

JUSTICE FOR CHILDREN AND YOUTH

Canadian Foundation
for Children, Youth
and the Law



NEWSLETTER

Spring / Summer 2005

THE CRIMINAL CODE

CORRECTION OF CHILD BY FORCE

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. R.S., c. C-34, s. 43.

FEATURE ARTICLE - S.43 CHALLENGE

On November 20, 1998, National Child Day, we held a press conference to announce that we had just launched a constitutional challenge to section 43 of the Criminal Code.

Of course, before that day there had been much work identifying experts, preparing affidavits and securing funding from the Court Challenges Program to supplement the normal operating budget provided by Legal Aid Ontario.

Cheryl Milne, a long-serving staff lawyer at the clinic and Paul Schabas, a partner at Blake, Cassels & Graydon who offered his services *pro bono*, argued the case for five days in the Divisional Court, three days in the Ontario Court of Appeal and one day in the Supreme Court of Canada where we also provided pages of evidence and written argument.

On January 30, 2004 the Court released its 246-paragraph, 61-page decision. The following is a much briefer summary of the Court's reasons, Chief Justice McLachlin wrote the decision of the majority of the Court. She begins by describing section 43 from the point of view of parents, not children. She says that the section reflects Parliament's

decision to carve out a sphere in which parents and teachers may use minor corrective force in some circumstances without facing criminal sanction. The Chief Justice said that there is a "substantial social consensus" "supported by comprehensive and consistent expert evidence" on what is reasonable. The Chief Justice held that the Charter rights (s.7) of children to security of the person and procedural safeguards are not breached by excusing corporal punishment because that security interest is protected enough after the fact, when the Crown decides to prosecute.

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NOTE FROM THE CHAIR

Stephen Lamont

The January 2004 release of the Supreme Court of Canada’s decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* marked both a highlight and a low point for all of us at Justice for Children and Youth. Several years of our determined attempt to have the courts strike down section 43 of the *Criminal Code* – which provides a limited “correctional force” defence to parents, caretakers and teachers who commit a physical assault against a child or youth – resulted in the Court upholding the continued presence of this “spanking law” in Canada. This was a great disappointment amongst those of us who continue to believe that such a law has no place on the statute books of our nation; it was a particular blow to the staff members of our clinic who had laboured so long and so determinedly in preparing for and arguing this case at three different levels of court.

We took great comfort, however, from the extent to which our highest court narrowed the interpretation of section 43 and issued guidelines which made it clear that certain types of assault fall outside the protection of this “defence”. Through our efforts – and the efforts of those who supported our court challenge – section 43 can no longer be invoked in aid of those who abuse children in numerous ways now outlawed, including by the use of objects, or by direct blows to the head of a child or by hitting children under the age of two or over the age of twelve. To the extent that these actions can now properly be seen as criminal acts against children and youth, our challenge accomplished much even in defeat.

But we remain convinced that section 43 must be eradicated from the *Criminal Code*, and since the courts were not able to do this through constitutional means, our attention turns now to the Parliament of Canada to persuade politicians to repeal the provision. We have been gratified to see how much public support appears to exist for repeal, and a recent appearance by senior clinic personnel before a Senate Committee investigating the issue, was met with enthusiasm by senior parliamentarians who seem to have sensed that the time for repeal may finally be arriving. One of our strongest weapons in this fight will continue to be the *United Nations Convention of the Rights of the Child*, which – as interpreted by the UN itself – makes it clear that children have a right not to be abused, including by the use of “corporal punishment”. Canada is a signatory to this convention and must be made to abide by it. Many other countries, particularly in Western Europe, have repealed their laws permitting corporal punishment to bring themselves into line with the Convention.

It’s up to all of us to make sure that Canada does not lag behind on this important human rights issue affecting some of the vulnerable people in our society. We at Justice for Children and Youth will continue to be at the forefront of the campaign to repeal section 43. I thank all of our members for their continuing support for this work – and of course their support for all of the other valuable work that our clinic carries out on a daily basis on legal issues affecting our children and youth.



