

LEADERSHIP UPDATE

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Teachers and Section 43 of the *Criminal Code*

The Code of Professional Conduct requires appropriate conduct by teachers towards those in their charge. Section 4 provides that

“The teacher treats pupils with dignity and respect and is considerate of their circumstances.”

Section 43 of the *Criminal Code*, RSC 1985, c C-46, [the *Criminal Code*], justifies the use of corrective force by teachers in limited circumstances. It 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.”

These two provisions seem somewhat at odds, and indeed, although s 43 of the *Criminal Code* has recently been upheld by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v Canada* (Attorney General), [2004] 1 SCR 76, many provinces have banned corporal punishment from schools altogether. This is not the case in Alberta, however.

Therefore, for teachers in Alberta, the Supreme Court of Canada's comments in *Canadian Foundation for Children, Youth and the Law* (and other cases) help to provide direction as to what would be considered a “reasonable and corrective use of force” on a child pursuant to s 43 in a way that also complies with the Code of Professional Conduct.

I. Section 43 expressly requires that the force must be used “by way of correction”

Chief Justice McLachlin explained for the majority in *Canadian Foundation for Children, Youth and the Law* that these words, considered in conjunction with previous cases, result in two limitations to the s 43 defence.

A. It must be intended to be for educative or corrective purposes

The first limitation is that a person applying the force must have intended it to be for educative or corrective purposes. In other words, s 43 will not absolve the use of physical force against a child if that force is primarily motivated by anger or animated by frustration.

That is, to seek the immunity of s 43, a teacher must be able to demonstrate “only sober, reasoned uses of force that address the actual behaviour of the child and that are designed to restrain, control or express some symbolic disapproval of his or her behaviour.” If it is determined that the teacher was acting primarily out of anger or frustration, loss of temper or abusive personality, and not correction, the force will not be justified under s 43.

B. The child must be capable of benefiting from the correction

The second limitation is that the child must be capable of benefiting from the correction.

We must not, in trying to think about how we can make a big difference, ignore the small daily differences we can make which, over time, add up to big differences that we often cannot foresee.

—Marian Wright
Edelman



This requires the capacity to learn and the possibility of successful correction.

Accordingly, the Supreme Court noted that force against children under the age of two cannot be corrective, as they are incapable of understanding why they are hit. Corporal punishment of teenagers is likewise not sanctioned. In addition, any force used against children who are incapable of learning because of disability or some other factor is impermissible since, on the evidence, they are incapable of understanding why they are hit.

Indeed, in *R v Ogg-Moss*, [1984] 2 SCR 173, the Supreme Court noted, with respect to evidence revealing that the mentally challenged complainant was incapable of remembering the correction within minutes of its application, that the “assault could not, as a matter of law, constitute ‘using force by way of correction’ and the person committing it could not have recourse to s 43.”

II. The force applied must be reasonable

Even if it is found that physical force against a child was applied for the purpose of correction (in compliance with the limitations explained above), that use of force must then be reasonable under the circumstances.

The Supreme Court in *Canadian Foundation for Children, Youth and the Law* set out the following guidelines with respect to “reasonable under the circumstances”:

- (a) Courts are *not* to look to the gravity of the conduct of the student that attracts the punishment in determining whether or not the force is reasonable.

- (b) It would be unreasonable to apply physical force by way of correction to a child over the age of 12 because it can induce aggressive or antisocial behaviour.

- However, in *R v Storey*, [2004] OJ No 760, a teacher administered a small tap on the face on a pupil over 12 years of age for the purpose of correction. Regardless of his age (being over 12), and regardless of the Supreme Court’s comments in *Canadian Foundation for Children, Youth and the Law*, the judge found that the s 43 defence was made out, and the teacher was found not guilty.

- (a) Corporal punishment using objects (belts, rulers, etc) is considered unreasonable.
- (b) A slap or blow to the head or face would be considered to be unreasonable.

- Surprisingly, again in *R v Storey*, [2004] OJ No 760 (decided after the *Canadian Foundation for Children, Youth and the Law* decision), Justice Libman held that the “tap on the face,” done with an open hand with minimal force, was “reasonable under the circumstances.”

