

Section 43 of the Criminal Code

Section 43 of the Criminal Code of Canada sanctions the use of physical force against children by parents, teachers and parent substitutes, providing such force is reasonable and is used for the purpose of correction. This Criminal Code states

...every schoolteacher, parent or persons 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 circumstance.

The section 43 defence has existed in Canadian legislation since 1892. The purpose of the section is to authorize the physical punishment of children, including spanking, hitting, and slapping. The law also allowed the use of corporal punishment by husbands against wives, by employers against adult servants and by masters against apprentices. The right of a master to use such force on his apprentices was removed from the law in 1955. The corporal punishment of criminals, by whipping was permitted only until 1972.

Over time, our thinking on issues related to husbands hitting their wives and employers hitting servants has changed. We now consider these actions to be assaults.

Retaining Section 43 of the Criminal Code effectively discriminates against children. It makes them the only group of Canadian citizens who can be lawfully assaulted.

On January 15, 2002, the Court of Appeal for Ontario upheld the constitutionality of Section 43 of the Criminal Code. While expressing concern about the past application of section 43 of the Criminal Code of Canada, the Court upheld the constitutionality of the Section.

At the same time, the Court of Appeal appears to have narrowed the scope of Section 43 as a defence against the assault of children by their caregivers and teachers.

In the Judgment, the Court of Appeal has attempted to identify the parameters or guidelines for assisting a court in deciding whether the physical force applied to a child was "reasonable" in the circumstances.

Some examples are as follows

- it is improper to hit a child under the age of two
- it is improper to use corporal punishment on teenagers
- it is improper to use implements in administering corporal punishment
- it is improper to inflict a slap or blow to the head
- it is improper to cause injury which is tantamount to child abuse
- spanking, absent of any resulting injury, is not child abuse

The decision regarding the constitutionality of Section 43 of the Criminal Code was reviewed by the Supreme Court of Canada in the spring of 2000. A decision of the Supreme Court is expected in late 2003 or early 2004.

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The decision of the Court of Appeal for Ontario still leads to confusion concerning the rights of parents to use physical discipline in respect of their children. Section 101 of the *Child and Family Services Act* states

...no service provider shall inflict corporal punishment on a child or permit corporal punishment to be inflicted on a child in the course of the provision of a service to the child.

Under these provisions, a CAS social worker has a legal duty both to prevent foster parents from using corporal punishment on children in their care and to prevent parents in the community from using corporal punishment on their children when the families are receiving CAS services.

Corporal punishment is a risky and ineffective form of discipline to use with children. Parental reliance on corporal punishment is strongly linked to child maltreatment. The Canadian Incidence Study of Reported Child Abuse and Neglect (Health Canada, 2001) reported that 69% of the substantiated investigations of physical abuse involved some form of inappropriate punishment. Even when children are not physically injured during these punishments, research has demonstrated that this is a potentially harmful form of discipline, which may result in serious mental and emotional consequences for the child.

The risks of corporal punishment have been clearly recognized in many countries around the world. All European countries have prohibited corporal punishment in all schools and other institutions. Sweden, Norway, Denmark, Finland, Austria, Cyprus, Croatia and Latvia have existing civil laws that prohibit corporal punishment. In Italy, the use of violence for child rearing or educational purposes is no longer lawful.

It should not hurt to be a child.

The repeal of section 43 of the Criminal Code would provide an important statement about the rights of children not to be hurt by their parents, teachers or caregivers.

Reference	Bernstein, Marvin Continuing the Constitutional Challenge to Section 43 of the Criminal Code OACAS Journal, July 2002
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