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Edu-Law Newsletter —

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Edu-Law

Supreme Court of Canada supports the use of force for correction — clarifies "spanking" law

The Supreme Court of Canada's decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] SCC 4, was released on January 30, 2004. The majority of the Court (6 of 9 Justices) found that section 43 of the *Criminal Code* (the "spanking law") is not contrary to the *Charter*. However, three Justices wrote minority opinions. The first indicates that section 43 is contrary to the *Charter* but is saved by section 1 of the *Charter* (reasonable limits in a free and democratic society) (saved with respect to parents and persons standing in the place of parents, but not with respect to teachers). The second minority opinion indicates that section 43 is contrary to the *Charter* in a number of respects. The third minority opinion indicates that section 43 is contrary to the *Charter* and could not be saved by section 1 and should be severed from the *Criminal Code*.

Section 43 of the *Criminal Code* provides that ***"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"***.

The majority of the Court defined the issue before them as the ***"constitutionality of Parliament's decision to carve out a sphere within which children's parents and teachers may use minor corrective force in some circumstances without facing criminal sanction"***.

The Canadian Foundation for Children, Youth and the Law argued that section 43 violates sections 7, 12 and 15(1) of the *Charter*. The Court of Appeal rejected these arguments and refused to issue the declaration requested. (For an analysis of the Court of Appeal decision, see Hubbard, "Ontario Court of Appeal Upholds 'Spanking Law' ", *Education Law Newsletter*, Vol. 8, No. 2, March 2002).

Section 7 Argument

The Supreme Court found that section 43 did not breach the section 7 *Charter* guarantee of life, liberty and security of the person. While the Crown conceded that section 43 adversely affects a child's security of the person, the Crown argued that section 43 did not offend a principle of fundamental justice, which is the second step in an analysis of a section 7 *Charter* breach. The Foundation argued that the principle of fundamental justice offended was the "best interests of the child" principle. The Court did not accept this argument.

While the Court recognized that "best interests of the child" is a legal principle applied in family law, the Court refused to find that it was a "principle of fundamental justice", which would require a Court to provide separate representation of the child's interests in a criminal trial with respect to section 43.

The three factors identified by the Court for a principle to be a principle of fundamental justice are: firstly, that the principle at issue is a legal principle which the Court concedes "best interests of the child" is; secondly, that there is sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice"; and thirdly, that "the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results".

The Court held that "bests interests of the

child" failed to meet the second criterion, as it was not a "foundational requirement for the dispensation of justice". The Court provided the incarceration of a child's parent as an example. While, it is not perhaps in the best interests of a child that his or her parent who has committed a crime be incarcerated, this principle does not trump the best interests of society in such a case.

The Court also found that the best interests of a child principle was "highly contextual and subject to dispute", thereby, making it incapable of being identified with precision as required by the third factor.

Thus, the Court held that ***"... 'the best interests of the child' is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice".***

Next the Foundation argued that section 43 was too vague, because the language did not provide sufficient information about what type of conduct would be prohibited by the section. The Court in determining whether the section was sufficiently detailed asked whether section 43 "delineates a risk zone for criminal sanction".

The Court found that the section specifically identified to whom the section applied, but identified "less precisely what conduct" would be applicable. Further the Court identified that the conduct must be intended to be for educative or corrective purposes and must be reasonable in the circumstances. The Court held that taking into account Canada's international obligations the term "reasonable" means that the actions must avoid harming the child, could not be cruel, inhuman or degrading. **The Court also considered evidence regarding the appropriateness of corporal punishment and found that such punishment was not appropriate for children under the age of 2 years and was harmful to teenagers. Also, corporal punishment using objects was found to be inappropriate.**

The Supreme Court also set out what it considered to be reasonable circumstances for teachers. The Court stated: ***"Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered by s. 43".***

The Court held that while the past decisions regarding section 43 may be objectionable, one is able to understand what conduct would be prohibited.

