The Top Five 2002

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.

These are unofficial case summaries for the assistance of the classroom teacher. They do not represent the text of the Court decision. For the actual reasoning, please refer to the full Court decision.

1. *Falkiner v.Ontario* (2002) 59 OR (3d) 481 Ont. C.A.
http://www.ontariocourts.on.ca/decisions/2000/september/falkiner.htm

"Spouse in the House"

In 1995 the government of Ontario changed the definition of the word "spouse" in legislation affecting the payment of income assistance benefits. The government's purpose was to save money and to treat married and common law couples equally. Prior to 1995 a man and a woman who lived together continuously for three years were considered spouses whether they were married or not. Under the 1995 rule persons of the opposite sex who lived in the same place who had (1) a "mutual arrangement regarding their financial affairs" and (2) a relationship which amounted to "cohabitation" were defined as spouses. This definition became known as the "spouse in the house" rule.

Ms. Falkiner, a single mother on income assistance, had been living for less than a year with a man. They shared rent and utilities, but he did not support her or her children. The government ended Ms. Falkiner's benefits because it decided that she was a "spouse", and therefore she was not eligible to receive benefits as a "sole support parent". The Social Assistance Review Board decided that the new definition of "spouse" infringed sections 7 and 15 of the Charter. The Divisional Court agreed that the definition infringed the section 15 equality rights of women and sole support mothers on social assistance. The government appealed to the Court of Appeal.

The Court of Appeal decided that the government's definition of spouse included persons in relationships that were not marriage-like. The economic component of a spousal relationship is generally characterized by support or a support obligation, or by financial interdependence. Marriage-like financial relationships are not just "fair share".

The Court found that the definition of spouse violated section 15(1) of the Charter. Ms.

Falkiner and others like her had been discriminated against on the basis of their sex, as single mothers and as single mothers on assistance. Although women at the time only accounted for 54% of all persons receiving benefits and only 60% of single persons, they accounted for nearly 90% of those whose benefits were terminated because of the new definition of spouse. Single mothers were similarly disproportionately impacted.

The Court decided that the government's objectives in treating unmarried and married couples alike and to allocate public funds to those most in need were pressing and substantial, but it had not justified its violation of the Charter. The new definition of spouse was not rationally connected to the objectives and there was significant impairment of equality rights. The only positive effect was cost savings, but the negative effects were considerable and included reinforcement of dependency, deprivation of financial independence and state interference with close personal relationships.

2. *Adler v. Ontario* [1996] 3 S.C.R. 609
http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol3/html/1996scr3_0609.html

Education funding in Ontario of Roman Catholic separate schools but not of other religion-based schools.

Section 93 of the *Constitution Act, 1867* requires the Ontario government to fund Roman Catholic separate schools. This section was the result of an historical compromise crucial to Confederation. Parents who, because of religious or conscientious beliefs, send their children to private religious (non-Catholic) schools sought a declaration that the non-funding of those schools by the provincial government infringed their religious and equality rights guaranteed in the Charter.

Five justices of the Supreme Court found that the government's choice to not fund other denominational schools does not infringe the equality rights of students in non-Catholic religious-based schools for two reasons. Section 29 of the Charter exempts rights and privileges guaranteed under the Constitution from a Charter based challenge, and one part of the Constitution cannot be used to interfere with rights protected in another part of the same document. The Court stated that the province is free to exercise its plenary power over education in whatever way it sees fit subject to the restrictions relating to separate school funding set out in Section 93(1). However, legislation with respect to education beyond the confines of the special mandate to fund public schools and Roman Separate schools could be subject to a Charter challenge.

Two justices of the Court in a concurring opinion stated that only the rights and privileges of separate schools were given constitutional protection, and the distinction between Roman Catholic schools and other religious schools was not subject to Charter challenge. Even though non-funding imposed an economic disadvantage on parents who chose to send their

children to religious-based schools rather than secular public schools, this disadvantage was not due to the legislation requiring mandatory education. The *Education Act* allows for education within a religious school or at home and does not compel individuals to infringe their freedom of religion. The failure of the state to facilitate religious practice cannot be considered interference with freedom of religion. Any economic distinction was not due to the legislation but flowed exclusively from religious tenets and parental choice. The cost of sending children to private religious schools does not infringe freedom of religion protected by section 2(a) of the Charter.
That persons feel compelled to send their children to private school because of a personal characteristic (religion) with the effect that they are unable to benefit from public school funding is not an effect arising from the statute. The distinction between themselves and others is not the result of government action, and the threshold inquiry under section 15 of the Charter is not met.

