

Canadian Foundation v. Canada [2004] SCC

*note to students: I decided to provide another model brief because Canadian Foundation is a complex opinion. I won't do this for you each week.

1. CITATION AND PARTIES

- a. The case name is *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*
- b. The Appellant is **Canadian Foundation**
- c. The Respondent is **Canada, as represented by the Attorney General**
- d. The Court is **The Supreme Court of Canada**
- e. The Year is **2004**.
- f. Interveners included, Focus on the Family (Canada) Association, Canada Family Action Coalition, Home School Legal Defence Association of Canada and REAL Women of Canada, together forming the Coalition for Family Autonomy, Canadian Teachers' Federation, Ontario Association of Children's Aid Societies, Commission des droits de la personne et des droits de la jeunesse, on its own behalf and on behalf of Conseil canadien des organismes provinciaux de défense des droits des enfants et des jeunese, and Child Welfare League of Canada

2. FACTS

- a. **S. 43** of the Criminal Code **provides an exemption from criminal prosecution** for adults who **corporally punish children**.
- b. "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**."
- c. Canadian Foundation was a non-governmental organization which applied to the Supreme Court to strike down s. 43 of the Criminal Code as a violation of s 7, s 12, and s 15(1) of the Charter of Rights and Freedoms and as inconsistent with Canadians international obligations under the UN Convention on the Rights of the Child.

3. PROCEDURAL HISTORY – THROUGH WHAT PROCESS WERE THE FACTS TRANSLATED INTO A LEGAL QUESTION?

- a. The lower courts rejected the Foundation's position both at the application (trial) court and the court of appeal
- b. The SCC did not respond to a lower court rulings but offers the opinion directly to the questions posed by the Foundation.

4. THE LEGAL ISSUES OR QUESTIONS

- a. Q1) – “s7. 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.**”
- i. Does s. 43 infringe the rights of children under s. 7 of the Charter?
 - ii. If so, is the infringement a reasonable limit prescribed by law as justified by s. 1 of the Charter (free and democratic society)?
- b. Q2) – “s12. Everyone has the right not to be subjected to any **cruel and unusual treatment or punishment.**”
- i. Does s. 43 infringe the rights of children under s. 12 of the Charter?
 - ii. If so, is the infringement a reasonable limit prescribed by law as justified by s. 1 of the Charter (free and democratic society)?
- c. Q3 – “s15. (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. (2) Section (1) does not preclude any law, program or activity that has as its **object the amelioration of conditions of disadvantaged individuals** or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
- i. Does s. 43 infringe the rights of children under s. 15 of the Charter?
 - ii. If so, is the infringement a reasonable limit prescribed by law as justified by s. 1 of the Charter (free and democratic society).

5. THE HOLDING

a. Majority

- i. Q1 = no; Q2 = no; Q3 = no.
- ii. Reasonable includes:
 1. Mild, transitory, **corrective** force suited to the context
- iii. Reasonable excludes these conditions:
 1. **Use in anger**
 2. **CP use for under 2y or over 12y**
 3. **Use on children with disabilities that impair corrective purpose**
 4. **CP that causes lasting harm**
 5. **CP that is degrading or inhuman treatment**
 6. **When justified by reference to the child’s offense**
 7. **Any use of objects (belts, paddles, sticks)**
 8. **Striking the child’s head**
 9. **School use beyond to ‘restrain or remove,’ it cannot be used to protect schools who use CP as a punishment.**

***note condition 9 is very unclear in the opinion; see lecture.**

b. Binnie's Dissent

- i. s. 7 – no violation
- ii. s. 12 – no violation
- iii. s. 15 (1)
 - 1. **yes.** S43 violates the equality section of the Charter
 - 2. **yes.** The s43 infringement on children's equality rights in s15(1) is justifiable under s1 of the charter because it passes the **Oakes Test.**

c. Arbour's Dissent

- i. **S.7**
 - 1. **Yes,** section s.43 of the code violates s7 of the charter due to vagueness of application of "reasonable"
 - 2. **No,** the s43 violation of s. 7 cannot be saved by s1.
- ii. Because of this finding it is unnecessary to answer on s.12 and s.15

d. Deschamps Dissent

- i. **S. 15 (1)**
 - 1. **Yes,** section s.43 of the code violates s15(1) of the charter because it does the following – see para. 226
 - a. **Draws a distinction in a named category (age)**
 - b. **Distinction is one of disadvantage**
 - c. **Differential Treatment is negative**
 - d. **Dignity of the group is at stake**
 - e. **Pre-Existing Vulnerability and Disadvantage**
 - 2. **No,** the s43 violation of s. 15 cannot be saved by s1.
- ii. Because of this finding it is unnecessary to answer on s.12 and s.7