Section 12 Argument

The next argument put forward by the Foundation was that section 43 offended section 12 of the *Charter*, which guarantees the right not to be subjected to "any cruel and unusual treatment or punishment". The Court held that section 43 did not offend section 12. The Court commented that if the discipline was cruel and unusual it could therefore not be "reasonable" as required by section 43.

Section 15 Argument

The last argument put forward by the Foundation was summarized by the Court as follows: "*Section 43 permits conduct toward children that would be criminal in the case of adult victims*". The Foundation argued that "*Equality can be assured ... only if the criminal law treats simple assaults on children in the disciplinary context the same as it treats simple assaults on adults*". The Court rejected this argument indicating that it equates equal treatment with identical treatment, which is inconsistent with other jurisprudence.

The Court found that section 43 ***"ensures the criminal law will not be used where the force is part of a genuine effort to educate the child, poses no reasonable risk of harm that is more than transitory and trifling, and is reasonable under the circumstances. Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them."*** Further the Court found that section 43 was not intended to endorse the use of force against children.

The Court held that ***"a reasonable person acting on behalf of a child, apprised of the harms of criminalization that s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child's dignity has been offended in the manner contemplated by s.15(1). Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of s.43 on a child's sense of dignity. Yet, as emphasized, the force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting. Section 43 is not arbitrarily demeaning. It does not discriminate. Rather, it is firmly grounded in the actual needs and circumstances of children. I conclude that s. 43 does not offend s.15(1) of the Charter".***

General Comments

Clearly, the Supreme Court signalled that it is not acceptable for teachers to use corporal punishment, and that the only context in which physical force by teachers would be acceptable would be to restrain a student or redirect a student to comply with an instruction. While the use of physical force to discipline students is neither recommended or endorsed by school boards or teacher's federations, redirection and restraint are particularly common when teaching students with needs. This decision confirms that in those circumstances the use of force is reasonable. —

Court of Appeal confirms standard of care for special-needs students

In *F.C. (Litigation Guardian of) v. 511825 Ontario Inc.* (c.o.b. C.G.H.), [2003] O.J. No. 1734 (May 12, 2003), the Ontario Court of Appeal reviewed the standard of care required of school boards when supervising students with special needs. While the Court of Appeal recognized that the standard of care that a school board owes to students is that of a reasonably careful or prudent parent, it noted that the application of this standard may vary depending upon the individual factors of each student.

The student in this case, F.C., was a developmentally challenged twenty year old, who functioned at the level of a five to seven year old. His biological parents had entered into an agreement with the Children's Aid Society (the "Society"), whereby the Society placed him in a residential setting in order to provide various services for him. Consequently, he was the responsibility of the Society when not attending school.

In 1991 he began attending Campbellford District High School, which was operated by the former Northumberland Clarington Board of Education, and he was placed in a self-contained special education placement.

In 1996, F.C. developed a friendship with one of his classmates, H.S.. Both students were transported to and from their group homes by the Board. H.S. rode a taxi to and from school, while FC was transported by bus. Neither student was escorted to and from the school building or supervised while waiting for their transportation home.

In the Fall of 1996, F.C. and H.S. were involved on four separate occasions in incidents where they left school without permission or supervision. The first three incidents occurred at the end of the school day when they failed to take their arranged transportation home. On all three occasions they were found shortly afterwards.

The fourth incident occurred between classes during the afternoon. During a classroom change both students ran from their classmates and educational assistants and exited the School through the gymnasium. School officials began a search immediately and notified their group homes. F.C. and H.S. were not found until the next day.

The School Principal testified that following this fourth incident, she held a meeting with their teacher and educational assistants working in their class, and asked them to be "*extremely vigilant*" in ensuring that both students were properly supervised at all times. Also, the Principal believed that the classroom teacher would hold back F.C. for a short time at the end of the day until H.S. was in her taxi.

During a regularly scheduled plan of care meeting regarding F.C., involving officials from the group home, the Society and members of F.C.'s family, the incidents were discussed as well as their understanding of the School's plan to supervise both F.C. and H.S. No one from the Board or the School was informed of the meeting, nor did anyone communicate with the Board or School regarding the supervision plan.

