



Landmark Case

“THE SPANKING CASE”: TESTING THE VALIDITY OF SECTION 43 OF THE *CRIMINAL CODE OF CANADA*

Prepared for the Ontario Justice Education Network by Counsel for the Department of Justice Canada.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4

Facts

The Canadian Foundation for Children, Youth and the Law (CFCYL) is an organization dedicated to the protection of children's rights. It provides legal representation for youth as well as examining and responding to existing and proposed legislation related to the rights of children. In November 1998, the CFCYL applied to a court asking for a **declaration** that s. 43 of the *Criminal Code of Canada* is invalid because it legalizes the use of corporal punishment against children for the purpose of correction. In other words, children are the only group in society that can be legally assaulted as a means of discipline.

Criminal Code of Canada

s. 43. 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.

The basis for the challenge initiated by the CFCYL was that s. 43 was unconstitutional and violated numerous sections of the *Canadian Charter of Rights and Freedoms*, as well as the United Nations *Convention on the Rights of the Child*.

Challenging the *Charter*

The challenge was based on the following sections of the *Charter*:

Canadian Charter of Rights and Freedoms

s.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.

s.12 – Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

s.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.

In addition to this, the challenge also relied on Canada’s commitment to comply with the UN *Convention on the Rights of the Child*. The primary objective of the *Convention* is to establish an international standard of human rights for all children, everywhere.¹

Aside from the **applicant** (CFCYL) and the **respondent** (Attorney General of Canada), there were also a number of groups that felt they had an interest in the outcome of this challenge. These groups applied to the court for **intervener** status so that they, too could participate in this legal proceeding. Status was not granted to all applicants. The only group to be granted intervener status in support of this challenge was the Ontario Association of Children’s Aid Societies. On the other hand, parties opposed to this challenge that were granted intervener status were the Canadian Teachers’ Federation and a group of organizations that joined forces to form the Coalition for Family Autonomy.

This application for a declaration began in the Ontario Court (General Division), now called the Ontario Superior Court of Justice. Mr. Justice McCombs heard the application of the CFCYL from December 6-10, 1999 but did not make a ruling until July 5, 2000. In his decision, the judge ruled that s. 43 was consistent with the *Charter* and that it did not violate Canada’s obligations under the UN *Convention on the Rights of the Child*. He dismissed the application. However, in his reasons, the judge suggested that federal Parliament should examine the use of reasonable force, as set out in s. 43, and come up with more clearly defined parameters to guide teachers, parents and caregivers.

Ontario Court of Appeal

The CFCYL was dissatisfied with this ruling. It felt that Justice McCombs’ misinterpreted the evidence and that he was also wrong in the way he interpreted the law. In January 2001, CFCYL appealed the decision to the Court of Appeal for Ontario where it was heard by Justices Catzman, Doherty and Goudge from September 10-12, 2001. On January 15, 2002 the Court of Appeal upheld the decision of the lower court stating that the purpose of s. 43 was to allow parents and teachers to “apply strictly limited corrective force to children without criminal sanctions so that they can carry out their important responsibilities to train and nurture children without the harm that such sanctions would bring to them, to their tasks and to the families concerned”. The appeal was dismissed.

Supreme Court of Canada

In March 2002, the CFCYL applied for **leave** to appeal to the Supreme Court of Canada (SCC), the highest court in the country. The SCC can refuse to hear a case. It usually hears cases that are of national significance, on appeal from a provincial appeal court. Often the cases deal with **constitutional** issues. CFCYL’s argument was that the Ontario Court of Appeal made an error in law and did not give adequate consideration to the expert evidence before them and, as the matter was one of national significance, permission to appeal should be granted. In October 2002, the SCC announced that it would hear the appeal, although no date had been set. Since about 90% of applications to the SCC for leave to appeal are rejected, the decision to hear this appeal was a clear

¹ See the OJEN/UNICEF Canada resource, *Children’s Rights Count*, at www.ojen.ca

indication that this constitutional challenge was important. On March 4, 2003, the SCC announced that the hearing would take place on June 6, 2003. The Court granted intervener status to those groups that had participated in the two previous hearings in the lower courts, as well as to two other organizations that applied for status, the Child Welfare League of Canada and the Quebec Human Rights Commission.