Justice for Children and Youth

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EXECUTIVE DIRECTOR REFLECTIONS

Martha Mackinnon

This issue of our newsletter has a focus on corporal punishment: our constitutional challenge to section 43 of the Criminal Code; law reform efforts and submissions to the Senate Committee on Human Rights; national and international coalitions to eliminate violence against children; alliance-building with eminent Canadians and Canadian organizations; efforts to inform and enlighten public opinion; and the holding of a cross-sectoral Symposium to develop strategies for the future. Seven years after we launched the legal challenge, two years after it was argued at the Supreme Court of Canada, six months after our Symposium to reflect and look forward seems a good time to consider my own feelings.

When we began the litigation, we knew that the majority of Canadians thought either that corporal punishment was good for kids or acceptable, or that it was a private decision, no one else's business and therefore should not be considered to be assault. However, when I described what the law said, and that we were challenging it under the Charter, non-lawyer friends and acquaintances thought the case was a certain win – a “slam dunk” as one person described it. Non-lawyers could not picture any way for judges to think that section 43 of the Criminal Code did not produce inequality for children and youth. Whether they wanted us to win or not, they assumed the Charter meant that we would have to win. Yet... the Superior Court of Justice found section 43 to be constitutional (but many kinds of force to be unreasonable). The Ontario Court of Appeal found the section to be constitutional. And the majority of the Supreme Court of Canada found section 43 to be constitutional.

So, were we terrible lawyers? Are my friends and acquaintances not very bright? Should we never have launched on this litigation path? Are young people worse off because of the litigation?

On reflection, I think that young people are better off in many ways, but the law has suffered some damage. I am less optimistic that section 15 of the Charter, the equality provisions, can be used effectively to protect Canada's most vulnerable children and worry about other vulnerable groups who are dependent on others, such as the elderly and many who are affected by disabilities.

However, the majority of the Supreme Court of Canada has said that section 43 should not be used to defend as reasonable the use of force against children when the child is under two or a teenager, when the force is applied to the child's head, when the force is applied with an implement, or when the force is applied out of anger or frustration. A passionate minority would have found that children's equality rights are infringed when the state legislatively excuses the use of force on them, but not on others. Anecdotal evidence since the decision suggests that the police, child welfare workers and other family counsellors find the decision helpful in educating parents and in intervening in cases of severe abuse.

The United Nations Committee on the Rights of the Child has expressly criticized Canada for failing to repeal section 43. The Senate's Human Rights Committee has been hearing submissions on how well Canada respects the human rights of children and complies with its international obligations as a proponent and signatory to the U.N. Convention on the Rights of the Child. There is a bill to repeal section 43 currently being considered by the Senate.

More rewarding is the fact that the case has raised public awareness and seems to have made Canadians more thoughtful about their ideas on raising children. The majority of Canadians now think that section 43 should be repealed and a large majority believes that Canadians should be educated not to use corporal punishment. If public opinion can change so dramatically in 5 or 6 years, then there is hope for a safer, more respectful childhood for Canadians who will grow up less prone to violence themselves.



JFCY Symposium to End the Physical Punishment of Children

On November 1, 2004, Justice for Children and Youth sponsored an advocacy workshop on Section 43 of the *Criminal Code* and the physical punishment of children. The workshop was organized to address the outcome of the Supreme Court of Canada's decision to uphold the constitutionality of section 43 and to deliberate on future advocacy initiatives.

The morning started with a summary of the case by Professor Anne McGillivray, law professor at the University of Manitoba, and Cheryl Milne who was the lawyer who argued the case. Both speakers expressed concerns about the message that the case conveyed to the public that children were less worthy as human rights holders in Canada. Despite the Court's attempt to limit the defense to very minimal use of force, the list of exceptions to the defense was described as legally unworkable.

Dr. Joan Durrant, psychology professor at the University of Manitoba then presented on the most up to date social science evidence on the effects of physical punishment on children. She also reported on the progress of the Joint Statement on the Physical Punishment of Children, with over 100 organizations signing on to a call for the repeal of section 43.