In January, 1997 F.C. and H.S. went missing for a fifth time and were not discovered for four days. When they were found, they were both suffering from severe frostbite. F.C.'s injuries required several operations and resulted in the amputation of both of his legs.

F.C.'s parents brought an action for negligence against the Board, the Society and the operators of the group home. A jury dismissed the claim against the Board, but found that the group home and the Society had both been negligent for failing to communicate properly with the School and for failing to ensure F.C.'s safe return home at the end of the school day.

The group home and Society argued on appeal that the standard of care owed by the Board to F.C. was higher than to a student who was not developmentally challenged, and that it was unjust and unreasonable for the jury to find that the Board was not negligent.

The Court of Appeal recognized that the Board owed a duty of care to F.C. and that school boards are bound by the standard of a reasonably careful or prudent parent in providing for the supervision and protection of the students in their care. Further, this standard should not be applied in the same manner and to the same extent in every case, and the application of the standard will vary depending on the student's age, skills, competency, and capacity and the nature of the activity at issue. However, the Court found that adjusting the standard to conform to the individual student does not result in a different legal characterization of the standard:

"the issue is not one of the proper definition of the standard of care, or of it's characterization as a 'higher' or 'lower' standard compared to the normal standard for school authorities; rather, the important questions here are how the standard is to be applied in this case, given F.C's particular circumstances, and whether the Board exercised the care that would be expected of a reasonably prudent parent in like circumstances".

The Court of Appeal reviewed the evidence that the jury was entitled to rely on in reaching a conclusion that the action should be dismissed as against the Board.

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The Court noted that the Society and members of the family failed to advise the Board of the plan of care meeting and failed to advise the Board and School of the supervision plan. The Court of Appeal noted that the Board and School were "*unaware of an emerging, and significant, pattern of runaway activities by F.C. and H.S. Both the principal and Mr. Conte stressed in their trial testimony that, had they known of all four A.W.O.L.s before January 1997, immediate and additional action would have been taken by them*". The Court of Appeal also reviewed the evidence with respect to actions taken or not taken by the family and the Society. The Court of Appeal concluded that it was open to the jury to conclude that the Board had a reasonable belief in the effectiveness of the transportation arrangements, and such was a belief which a "*reasonably prudent parent would hold in the circumstances*".

Nevertheless, the Court of Appeal did note that "*... while a different conclusion might well have been reached by the jury on this record given the vulnerability of F.C., there was evidence at trial which, if accepted by the jury, supported the finding that the Board was not negligent in the circumstances*".

Although in this case the Board was held not to be negligent, the comments of the Court of Appeal indicate that the jury might have found otherwise on the evidence. Consequently, although the Court of Appeal confirmed the standard of a "*reasonably prudent parent*", it is quite clear that the Court was concerned about the "*vulnerability*" of the special-needs students. In other words, boards and schools need to be sure that the steps taken to safeguard special-needs students take into consideration the vulnerability of the students. Obviously, while the steps must be what a reasonably prudent parent would undertake, the test is a reasonably prudent parent of a vulnerable student. —

Supreme Court of Canada confirms ongoing role of Court in Charter cases

The issue before the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, was whether a trial judge may, after ordering that a provincial government use its best effort to build French-language school facilities by given dates, retain jurisdiction to hear government reports on the progress of those efforts.

At trial, the judge had ruled that the Court would retain the jurisdiction to hear reports from the government regarding the government's compliance with the Order requiring that it establish homogenous French language schools and facilities in five school districts in Nova Scotia. In a 5 to 4 decision, the majority of the Supreme Court of Canada held that the remedy ordered by the trial judge was "just and appropriate under the circumstances" pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

Linguistic and cultural preservation is achieved through minority language education rights. The majority of the Court held that the purpose of section 23 of the *Charter* is to "*preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population.*" The Supreme Court noted that section 23 was designed to address not only past injustices and halt the progressive erosion of minority official language cultures but also to actively promote their use.