It should be noted, however, that the judge indicated that if he had found the degree of force even slightly more, he would have found without hesitation that the teacher had committed a criminal assault.

- (a) Force that is applied in a degrading, inhuman or harmful way would not be considered reasonable.
- (b) Force of more than a transitory or trifling nature would not be reasonable.

- (c) An application of force that causes injury or harm, or raises a reasonable prospect of harm, would not be reasonable.

- (d) The use of corrective force to remove children from classrooms or to secure compliance with instructions may sometimes be reasonable.

III. Other types of force

There are other types of actions that may also be covered under s 43, which are short of what is normally considered corporal punishment, such as placing an unwilling child in a chair for a five-minute time out, or using corrective force to remove children from classrooms or secure compliance with instructions.

IV. “Child” means “child”

In two earlier cases before the Supreme Court of Canada, *R v Ogg-Moss*, and *R v Nixon*, [1984] 2 SCR 197, it was determined that even if an adult had reduced mental capacity similar to that of a child, he or she would not be considered a child pursuant to s 43. Therefore, for instance, a teacher of adult special needs students cannot have the protection of s 43, even if the force used is meant to be a reasonable corrective use of force.

V. Conclusion

What must be recognized is that s 43 of the *Criminal Code* should not be viewed as giving teachers a right to use physical force or the threat of physical force. Indeed, s 43 identifies what the Supreme Court of Canada calls a “risk zone for criminal

For further information, visit www.teachers.ab.ca or contact Member Services at the Alberta Teachers’ Association, 447-9400 (in Edmonton) or 1-800-232-7208 (from elsewhere in Alberta).

sanction” and states that “the prudent parent or teacher will refrain from conduct that approaches those boundaries, while law enforcement officers and judges will proceed with them in mind.”

Essentially, s 43, at best, is merely a justification or defence to use when reasonable corrective force has been used appropriately. As noted by the Supreme Court in *R v Ogg-Moss*, “it exculpates a ... schoolteacher ... who uses force in the correction of a child.”

Indeed, any use of force that is not used primarily for the purpose of correcting a child in a teacher’s care, or that is unreasonable in the circumstances, will not be justified under s 43, and that teacher could face criminal assault charges as a result and, ultimately, conviction of a criminal offence.

Educational Leadership Academy 2007 Administrator Mentorship Update

presents

Learning-Focused Leadership with **Dr Joseph Murphy**, internationally recognized author, speaker and educational leader at **The Banff Centre, Banff, from July 8–12, 2007.**

The academy program will highlight actions that school leaders can take to promote high levels of academic and social learning for all students. The keynote presentation will provide an overview of central leadership functions, setting the stage for the week. Murphy will then explore the context for changing conceptions of schooling and school leadership. Specific dimensions of effective instructional leadership will be examined—building personalized learning environments, promoting teacher leadership and linking school and community around leadership. Murphy will lead a culminating activity on turning around troubled schools which will provide an opportunity to tie together new knowledge and skills.

For program information contact the directors, Konni deGoeij or Joyce Sherwin at (780) 447-9400. For registration information contact Leslie Kaun at (780) 447-9400 or leslie.kaun@ata.ab.ca, or visit the ATA website home page (Resources for School-Based Administrators).

Spring brings an unusual number of changes in school administrator assignments this year for many school districts around the province. School districts are noticing that there are fewer experienced applicants for vacancies and fewer teachers in their jurisdictions are choosing school administration as a career path. Recruiting and retaining school administrators is becoming a priority for these school jurisdictions. The Association believes that our Administrator Mentorship program, designed in collaboration with St Albert Protestant School District No 6, is an effective program to address this issue.

The Association School Administrators Issues and Concerns Committee (SAICC) recommended that all superintendents receive letters advising them about the program as well as a personal copy of the administrator mentorship handbook. Letters were sent out in March 2007, and several jurisdictions across the province have contacted the Association for more information or more copies of the document, or have made requests to partner with the ATA to develop a mentorship program for administrators in their area. It is hoped that a number of projects will begin for the 2007/08 school year across the province. If you are interested in discussing possibilities of a project in your local or district, please contact Catherine Moir toll free at 1-800-232-7208 or (780) 447-9473, or e-mail her at catherine.moir@ata.ab.ca.