The last presentation of the morning was a panel presentation from four different perspectives. Professor Katherine Covell of the University College of Cape Breton, Executive Director of UCCB Children's Rights Centre provided the international perspective from her observations of the concerns expressed by the United Nations Committee on the Rights of the Child when she presented Canada's NGO report. She also reported on her work on the U.N. Global Study on Violence Against Children. Hélène Tessier, of the Québec Human Rights Commission spoke about the efforts of the commission to advocate for the

repeal of section 43 and the success that they had achieved through the removal of the right of parents to physically punish their children from the Quebec Civil Code.

Marvin Bernstein, Director of Policy Development and Legal Support for the Ontario Association of Children's Aid Societies identified the need for more professional and public education on the new limitations established by the Supreme Court on the application of section 43. He noted that there is currently very little collaboration within and between sectors working with children around the issue of section 43. He called for the development of protocols with law enforcement, public health and other social services agencies to work to prevent the physical harm of children.

The final panelist was Dia Mamatis a Health Promotion Consultant for Family Abuse Prevention, Policy and Planning of Toronto Public Health. Ms. Mamatis presented Toronto's public education initiative to end family violence, which included the ad campaign seen throughout the city. They are currently in their third year of a five-year campaign which focuses on positive parenting and the discouragement of physical punishment of children. They have also endorsed the Joint Statement and written to the Attorney General calling for repeal.

The afternoon session consisted of five roundtable discussions wherein participants were asked to develop strategies with a specific advocacy focus. The working committees were (1) health and education; (2) legal and political; (3) research; (4) youth engagement; and (5) engaging other sectors. The groups developed recommendations which will form the final report of the symposium (soon to be published by JFCY).



NEW FACES AT JUSTICE FOR CHILDREN AND YOUTH



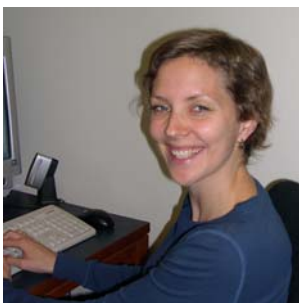
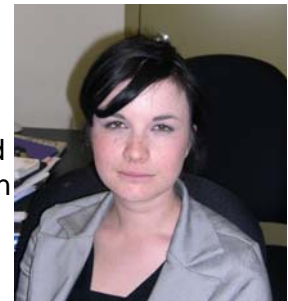
Lisa Nuqui joined the JFCY team in March as the new Administrative Assistant. She comes to us from the Legal Accounts Department of Legal Aid Ontario. Lisa is enjoying learning about agencies and services available to young people. She is having a great time with all the friendly faces at JFCY and, in turn, the staff appreciates her dedication and hard work.

Gary Magee is the new Street Youth Legal Services lawyer at Justice for Children and Youth. Originally from the small, eastern Ontario town of Morrisburg, he studied Kinesiology at the University of Western Ontario, and went on to study law at the University of British Columbia. Gary articulated in Morrisburg and was called to the Bar of Ontario in 2004. Before coming to JFCY, Gary had a sole practice that focused mainly on criminal and family law.



Nicole Williams is the new Community Legal Worker (CLW) with the Street Youth Legal Services Program of Justice for Children and Youth. She has a BA in Political Science and Canadian Studies from Trent University, and is in the last phase of her BSW at Carleton University. Prior to joining the JFCY team Nicole worked in an advocacy and support role with male offenders and ex-offenders in Kingston. She has also been involved in facilitating groups for marginalized youth related to suicide prevention / intervention, anger and self-esteem.

Claire Denham started at JFCY on a placement while completing a BSW at Ryerson University. She has recently been hired as a Community Legal Worker to work on a special project in Education Law and the Safe Schools Act. The voices of youth are critical yet often neglected. Claire's hope is that youth will become more involved in advocacy initiatives to increase young peoples actions and ideas on justice issues within their school communities. It is important that youth become increasingly involved in advocacy initiatives to address the political, economic and social inequities many are faced with. Claire is looking forward to engaging and working with young people on youth led social justice initiatives.



Kathleen Murphy is an articling student at Blake, Cassels and Graydon, LLP and is spending the last two months of articling here at JFCY. She is originally from Saskatoon and has a B.A. in English from the University of Saskatchewan. After her undergrad, Kathleen attended law school at McGill University, where she obtained both a Common law and Civil law degree. Kathleen will be called to the Bar in July of this year.



