

# The Constitution Act, 1867

(THE BRITISH NORTH AMERICA ACT, 1867)

## *Education.*

**93.** In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:--

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

**93A.** Paragraphs (1) to (4) of section 93 do not apply to Quebec.

## **Criminal Code of Canada**

Section 43 of the *Criminal Code* reads as follows:

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.

# Criminal Code of Canada – S. 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 section of the Criminal Code of Canada is often referred to as the “Spanking Law”.**

Spanking is a form of physical discipline known as corporal punishment. Parents and experts alike often hold different opinions on whether spanking is an appropriate way to control a child who is misbehaving. The purpose of this pamphlet is to review recent Court decisions on the use of physical discipline towards children by parents and guardians. It provides general information on the topic and discusses Section 43 of the Criminal Code of Canada. It should only be used as an information resource as it does not contain a complete statement of the law in the area and laws change from time to time. Anyone needing specific advice on his or her own legal position should consult a lawyer.

*Is spanking children against the law?*

The law assumes that spanking a child to ‘correct’ the child’s behavior is not against the law as long as the force used is reasonable. Section 43 of the Criminal Code of Canada provides a defence for parents, parent substitutes and teachers who used corporal punishment to discipline a child in their care and who have been charged with physically assaulting that child. This section of the Criminal Code is often referred to as “the spanking provision”.

*Does that mean it’s all right to use physical discipline with children?*

Not necessarily. There is often a fine line between spanking a child and physical abuse of a child. If the force used slips into abusive, harmful or degrading conduct, it could result in a criminal charge or trigger a child protection investigation. There have been cases when parents or teachers have been charged with assault for spanking a child or using other forms of physical punishment. Over the past several years, many provinces have enacted legislation to prohibit the use of corporal punishment of students by teachers.

*Has Section 43 of the Criminal Code been challenged in court?*

Yes, the Canadian Foundation for Children, Youth and the Law challenged the constitutionality of Section 43 in an Ontario Court. In July 2000, the Court upheld Section 43 and the judge dismissed the application. The Foundation appealed to the

Ontario Court of Appeal and in September 2001 the Court again upheld the constitutionality of Section 43. The case was then appealed to Supreme Court of Canada, which is the highest level of court in Canada. The Supreme Court sets the standards that all other courts in the country must follow. On January 9, 2004, the Supreme Court of Canada announced its decision in the case of *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*. The Court was not deciding on whether corporal punishment is good or bad. They were deciding whether Section 43 of the Criminal Code violates Section 7 of the Canadian Charter of Rights and Freedoms. This section deals with security of the person. The Court decided that it did not violate the Charter. However, to ensure the best interests of the child, the Supreme Court ruling set boundaries on the use of force to discipline children.

*What 'boundaries' did the Supreme Court set for physically disciplining children?*

The Supreme Court of Canada stated that:

- The force used must be intended to educate or correct the child;
- The force used must be to restrain, control or express disapproval of the actual behaviour;
- The child must be capable of benefiting from the discipline. In other words, factors such as a child's age and disability will influence the child's ability to learn from the use of force;
- The force used must be "reasonable under the circumstances" and not offend society's view of decency.

*What is considered reasonable force?*

Since 'reasonable under the circumstances' is a broad term, the Supreme Court created a definition in relation to child discipline. The Court interpreted reasonable force as "minor corrective force" which is short-lived and not harmful. The Court also set limits on what would be considered reasonable force. This means that Courts have an objective test to apply when deciding whether the use of force is reasonable. As well, expert advice and social consensus on the reasonable use of corporal punishment reduces the risk that courts will make arbitrary or subjective decisions.

*What limits did the Court set on reasonable force?*

The Court found that the following is not reasonable:

- Hitting a child under two years of age. It is wrong and harmful because spanking has no value with very young children and can destroy a child's sense of security and self-esteem. Children under two do not have the cognitive ability

to understand why someone is spanking them.

- Corporal punishment of teenagers. It is not helpful and is potentially harmful to use force on teenagers because it achieves only short-term obedience and may alienate the youth and promote aggressive or other anti-social behaviour.
- Using objects to discipline a child such as belts, rulers, etc. This is potentially harmful both physically and emotionally.
- Slaps or blows to the head.
- Degrading or inhumane treatment.
- Corporal punishment which causes injury – (causing harm is child abuse).

In referring to teachers, the Court said that:

- “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.”

*Can I get more information about this issue?*

You may wish to read the case. A copy of this judgment, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, is available online at: <http://scc.lexum.umontreal.ca/en/2004/2004scc4/2004scc4.html>

[http://www.legal-info-legale.nb.ca/en/publications/criminal\\_law/Spanking\\_EN.pdf](http://www.legal-info-legale.nb.ca/en/publications/criminal_law/Spanking_EN.pdf)  
Public Legal Education and Information Service of New Brunswick