6. NOTES ON REASONING:

a. Reading-Down the Statute

- i. The most tangible action by the SCC in this case was to **read-down the statute to create a constitutionally sound provision.** This judicial redefinition of 'reasonable' departed from how the statute had been previously read by courts and strengthened the position of CAS and police. Paradoxically, it was this judicial intervention that allowed the statute to survive challenge.
- ii. Greatly narrowing the meaning of "reasonable under the circumstances" in s.43 enabled the Majority to save the statute without applying s1 of the Charter (as all dissenting Justices would have) – see lecture for a full explanation. Here is why:
 - 1. Survivability of s7 requires the reading down of the statute so that "reasonable under the circumstances" as a clear meaning.
 - 2. Survivability of s15 (1) requires the reading down of the statute so that corporal punishment could be imagined to "correspond" to

children's 'needs.'

- b. **S. 7 - the invisibility of children's rights to 'liberty and the security of persons.'**
- i. McLachlin and Binnie accept that the constitutionality of s.43 relative to s7 hangs on whether "reasonable under the conditions" clearly "delineates a risk zone for criminal sanction."
 - ii. This assumes that the constitutional problem for s43 presented by s7 is **what s.43 does to adults, rather than what it does to children.**
 - iii. It was as if the Justices **could not conceptualize that the tension between parental rights and children's rights was the central issue posed by s. 7.**
 - iv. If they had been able to recognize children's rights relative to s. 7 (rather than only parental rights), they might have more clearly pronounced a case for or against the implications of the practice of corporal punishment for children's 'liberty' and 'security of persons.'
 - v. This would have been dangerous to the Respondent position because it is a well-established political principle that the threat of physical pain disables one's freedom in general. So, the Majority (siding with the Respondents) simply skipped this issue.
 - vi. I find this aspect of their s7 holding extremely troubling. It is the right to "life, liberty, and security of persons" which allows **all other rights** to get a footing; **what children lose in s. 43 is protection from the threat of physical pain and humiliation - the foundation of human dignity in our political community.** The fact that this foundational right implies a legal exposure for those who might hit (parents or teachers) children is the whole point of the protection.
 - vii. **Even Arbour**, who rejects s43 on the basis of s7, does not accept my points b ii-vi. She reasons that the phrase 'reasonable under the circumstances' in application by courts is unacceptably 'vague,' inconsistent, and disproportionate.
 - viii. **Unfortunately Deschamps**, who reasons in a way consistent with my points bii-vi above, does not address the s. 7 question.
- c. **S. 15 (1) corresponding needs as an alternative the s.1 limits on equality**
- i. If s.7 is a difficult part of the Charter to apply, **the challenge to s. 43 posed by s.15(1) is much more direct.**
 - ii. **The Majority** is able to support s. 43 by arguing that it **creates a different, but not unequal standard of treatment based on age.** To do this the Majority needs a 'standard' for reasonable – which can be shoe-horned into the doctrine of corresponding needs. This is why they 'read-down' the statute.
 - iii. **Binnie** objects to the Majority primarily on this doctrine of correspondence – calling it a 'Trojan Horse.' For Binnie, s. 43 infringes on children's s.15(1) equality rights and is an insult to their dignity as persons.

1. Binnie reasons that s. 43 can be saved because s. 43 passes the Oakes test.
 2. The Oakes Test (see lecture)
 - a. Meets a pressing social concern of the government – **child rearing.**
 - b. The infringement is proportionate to the problem of **over-policing families.**
 - c. The impairment of children’s rights is the minimal impairment so long as it **is limited to families and not allowed in schools.**
- iv. **Deschamps** more strongly asserts that s. 43 infringes on children’s equality rights by **“perpetuat[ing] the notion of children as property rather than human beings.”** Note: this is precisely why it should fail the s7 challenge in my view.
1. Contrary to Binnie, Deschamps reasons that s. 43 cannot be saved from s15 by s1. It fails the Oakes Test.
 - a. She rejects the idea that the actual **“pressing and substantial objective”** of s 43 was child development; it was the protection of adult authority. Nevertheless, she accepts that developmental arguments might be used *ex post facto* to past this first step.
 - b. Proportionality
 - i. Rational connection between s.43 and the objective of limiting over-policing of parents to advance children’s well-being can be accepted by Deschamps.
 - ii. Minimal impairment is not met, she says, because the impairment of children’s rights to bodily integrity outweighs the substantial objective.
 - iii. The **“discrimination represented by s. 43 produces the most drastic effect; it sends the message that children, as a group, are less worthy of protection of their bodies than anyone else.”**

7. **JUDGMENT – S. 43 is upheld, and the appeal is dismissed.**

8. **SIGNIFICANCE** - see Lecture