My Justice for Children and Youth Experience
Chimene Boyes

My name is Chimene Boyes and I am 21 years old. I was born in Scarborough, where I grew up with my family and friends. I was 16 when the doctors told me that I had diabetes, and my life was shattered. I couldn't deal with the fact that I had the disease, and soon left home in an attempt to run away from all my problems. I fled to the streets of downtown Toronto, and began seeking escape in drugs. I soon became

addicted and spent the next few years of my life alone and on the streets. I continued to run away from all my problems. I was arrested several times under my own name and several times under a fake name. Each time the charges would build and build. Eventually, I realized that I had to stop hiding and I turned myself in.

When I got out of jail in November 2003, I started a court-supervised treatment program called the Toronto Drug Treatment Court (DTC). I realised that what I had been missing in my life was the respect and love for myself that it took to take care of my health and well being. I was assigned a therapist at the Centre for Addiction and Mental Health, and I began my recovery. DTC is a big part of my life, and even though I have already graduated, I still consider myself an active member of the Toronto Drug Treatment Court.

Since November, I have been part of an organisation called Serve Canada, which engages diverse youth in experiential-based learning opportunities. One of the components of the Serve Canada program is that each participant is given a chance to have a full-time four-week internship at the agency or company of her choice. I chose to come to Justice for Children and Youth because I have always had a fascination with law, and wanted to learn more about the way that the justice system works.

Since I came to JFCY I have learned so many useful skills, and my interest in law has become even more obvious to me. I really believe in the work I do here, because I know that I am helping young people whose opinions and perspectives are often overlooked because they don't know their rights. I feel good about being part of this organisation because if I reach one person then I know that it is all worthwhile. I never thought I would have this opportunity, and now that I do, my dreams have come true.



SECTION 43: WHERE DO WE GO FROM HERE?

Although the decision of the Supreme Court in our constitutional challenge to section 43 was disappointing, we have seen considerable progress in the overall campaign to eliminate the physical punishment of children in Canada since the commencement of the court application in 1998. Over the course of the litigation groups have come together to endorse a Joint Statement on the Physical Punishment of Children and Youth which calls for repeal as well as to continue to work together on other strategies for reform. The following is a short list of some of the activities that JFCY has been involved in or is aware of:

JOINT STATEMENT ON PHYSICAL PUNISHMENT OF CHILDREN AND YOUTH

The Joint Statement was launched with over 100 signatures in September 2004. The document summarizes the social science data on the effects of physical punishment on children as well as the human rights issues raised by the justification of assaults on children under Canadian law. The recommendations of the report include public awareness strategies, continued research and legislative reform. Signatories include individuals such as Stephen Lewis, Senator Landon Pearson and George Thomson as well as organizations such as Canadian Paediatric Society, Ontario Association of Children's Aid Societies and Toronto Public Health. The Joint Statement, and how to endorse it, can be found at www.cheo.on.ca/english/1120.html.

BILL S-21

Senator Hervieux-Payette introduced a private members bill in the Senate of Canada to repeal section 43 of the *Criminal Code*. The Bill received second reading and is now scheduled for hearings at the Senate Standing Committee on Legal and Constitutional Affairs. JFCY has been invited to make an oral submission in support of this Bill on June 8, 2005. We encourage members of JFCY to write to the Senators to support this bill. If you need information on how to do this, you can contact the clinic at our general email address: info@jfcy.org or call us at 416-920-1633/1-866-999-5329 (toll free in Ontario).

OTHER LEGISLATIVE AMENDMENTS

Provincial governments across Canada are being encouraged to enact prohibitions against physical punishment of children and youth within child welfare and education legislation. Currently Saskatchewan is considering adding a prohibition against teachers' use of physical punishment to its *Education Act*. If this passes the only provinces without such a prohibition will be Ontario, Manitoba and Alberta. Prohibitions within education legislation would be entirely consistent with the Supreme Court's limitations on the application of section 43. Currently in Ontario children who are in receipt of child welfare services are not to be subjected to corporal punishment. Advocates have argued that the *Child and Family Services Act* should go further and state that all children in the province should be free from physical punishment and other humiliating or degrading treatment or punishment.