Although minority-language education rights are accorded to individuals, these rights are recognized to be particularly vulnerable to government delay or inaction because they only apply if "numbers warrant" and, the specific programs or facilities that the government is required to provide vary depending on the number of students who might participate. In practical terms, if delay is tolerated, governments could potentially avoid the duties through their own failure to implement the rights vigilantly. The trial judge crafted his remedy in the context of cultural erosion and was sensitive to the need for timely execution, the limits of the judiciary's role and the desirability of allowing the government flexibility in the manner in which it fulfilled its constitutional obligations.

The Supreme Court found that urgency does not, in itself, create jurisdiction for a superior court to issue a remedy of unlimited scope under s. 24(1) of the *Charter*.

The Supreme Court outlined the following hallmarks of an appropriate and just remedy under the *Charter*:

- the remedy meaningfully vindicates the rights and freedoms of the claimants;
- it employs means that are legitimate within the framework of constitutional democracy;
- it is a judicial remedy which vindicates the right while invoking the function and powers of a court;
- it ensures that the rights of the claimant are fully vindicated and fair to the party against whom the order is made; and,
- it is consistent with the constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*.

The dissenting decision was based on the argument that court orders should be written in a such a way that parties are put on notice of what is expected of them. Courts should not unduly encroach on areas that remain the responsibility of public administration, and they should avoid turning into "managers of the public service". The dissent found that the Order gave no clear notice of the obligations, the nature of the reports or even the purpose of the reporting hearings. In addition, the dissent took exception with the fact that the judge had assumed that he could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized.

The dissent argued that when a court intervenes in administrative matters properly entrusted to the executive, it exceeds its proper jurisdiction, acts illegitimately and breaches the separation of powers. Such action cannot be characterized as relief that is "*appropriate and just in the circumstances*" and within s. 24 (1) of the *Charter*. The dissent also noted that it was not clear that alternative, less-intrusive remedial measures would not have achieved the ends sought. —

Court deals with unique school closing challenge

In 2003, the defendant School Board closed the local elementary school. The Parsons Pond Foundation represented parents and residents in Parsons Pond in an action for injunctive relief and factual declarations. The result is reported in *Parsons Pond Foundation Ltd. v. Corner Brook / Deer Lake / St. Barbe School District #3*, [2003] N.J. No. 222.

The plaintiffs' position was that given their reliance on the Board's 2001 resolution to keep the local elementary school open, subject to a future decline in student enrolment and teacher allocation, the Board was estopped from closing the school as long as the stipulated conditions are met. The plaintiffs argued that they would not have expended resources on home improvements had they not believed that their children would be able to attend the local school. In essence, the plaintiffs' argument was that they relied on their knowledge of future student population and believed to their detriment, based on the 2001 Board Resolution that the school would remain open.

In dismissing the action, the Newfoundland and Labrador Supreme Court took into consideration several factors. It noted that there was no evidence to suggest that the School Board breached any duty of procedural fairness in making the 2003 decision to close the school. There was also no suggestion that the Board was contractually bound to one or more of the plaintiffs to keep the school open. As this case does not call for judicial review of the 2001 Resolution, the court expressed no opinion about whether they could review the decision and the appropriate standard of review.

Historically, school closure decisions have been set aside on procedural grounds, leaving the school board to reconsider the matter after complying with the appropriate procedural requirements. While the presence of a school is an important contributor to the economic and social fabric of the community, particularly in a small rural community, is it not for the Court to override or second-guess decisions made by the School Board where the Board has complied with any applicable legislation and acted in a procedurally fair manner. The Court states that it cannot and should not interfere with the decision-making process.

The Court found that the doctrine of promissory estoppel was not available and that, even if it were, the facts did not support its application in this case. The defendant school board is a creature of statute absent contract considerations that did not arise in this case, a statutory body such as the school board could not act to fetter the future decision-making process of the Board in a manner that would prevent a future Board from fulfilling its statutory mandate. Here, through the use of the doctrine of promissory estoppel, the plaintiffs sought to prevent the Board from entering into the decision-making process permitted under the *Schools Act*.