The Majority Opinion of the Supreme Court of Canada

On January 30, 2004, the SCC held, in a 6-3 decision, that s. 43 was constitutional, upholding the previous decisions of the lower courts. Despite this, the SCC established some legal guidelines and limitations to be used when determining what degree of force would be considered "reasonable under the circumstances". The SCC held that spanking is only acceptable for children between the ages of 2 to 12; that the use of objects such as belts or hitting in the head is not permissible; and that no child should be hit in anger or out of frustration. The SCC also added that teachers should not be permitted to strike students, but that limited force is allowed in order to restrain students during a violent outburst

TRACKING THE CASE THROUGH THE COURT SYSTEM

Ontario Superior Court of Justice

In November 1998, the Canadian Foundation for Children, Youth and the Law sought a declaration challenging the validity of s.43 of the *Criminal Code of Canada*. The application was heard on December 6-10, 1999 and on July 5, 2000 the judge made a decision upholding the constitutionality of s.43 and the application was dismissed.



Court of Appeal for Ontario

In January 2001, the CFCYL appealed the decision to the Court of Appeal for Ontario claiming that the lower court's decision was inconsistent with the evidence presented. The appeal was heard on September 10-12, 2001 and on January 15, 2002 the Court of Appeal upheld the decision of the lower court and the appeal was dismissed.



Supreme Court of Canada

In March 2002, the CFCYL applied for leave to appeal to the Supreme Court of Canada claiming that the issue was one of national importance and that adequate consideration of the evidence was not given by the two previous lower courts. A hearing was granted and took place on June 6, 2003. On January 30, 2004, the Supreme Court of Canada ruled that s. 43 was constitutional, upholding the previous decisions of the lower courts. Despite this, the court did set out some legal guidelines as to what was considered reasonable or acceptable behaviour under s.43.



Classroom Discussion Questions

1. Using the "Timeline of Events" provided, write a brief description of the importance of each date on the timeline to this case.
2. Examine your timeline. What observation can you make about the litigation process?
3. Why did the Canadian Foundation for Children, Youth and the Law decide to challenge the validity of s. 43 of the *Criminal Code of Canada*?
4. Using a textbook, dictionary or the internet, define the term "corporal punishment".
5. The Canadian Teacher's Federation had stated that their position was that teachers should not use corporal punishment on students and yet they stood as interveners in support of s. 43 throughout all three trials.
 - a) How does s. 43 affect the teacher's role in the classroom?
 - b) What do you think teachers feared could happen if s. 43 were repealed?
6. The courts are often required to decide between the rights of the individual and the needs of society. In this case, was the Supreme Court decision in favour of individual rights, the needs of society or a balance of both? Explain.



CFCYL v. A.G. (Canada): Timeline of Events

November 1998 -

December 1999 -

July 2000 -

January 2001 -

September 2001 -

January 2002 -

March 2002 -

October 2002 -

March 2003 -

June 2003 -

January 2004 -



CFCYL v. A.G. (Canada): Worksheet 1

A LOOK AT THE LAW

This case involved legislation from three different branches of the law.

- **Criminal** - The *Criminal Code of Canada*;
- **Constitutional** – The *Canadian Charter of Rights and Freedoms*; and
- **International** - The *United Nations Convention on the Rights of the Child*.

Criminal Code of Canada

s.43 – 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.

Canadian Charter of Rights and Freedoms

s.1 – The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.

s.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.

s.12 – Everyone has the right not to be subjected to any **cruel and unusual treatment or punishment**.

s. 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.

United Nations Convention on the Rights of the Child

The rights outlined in the Convention apply to all children, everywhere, that are under the age of 18. The basic principles of the Convention that are most applicable to this case are that:

- every child has the right to have its basic needs fulfilled
- all children are considered to have the same rights and equal worth
- every child has the right to express its opinions and be respected
- children have the right to be protected from abuse and exploitation

Questions

1. Three different branches of law were applied in this case. Which is considered to be the most important and given the greatest weight in the consideration of cases?
2. What difficulties arise out of the use of the term "reasonable" in s. 43?
3. Section 1 of the *Charter* has come to be known as the "reasonable limits clause" because it clearly states that limits can be set on your rights and freedoms. In *R. v. Oakes* (1986), the Supreme Court of Canada established criteria to these "reasonable limits" in what is commonly referred to as the "Oakes Test". This test is used to determine if a law can survive a challenge based on section 1 of the *Charter*. Review OJEN's resource "Section 1 of the *Charter* and the Oakes Test", available at www.ojen.ca.