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BULLETIN BOARD



BEQUEST

Robert W, Hatton was a life member of Justice for Children and Youth from 1994. His personal commitment and contributions to vulnerable youth and to international human rights during his lifetime will have effect into the future as he has made a significant bequest to our work for young people. Mr. Hatton's bequest will allow us to continue to work for the welfare and human rights of children and, in the immediate future, will help us advocate for constructive alternatives to custody and supportive programming for young people in conflict with the law. We are truly grateful.

COMMITTEE MEMBERS WANTED

JFCY is looking for members to join our new **COMMUNITY DEVELOPMENT COMMITTEE.**

Possible topics of interest for this year include:

- the new "super jail" for youth in Brampton
- reaching out to youth in new immigrant communities
- policing issues and youth.

Contact Lee Ann for more information.
[chapmal@lao.on.ca]

Is there a topic you would like to read about in a JFCY Newsletter?

Do you have any comments or suggestions?

Feel free to contact us via email

[justgen@lao.on.ca]

– we would

appreciate any input you may have.

Addition to the JFCY Family

Staff and Board offer congratulations to staff lawyer, Mary Birdsell, on the birth of her son Joseph. Joseph was born on April 18, 2005. Dad, Trevor and big sister Morley are thrilled with the new addition to the family.



FEATURE ARTICLE - *continued from page 1*

Chief Justice McLachlin also rejected that argument that s.7 of the Charter is violated because s. 43 is not in the best interests of the child. While the Chief Justice agreed that "the best interests of the child" is a recognized legal principle in Canada, she said the principle, while important, was not vital or fundamental to a Canadian notion of justice.

Citing many erratic previous cases, we argued that section 43 is too vague to be proper criminal law. The Chief Justice found it not to be vague because reasonable force means:

- 1) The physical force cannot be motivated by anger, loss of temper or frustration, but must be sober and reasoned to educate the child.
- 2) The child must be capable of benefiting and must, therefore, be older than two and must not have their ability to understand be negated by a disability.
- 3) Force is not reasonable if there is harm or a reasonable prospect of harm.
- 4) In compliance with international treaty obligations, the physical correction can neither harm nor degrade the child.
- 5) For the same reason, and because of societal consensus, there can be no corporal punishment in schools, although force may be used to restrain or remove a student in appropriate circumstances.
- 6) If the child's behaviour does not require correction, force cannot be reasonable.
- 7) Because the reasonableness of the force must not be subjectively decided, it should be determined objectively based on current learning and experts and on consensus. Thus corporal punishment of teenagers is harmful and wrong.
- 8) Similarly physical punishment using objects such as rulers or belts is physically and emotionally harmful and is not reasonable force.
- 9) Slaps or blows to the head are harmful and not reasonable based on the same expert consensus.

These criteria create, for the majority of the Court, a "solid core of meaning" as to what force will in future be considered "reasonable in the circumstances".

The majority quickly rejected the argument that section 43 offends section 12 of the Charter which protects all of us in Canada from cruel and unusual punishment.

Perhaps the most troubling part of the majority's decision is its rejection of the equality argument. Since section 43 applies only to the use of force on children, it clearly makes a distinction based on age. However in deciding whether the distinction is wrongly discriminatory, the Chief Justice decides not to look at it from the point of view of the child, (whom she assumes is a pre-schooler) but rather from the point of view of a reasonable person who considers the views and developmental needs of the child. So in considering whether legal authorization of the use of physical force on children offends their human dignity and freedom by treating them as less worthy, it was not the perspective of the child that mattered, but that of the reasonable person.

Since children need their parents and teachers, introducing the criminal law into children's families and schools would harm children more than help them. The majority was concerned that without section 43, placing an unwitting child on a chair for a five-minute "time-out" would be criminal conduct and that the burden of criminalizing such conduct would be borne by children.

Because of all of the above criteria, the criminal law will still protect children from harmful, degrading or abusive conduct, so a reasonable person would not think that section 43 negatively affects a child's sense of dignity; therefore, the majority concludes, it is not wrongly discriminatory and does not breach section 15 of the Charter, the right to equality.