One justice of the Court dissented in part. She did not agree that section 93 was immune from Charter attack, but she agreed that freedom of religion did not entitle one to state support for one's religion. Roman Catholic separate schools have a constitutional right to funding. However the government's decision to not fund other religious schools did infringe the students equality rights *vis a vis* secular schools. This justice found that the *Education Act* discriminates among individuals. The state cannot blame the individual for having or for having chosen a status that leads to discrimination. However, the state's infringement of section 15 of the Charter was justifiable in that the public school system represents the most promising potential for realizing a more fully tolerant society. Denying funding to private religious schools is rationally connected to promoting the goal of a more tolerant society and only minimally impaired Charter guarantees.

One justice dissented. Provinces exercising their plenary powers are subject to the Charter. Failure to fund other private religious-schools did not infringe religious rights guaranteed under the Charter but did infringe section 15 equality rights. The state discriminated on the basis of religion. The state cannot blame the individual for belonging to a discriminated group. Complete denial of funding was an excessive impairment. Partial funding could be provided without affecting the objectives of public school support.

3. *Trinity Western University v. British Columbia College of Teachers,* [2001] 1 S.C.R. 772
http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol1/html/2001scr1_0772.html

Acts of private institutions are exempt from the Charter but an administrative body can look to the Charter and human rights legislation in making decisions in the public interest. It must decide correctly however.

Trinity Western University ("TWU") is a private religious-based institution in British Columbia.

It had a five-year teacher training program offering baccalaureate degrees in education since 1985. Under this program students studied for four years at TWU. The fifth year training was done at Simon Fraser University. In 1995 TWU applied to the British Columbia College of Teachers ("BCCT") for permission to assume full responsibility of its teacher education program. One reason for the application is that TWU wished to have all five years of study reflect its Christian world view. TWU Community Standards forbid practices condemned by the Bible including homosexual behaviour. The BCCT denied the TWU application because it was not in the public interest to approve a teacher education program which appeared to follow discriminatory practices.

At trial the Court found that the BCCT, an administrative body, did not have the jurisdiction to consider the issue of discriminatory practices and there was no reasonable basis to support its decision regarding discrimination. The British Columbia Court of Appeal found that the BCCT had acted within its jurisdiction, but affirmed the trial judge's finding that there was no basis to the discrimination. The Supreme Court of Canada agreed that the BCCT had the jurisdiction to consider discriminatory practices in dealing with the TWU application because the suitability for entrance into the profession of teaching must take into account all features of an education program. Public schools are meant to develop civic virtue and responsible citizenship and to educate in an environment free of bias, prejudice and intolerance. It would not be correct to limit the BCCT to only a determination of knowledge and skills.

TWU is a private institution and exempted, in part, from human rights legislation and the Charter does not apply. However the BCCT was entitled to consider these in deciding whether it was in the public interest to allow teachers to be trained at TWU. However any conflict between religious freedoms and equality rights should be resolved by defining the rights involved. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. The proper place to draw the line is between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them.

The Supreme Court decided that the BCCT had decided incorrectly by not taking into account the impact of its decision on the right to freedom of religion of members of TWU when it assessed TWU's alleged discriminatory practices. There was no evidence that TWU trained teachers had fostered discrimination in the public schools of British Columbia. Absent evidence that TWU training fostered discrimination, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. Acting on those beliefs would be a different matter. If a teacher in a public school system engages in discriminatory conduct, the teacher would be subject to discipline. In this way the scope of freedom of religion and equality rights that come into conflict can be circumscribed and reconciled.

4. *United States of America v. Burns* [2001] 1 S.C.R. 283
http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol1/html/2001scr1_0283.html

> The SCC changed its mind. Law can change as society's values and convictions evolve. Canada's understanding of fundamental justice and capital punishment affects the decision to extradite an accused without first receiving assurances that the death penalty would not be imposed.