Apply the "Oakes test" to this case by following the steps below.

1. Is the limitation prescribed by law?
2. Is the purpose of s. 43 of the *Criminal Code of Canada* important enough that it warrants the limitation of constitutionally protected rights and freedoms? (If "no", then the law is unconstitutional. If "yes", go on to 3. .)
3. Has the government, in the course of achieving its legislative objectives, chosen proportional, or relative ways, to achieve those objectives?
 - a. Is there a "rational connection" between the limit on children's rights and the government's intended objective in s. 43?
 - b. Is the limitation of the right as minimal as possible in achieving the objective?
 - c. Does the benefit derived from s. 43 outweigh the severity of the infringement?

If you answered "no" to any of the questions above, then s. 43 should be deemed to be unconstitutional. If not, then it passes the "Oakes test" and s. 43 would survive a challenge based on s. 1 of the *Charter*.



CFCYL v. A.G. (Canada): Worksheet 2

United Nations Convention on the Rights of the Child²

Using your textbook, the Internet and any other resources available to you, research the following questions on the United Nations and the *Convention on the Rights of the Child*.

1. When was the United Nations established?
2. What is the role of the United Nations?
3. How many member states are there?
4. What is the role of the UN General Assembly?
5. What is the role of the UN Security Council?
6. When did the UN *Convention on the Rights of the Child* become international law?
7. When did Canada ratify the *Convention*?
8. What are the four guiding principles of the *Convention*?
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
9. What is the expectation for member countries that have legislation that is contrary to the *Convention*?
10. Is the *Convention* legally binding on its member countries? Explain.

² See Children's Rights Count at www.ojen.ca and www.unicef.org/crc/convention.htm



CFCYL v. A.G. (Canada): Worksheet 3

LOOKING AT BOTH SIDES OF THE ISSUE

Research the arguments that were made in this case that were both for and against the **repeal** of s. 43 of the *Criminal Code of Canada*. Place your answers on the chart below under the appropriate heading. You must have at least 3 arguments for each side.

ARGUMENTS SUPPORTING THE REPEAL OF s. 43	ARGUMENTS AGAINST THE REPEAL OF s. 43

1. Choose one of the arguments above that support the repeal of s.43 and state why you think it is a valid argument.
2. Choose one of the arguments above that is against the repeal of s. 43 and state why you think it is a valid argument.

RECOMMENDED WEBSITES

The following websites are good sources for information related to this case.

Supreme Court of Canada

<http://www.scc-csc.gc.ca/>

This site provides information on the Supreme Court of Canada, the judges, court cases and judgments. For the full text of the judgment in appeal of this case go to

<http://scc.lexum.org/en/2004/2004scc4/2004scc4.html>

Guide to Ontario Courts

<http://www.ontariocourts.on.ca/>

This site provides information on the courts of Ontario, court cases, judgments, etc.

Department of Justice – Canada

<http://www.canada.justice.gc.ca/>

This site provides information related to Canada’s justice system including the courts, legislation (including the full text of the *Canadian Charter of Rights and Freedoms*) and much more.

Canadian Legal Information Institute (CanLII)

<http://www.canlii.org/>

This site has links to courts, to journals, cases and legislation.

Toronto – The official website of the city of Toronto

http://www.toronto.ca/health/ssl_index.htm

United Nations

<http://www.un.org/>

This site provides information on the United Nations. For a look at the *Convention on the Rights of the Child* in its full text go to <http://www2.ohchr.org/english/law/crc.htm>

UNICEF Canada

<http://www.unicef.ca/>

This site provides information on the UN *Convention on the Rights of the Child*.

Justice for Children and Youth

<http://www.jfcy.org/>

This site provides a great deal of information related to this case.

Repeal 43 Committee

<http://www.repeal43.org/>

This site is set up by an organization committed to the repeal of section 43.