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Mr. Justice Binnie, in dissent, strongly disagreed that section 43 does not offend children's dignity. He said section 43 clearly designated children as second class citizens. He felt that all of the reasons the majority expressed as to why children's dignity was not offended were really justifications for a law that does in fact violate children's equality rights. Even "sober, reasoned uses of force" affect a child's physical integrity. Children may need their parents and teachers, but they do not "need" to be corrected by physical force. Corporal punishment violates the child's dignity, partly because of the humiliation he or she is likely to feel, but mainly because of the lack of respect inherent in the act.

However, because the general law prohibiting assault is so broad in Canada and prohibits even fairly minor contacts, Justice Binnie said that section 43's protection of parents from criminal consequences is a reasonable limit on children's equality rights and is therefore constitutional. This does not leave children without effective recourse (child protection legislation); it just helps keep the family out of the criminal courts.

Because a teacher-pupil relationship is not like that of a parent and child, but more like a master and apprentice (justification for corporal punishment abolished in 1955), Justice Binnie does find section 43 unconstitutional with respect to teachers.

In a separate dissent, Madame Justice Arbour began by criticizing the detailed test set out by the Chief Justice. While she said it was a praiseworthy effort to curtail the law and take it where it ought to be, Justice Arbour said that to do so is not the role of courts in the area of criminal law.

Justice Arbour described numerous cases in which parents and teachers have been acquitted after failing the Chief Justice's tests, for example, after applying karate kicks to students or knocking out a son, using belts that leave buckle marks. She then looked at the Charter arguments. Section 7 of the Charter guarantees that depriving anyone of their security of the person must be done in accordance with the principles of fundamental justice. If a law is too vague, it does not give "fair warning" about the legality of their actions and increases enforcement discretion. She finds that all of the varied case law, with its inability to set clear tests for reasonable force, establishes clearly the vagueness. She notes that ideas of reasonableness often involves cultural, religious, political and ethical beliefs. They may also reflect one's own parenting style and experiences. All of these differences contribute to vagueness which is particularly problematic because the rights of children and their physical integrity are affected.

Justice Arbour also disagreed with the Chief Justice's assertion that the United Nations Committee on the Rights of the Child does not require parties to the Convention to ban all corporal punishment of children. She quotes its report in 1995:

"physical punishment of children in families should be prohibited . . .
... educational campaigns should be launched with a view to ... fostering the acceptance of its legal prohibition."

and in 2003 it recommended the adoption of:

"legislation to remove the existing authorization of the use of "reasonable force" in disciplining **children** and explicitly prohibit all forms of violence against **children**, however light, within the family, in schools and in other institutions where **children** may be placed."

Justice Arbour says that the test set out by the majority to make section 43 sufficiently precise is not mere interpretation, but a whole new provision, a judicial re-writing. She found the section is unconstitutionally vague.

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Section 43 cannot be justified by section 1 of the Charter, also because of its vagueness. She would have struck down s. 43, leaving parents and teachers protected in excusable or trifling cases by old common law defenses of *de minimus* and necessity.

Madame Justice Deschamps, in a third dissent, agreed with both Justices Arbour and Binnie that the wording of section 43 cannot be as narrowly interpreted as the majority did. That would have the court substituting its own views rather than interpreting Parliament's words. She also agreed with Justice Arbour that section 43 is unconstitutional because it is too vague in its effect on the physical integrity of children, but she preferred to base her analysis on the equality rights of young people. First, she says, Parliament decided to criminalize assault. Then it specifically lifted protection from assault for children while protecting all others.

Second, this different treatment is based on age. Third, she considers whether the different treatment created by section 43 violates the dignity of children. Here, she says it is not whether corporal punishment infringes a child's dignity, but whether Parliament's explicit choice not to criminalize some assaults against children violates their dignity. Justice Deschamps said that children historically were considered the property or chattels of their parents. Modern times have recognized children as individuals with human rights, but section 43 is a throwback to old notions of children as property. She strongly disagrees with the majority that the different treatment ameliorates the disadvantage experienced by children. The only groups which benefit are parents and teachers charged with assaulting a child. She also strongly disagrees with the Chief Justice that section 43 is an age-appropriate response to the unique circumstances and needs of children to live with their parents:

"It cannot be seriously argued that children need corporal punishment to grow and learn. Indeed, their capacities and circumstances would generally point in the opposite direction – that they can learn through reason and example while feeling secure in their physical safety and bodily integrity. By condoning assaults on children by their parents or teacher, s. 43 perpetuates the notion of children as property rather than human beings and sends the message that their bodily integrity and physical security are to be sacrificed to the will of their parents, however misguided."

