

## 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.



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### ***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](http://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.