outlawed corporal punishment by teachers, and in this the majority's analysis is largely consistent with the position that has been maintained by the Canadian Teachers' Federation for several years now. Seeking to balance competing interests, the Court upheld Parliament's decision "to carve out a sphere within which children's parents and teachers may use minor corrective force in some circumstances without facing criminal sanction", but articulated some strict limitations to ensure that only minor corrective force of a transitory or trifling nature is exempted. It is a decision that should be welcomed by educators. 🌈

1 Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4.

2 E. Hancock, "Section 43: A Teachers' Association View" in J.P.R. Howard & B.M. MacNeil, eds., *The Law, Education & The Future: Bridging the Millennium – Proceedings of the Eleventh Annual Conference of the Canadian Association for the Practical Study of Law in Education*, held in Charlottetown, Prince Edward Island, April 30 – May 2, 2000 (Toronto: CAPSLE, 2003) 243 at 245, para. 10.08.

3 *Ibid.*, at 251-252, paras. 10.22–10.23.

4 *Ibid.*, at 248, para. 10.15.

5 *Supra* note 2, at paras. 24–25.

6 *Ibid.*, at para. 30.

7 *Ibid.*, at paras. 37-38.

8 *Ibid.*, at paras. 58-59.

9 *Ibid.*, at para. 68.

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