Therefore section 43 infringes the equality rights of children.

In considering whether this breach of Charter equality rights can be justified under section 1 of the Charter, Justice Deschamps says that the purpose of s. 43 is to give latitude to parents and teachers to carry out their responsibilities and that is an important purpose. Could Parliament have supported that latitude while infringing children's equality less? Yes, teachers could have been treated differently from parents, infants from older children, minor force from serious assaults. Section 43 is not a proportionate response to a desire to benefit parents.

While the severe restrictions put on the section 43 defense by the majority may make it constitutional, the sort of balancing of all the competing interests is not the Court's role. Justice Deschamps finds section 43 unconstitutional and would let Parliament choose how it wishes to respond.

The irony of the decisions in this case is that the majority, seemingly more conservative supporters of Parliament's right to legislate, have had to indulge in activist judicial legislative drafting. Each of the three dissenting opinions say that is the job of Parliament.

The Senate, in Bill S-21, is now considering a Parliamentary response.



CASE UPDATES

JUSTICE FOR CHILDREN AND YOUTH - IN OTTAWA

C.D. and C.D.K. v. Her Majesty the Queen: The clinic, under its corporate name the Canadian Foundation for Children, Youth and the Law was granted intervener status in two cases heard together on April 14th involving the interpretation of the term “violent offence” under the *Youth Criminal Justice Act*. The appellants, and the clinic, were arguing for a narrow interpretation of the term in keeping with the Act’s more restrictive use of custodial sentences for young people. The Respondent Attorney General, joined by intervening Attorneys General from Ontario, British Columbia and Manitoba argued for a more expansive definition to allow judges to consider custody in more cases. Cheryl Milne, with Emily Chan, appeared for the clinic at the Supreme Court of Canada.



R.W.C. v. R.: On April 18th, the Foundation was an intervener in this Supreme Court case out of Nova Scotia involving the application of the DNA data bank provisions of the *Criminal Code* to young people. The Nova Scotia Court of Appeal revised a decision of the trial judge not to order DNA from a 13 year old who had pleaded guilty to assaulting his mother with a “weapon” by stabbing her in the foot with a pen. Attorneys General from British Columbia, Ontario and Alberta intervened as well. Martha Mackinnon, with Lee Ann Chapman, presented the clinic’s legal arguments.

Poshteh v. Canada (Citizenship & Immigration), 2005 F.C.A. 85.

Justice for Children and Youth intervened in this case at the Federal Court of Appeal. We argued that in determining membership in a terrorist organization the Immigration Board must take into account that the young person was a minor at the time. Further, because he was a minor at the relevant times, the *Convention on the Rights of the Child* will apply and therefore the Board must take Poshteh’s best interests into account when making their decision. The Federal Court of Appeal rejected the arguments and found that it was not unreasonable for the Immigration Division to have adopted a broad approach to the interpretation of membership, without regard to the level of integration of the alleged member, (handing out pamphlets) or his status as a minor. Furthermore, a finding the Poshteh was inadmissible to Canada engaged neither those rights he may have had while a minor under the *Convention on the Rights of the Child*, nor his current rights under s. 7 of the Canadian Charter of Rights and Freedoms, 1982. Lee Ann Chapman, with Martha Mackinnon presented the clinic’s legal argument.

R. v. R.(S.)

Mary Birdsell and Cheryl Milne were successful in arguing that a delay of over 20 months in the scheduling of a trial on a *Youth Criminal Justice Act* charge was unreasonable. The Court ordered a stay of proceedings. The cause of the delay was the failure of the Crown to ensure that a conference with the complainants took place in a timely manner.