Glen Burns and Atif Rafay, Canadian citizens, were wanted in Washington state on three counts of aggravated first degree murder of Mr. Rafay=s parents and sister. They were apprehended in British Columbia as the result of an RCMP sting operation during which they claimed responsibility for organizing and carrying out the murders. The United States began proceedings to extradite the accused to Washington to face trial there. If the accused were found guilty they would face either the death penalty or life in prison without possibility of parole. Under the Extradition Treaty between the United States and Canada, a fugitive may be extradited with or without assurances that the death penalty not be imposed. The Minister of Justice of Canada, after considering the circumstances and the fugitives ages, just 18 at the time of the murders, decided not to ask for assurances. The British Columbia Court of Appeal set aside the Minister=s order and directed him to seek assurances as a condition of surrender. The Minister appealed.

The Minister [the executive branch of government] has a broad discretion to decide to request assurances, but it must exercise it in accordance with the Charter. The Court has traditionally given deference to the Minister is extradition cases, and the Court should not interfere with international relations, however, the Court [the judicial branch] is the guardian of the Constitution and death penalty cases are uniquely bound up with basic constitutional values. While an individual who commits a crime in another state must be answerable to the justice system of that state, in Canada the death penalty is not an acceptable element of criminal justice. Abolition of the death penalty is a major Canadian international initiative.

Since earlier Supreme Court decisions concerning extradition without assurances, there has been a change in attitude toward capital punishment in Canada, the United States and Great Britain. The death penalty does not advance the public interest in a way that life without parole wouldn=t. A refusal to request assurances would not undermine Canada=s international obligations or good relations. The Extradition Treaty provides for assurances. If fugitives are returned to a foreign country to face the death penalty or to face death from natural causes after life in prison, they are equally prevented from using Canada as a safe haven.

5. *Canadian Foundation for Children, Youth and the law v. Canada (Attorney General)* (2002) Docket:C34749 Ont. C.A.

http://www.ontariocourts.on.ca/decisions/2002/january/canadianC34749.htm

www.ontariocourts.on.ca/ojen/index.htm

Section 43 of the *Criminal Code,* R.S.C. 1985 c. C-46 reads as follows:

> 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.

This is a defense for any parent, surrogate parent or teacher who may correct a child by using force which might otherwise be considered a criminal assault.

The Court of Appeal of Ontario decided that the law did not violate a child's constitutional rights to security of the person, to be protected against cruel and unusual punishment, and to equality. The Court found no empirical evidence establishing a definitive long term causal link between corporal punishment and negative outcomes for children, nor did it find empirical evidence that non-abusive or mild forms of physical discipline such as spanking have a positive corrective effect upon children. Furthermore no country in the world has criminalized all forms of physical punishment of children by parents. Criminalization is too broad and blunt an instrument to address problems concerning child welfare. The most appropriate way to address the issue is to develop educational and other social programs designed to change social attitudes, rather than to expand the reach of the criminal law.

S. 43 offers protection only when the force is intended for "correction", when the child being "corrected" is capable of learning from that correction, and then only when the force used is reasonable in the circumstances. "Reasonable in the circumstances" includes consideration of the age and character of the child, the circumstances of the punishment, its gravity, the misconduct of the child giving rise to it, the likely effect of the punishment on the child and whether the child suffered any injuries. Finally, the person applying the force must intend it for "correction" and the child being "corrected" must be capable of learning from the correction.

The s. 7 issue presented by s. 43 is not about whether physical punishment of children is good or bad. The government has clearly and properly determined that it is bad. Rather the issue is whether s. 43 infringes the child's security of the person in a way that violates the principles of fundamental justice. The Court decided s. 43 fairly balances the individual and state interests at stake.

The Court decided that s. 43 did not violate s. 12 of the Charter everyone has the right not to be subjected to any cruel and unusual treatment or punishment because the state was not the actor in inflicting punishment or can be held responsible for it.

The Court found that while s. 43 does discriminate against children by reason of their age (s. 15 of the Charter), it was a justifiable infringement. The objective of s. 43 is to permit 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. Parents, teachers and families play very significant roles in our society. Facilitating those is an objective that is pressing and substantial. Prosecuting non-abusive physical punishment of children by parents or teachers would hinder them in the discharge of their responsibilities towards those children and harm families. Proportionality of the law is met given the active educational programs undertaken by government to eliminate physical punishment altogether and non-criminal legislation protecting against child abuse.