The Court argued that, assuming public law estoppel was available in Canada, it would not be applicable to a school closure decision taken by a school board pursuant to and in compliance with the *Schools Act*. The Act places a continuing and specific obligation on the board to organize and administer education within its district. The only specific statutory constraint on a school board closure is procedure. Therefore, in this statutory context, there is no room for a Court to estop a board from deciding to close a school because the board had previously decided that a school would remain open as long as certain conditions were met and parents and others relied on that earlier decision. To conclude otherwise would detract from and diminish the board's clear statutory obligation and duty. Thus the Court found that the law is clear that any entitlement to relief based on a promise and reliance and other necessary elements must "*give way to the paramount authority of the legislature and to the public policy of the enabling statutory body to continue to act in the over all public interest, notwithstanding the potential adverse consequences for one or more individuals*".

The Court went on to say that even if it was wrong about the availability of public law estoppel, the facts here do not support the necessary elements. The 2001 board decision was not a promise or assurance, as there was no time period stipulated, no indication as to what the decline in student population would be sufficient to trigger reassessment, nor any indication regarding the time period any decline would be projected. The resolution lacked the specificity and certainty necessary for categorization as a promise or assurance intended to be acted upon, and there was no evidence that the board intended that the parents and others make investment decisions.

For public law estoppel to apply there must also be intent that the legal relationship between the parties be affected. Here, there was no legal relationship between the board and the parents. Even if there was, the Court found that reliance in the form of buying or renovating a home would fall outside the parameters of any such legal relationship. Finally, the Court held that any reliance of the parents was based only in part on the 2001 Resolution of the Board. It was equally dependent on the plaintiffs' own individual assessments of future student enrolment.

Thus, another decision affirms that school closing decisions may be judicially reviewed only on the basis of the procedural steps taken by the Board. It is unlikely that a Board may be prevented from changing its mind about school closures. —

Protection of personal privacy and third parties

In *2000-IR-009; Re Edmonton Public Schools*, [2003] AIPCD No. 13, the Alberta Information and Privacy Commissioner responded to concerns raised regarding a practice of the Edmonton Public School Board of allowing DeVry Canada Inc. ("DeVry") to operate workshops through the Board's schools, which discussed career choices in applied technology. The Investigation and subsequent report concluded that, while a school board had a duty to protect student's personal information, it would not be liable under Alberta's *Freedom of Information and Protection of Privacy Act* (the "Act") for the collection of information by a third party when the Board did not at any time have actual care or control over the information.

It was alleged that the Board was allowing the private corporation to have access to personal information about Grade 11 and 12 students and their families. As part of the workshops operated by DeVry, students were given survey questionnaires. Once filled out and collected, these surveys were returned to the DeVry head office, where reports were developed with the results. These reports were then used to approach prospective student customers outside of the school context.

The issue for the Commissioner was whether the Board breached its duties under the Act by hosting the workshop.

The Investigator found that while public bodies like school boards must vigilantly protect personal information, the relevant sections of the Act are based on the assumption that the public body has acquired custody or established control over the information. In this case, the personal information being collected was never in the possession of the Board.

The mere fact that the Board facilitated the information collection by DeVry did not create a sufficient connection to make the Board responsible under the Act. Since there was no information being collected and held by the Board, the Board had not breached the Act.

The Investigator did express concern over the Board's practice, and suggested that the Board make these workshops voluntary and provide sufficient time for the students to consult with their parents before responding to the survey.

In addition, in such a case the Board may choose to send home an information circular telling parents what information may be requested, that this information was being collected by a third party and that the Board would not be responsible for the collection, use or disclosure of the information. As well, given the application of the Federal Privacy Legislation, and in this case the Alberta Legislation, the company would be required to receive consent prior to collecting the personal information, and as part of the consent process information about how the information would be used would need to be provided. —

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For any information with respect to Edu-Law or the services provided by KEEL COTTRELLE LLP, please contact **Bob Keel** at **905-501-4444**, or at **rkeel@keelcottrelle.on.ca**.

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Professional Development Corner

Edu-Law is providing a series of "In-House" Negotiation & Mediation Training Programs in April and May. Anyone interested in such In-House Programs, or a Program together with a co-terminous Board, should contact Edu-Law.

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March 29, 2004

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