C. & M. v. C. & M.

Cheryl Milne represented two sisters who were seeking a custody order in the Family Court so that they could remain living with their maternal grandmother rather than be deported to the Philippines. The girls, who are now 14 and 16, were only 4 years old when they were made permanent residents of Canada. Their mother was deported because the Immigration officer determined that she had lied about her marital status when she came to Canada. The Family Court was persuaded that it was in the girls' best interests to stay in Canada while they made a claim on humanitarian and compassionate grounds to stay permanently. As a result of the court order, Citizenship and Immigration agreed not to proceed with their removal from Canada.

SAFE STREETS ACT

Gary Magee

As of the date of publication, our appeal to the Ontario Court of Appeal in *R. v. Banks* will have been perfected by the lawyers at Justice for Children and Youth.

The *Banks* appeal is a constitutional challenge to the *Safe Streets Act 1999* by thirteen homeless men who were charged and convicted of panhandling offences under ss. 2, 3, or 7 of the *Act*. All of the appellants beg as a means of subsistence. Some squeegee-clean car windows at intersections.

We are arguing on behalf of the defendants that the *Act* discriminates against the most vulnerable members of society and deprives them of their basic rights to expression and personal autonomy. Although the government argues that the aim of the *Act* is to increase traffic safety, we are submitting that the true purpose is to criminalize squeegeeing and panhandling.

In the appeal at the Superior Court, Justice Dambrot, despite our arguments, held that the law was not a criminal one, so it was within the jurisdiction of the province to enact it.

Justice Dambrot agreed that there was an infringement of the freedom expression guaranteed by section 2(b) of the *Charter*, but he found that it was not significant enough to attract a Charter sanction. Dambrot rejected our arguments on section 7 (liberty and security of the person) and 15 (equality) grounds.

On section 11(d) (presumption of innocence), Justice Dambrot agreed with the trial judge that there was an infringement of the *Charter* because the *Act* lists circumstances where a person will be deemed to have acted "aggressively". However, Justice Dambrot also agreed with the trial judge that the provisions could be saved by reading in a defence that will allow those who are accused to provide evidence that their actions would not have caused a reasonable person to fear for his or her safety or security.

We expect that the Court of Appeal will hear the case sometime this fall.

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UNITED NATIONS GLOBAL STUDY ON VIOLENCE AGAINST CHILDREN

The North American Consultation for the UN Secretariat’s Global Study on Violence Against Children took place in Toronto on June 2-3, 2005. The Global study will produce a report in 2006 with a summary of good practices around the world and recommendations to eliminate violence against children. There have been consistent recommendations against the physical punishment of children in the consultations around the world to date. The Roundtable on violence in the home produced a recommendation that the defence for physical punishment of children be removed from the law. Cheryl Milne has been on the Steering Committee for the North American Consultation and was the lead organizer of the juvenile justice Roundtable which took place on June 3, 2005.

NETWORKING

JFCY continues to collaborate with advocates and academics from across the country on this issue. Regular email communications and periodic conference calls keep us up to date on various initiatives underway, including academic research and opinion polls. Included in our network are Toronto Public Health, Repeal 43 Committee, Ontario Association of Children’s Aid Societies, Child Welfare League of Canada, University College of Cape Breton Children’s Rights Centre (through Dr. Katherine Covell) and other individuals such as Dr. Joan Durrant, Ron Ensom and Professor Anne McGillivray.

COURT CHALLENGES RESEARCH GRANT

We were given a small research grant to research and prepare a paper on the impact of the Supreme Court’s decision on subsequent cases. We continue to monitor the reported cases and are working on a questionnaire for Crown Attorneys who conduct child abuse prosecutions. Our report will be completed by the end of 2005.

SENATE STANDING COMMITTEE ON HUMAN RIGHTS

On April 18, 2005, Martha Mackinnon and Cheryl Milne were invited by the Senate Standing Committee to speak on the issue of Canada’s international obligations in regards to the rights and freedoms of children. After a brief presentation the Senators asked many questions regarding Canada’s compliance with the United Nations *Convention on the Rights of the Child* with many questions focused on our constitutional challenge to section 43. Our written brief, approved by the Policy and Positions Committee of JFCY can be accessed under the “What’s New” section of our website: www.jfcy.org.



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