

#OJENTMFall2021

OJEN's Access to Justice Week Twitter Moot Corporal Punishment in Canada

Should we change the law that permits corporal punishment of children?

About corporal punishment

Corporal punishment means inflicting physical pain or discomfort upon a person in order to discipline them for undesired behaviour. In many parts of the world, including Canada, corporal punishment has been a traditional part of how parents and others correct children whose behaviour is seen as undesirable.

However, some have pointed out that corporal punishment – in particular striking another person, such as in the case of spanking – might be considered a form of illegal assault if it were used to discipline anyone other than children.

In Canada, the law governing the corporal punishment of children is set out in Section 43 of the *Criminal Code of Canada*. The relevant portion reads:

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 2004, the Supreme Court of Canada (SCC) issued a landmark decision concerning the legality of s. 43. In the case, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, the applicants brought a constitutional challenge against the law, arguing that it violates children's rights under the *Canadian Charter of Rights and Freedoms*. In particular, the CFCYL argued that section 43 violates children's rights to:

- **Equality**, under section 15;
- **Security of the person**, under section 7; and
- Freedom from **cruel and unusual punishment**, under section 12

6 of the 9 Supreme Court judges who heard the case found that the law did not violate these rights, so the application was defeated. However, 3 judges dissented from this decision, and found that s. 43 violated one or more of the rights in question.

In their written decision, the majority of the SCC provided considerable interpretation of how and why they found s. 43 to be lawful. This included comments on what is and is not “reasonable” force, the context in which that force could lawfully occur, how to define “correction” of behaviour, and the kinds of relationships in which such correction could and could not be permitted.

In 2021, the issue of corporal punishment remains controversial in Canada.

Should we change the law?

Below you will find some resources to help you prepare your arguments. As you do, feel free to consider things like:

- Modifying parts of the law or the whole law
- How other countries address this issue
- The rights of parents and of children
- What “reasonable” means
- What “correction” means
- Novel proposals for reform
- Moral and legal arguments
- Whether the SCC guidelines are adequate and clear
- The circumstances of teachers and others who are legally *in loco parentis*, or “standing in the place
- Public opinion
- Legal ramifications of change
- Health, wellness and social science data

Corporal Punishment: Resources

1. SCC Case, OJEN & CLEO:
Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) 2004,
SCC 4
<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2115/index.do>

OJEN's Resource - Landmark Case: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mcb-cce/index.html>

CLEO has a resource but the link is broken: <https://cleoconnect.ca/resource/yourlegalrights/is-spanking-legal-in-canada-1/>

2. **Library of Canada Backgrounder Paper: The "Spanking" Law: Section 43 of the Criminal Code (document emailed)**

https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201635E

- section 43 and the SCC's judicial interpretation (majority of which upheld the provision as constitutional in 2004; includes majority & dissenting opinions)
- past proposals to repeal the section, [note: one of the calls to action in the TRC is to repeal s. 43] legal effects a repeal would have, given the definition of assault in the *Criminal Code* and the availability of common law defences.
- Public opinion on abolishing section 43, research regarding effects of physical punishment and international perspectives

3. **Justice for Children & Youth**

Corporal punishment - links and summaries of sources below: JFCY - Litigation Summary:
<https://jfcy.org/en/community-partnerships/corporal-punishment-of-children/s-43-litigation-summary/>

JFCY - Section 43 Factum (document emailed): <https://jfcy.org/wp-content/uploads/2014/06/Section43Factum.pdf> (** good summary of legal arguments)

Corporal Punishment aka spanking - <https://jfcy.org/en/rights/corporal-punishment-aka-spanking/>

- **Alternative Report to the UN Committee on the Rights of the Child regarding the Repeal of Section 43 of the Criminal Code (Canada) (document emailed):**
<https://jfcy.org/wp-content/uploads/2020/03/Alternative-Report-Section-43-of-the-Criminal-Code.pdf>

Joint Statement:

<https://www.cheo.on.ca/en/about-us/physical-punishment.aspx> (**there's a lot of good resources here - i.e. backgrounders and research papers)

http://js-advocacy.ca/pdf/joint_statement_e.pdf (document emailed)

Repeal 43 Committee: <http://www.repeal43.org/>

Global Initiative to End the Physical Punishment of Children:

<https://endcorporalpunishment.org/>

4. **Justice Canada summary:** <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mcb-cce/index.html>

5. **Law firm's website - with cases:** <https://www.dunnandassociates.ca/news/spanking-your-kids-how-far-is-too-far/>

6. **News Articles**
<https://www.cbc.ca/news/canada/supreme-court-upholds-spanking-law-1.496454>
<https://www.cbc.ca/news/canada/british-columbia/why-you-shouldnt-spank-your-kids-1.3974181>
<https://nationalpost.com/pmnews-pmn/canada-what-will-it-take-to-end-physical-punishment-of-children>