

**Mr. Aldunate**

**“The Spanking Case”: Testing the Validity of Section 43  
The Canadian Foundation for Children, Youth and the Law  
v. The Attorney General of Canada  
Activity 5: A LOOK AT THE LAW**

This case involved legislation from three different **branches** of the law:

- **Criminal** - The *Criminal Code* of Canada;
- **Constitutional** – The *Canadian Charter of Rights and Freedoms*; and
- **International** - The United Nations *Convention on the Rights of the Child*.

**The Criminal Code of Canada:**

Section 43 states 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 Canadian Charter of Rights and Freedoms:**

**s.1** – The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.

**s.7** – 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.

**s.12** – Everyone has the right not to be subjected to any **cruel and unusual treatment or punishment**.

**s. 15 (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.

**The United Nations Convention on the Rights of the Child:**

The rights outlined in the Convention apply to all children, everywhere, that are under the age of 18. The basic principles of the Convention that are most applicable to this case are that:

- Every child has the right to have its basic needs fulfilled
- All children are considered to have the same rights and equal worth
- Every child has the right to express its opinions and be respected
- Children have the right to be protected from abuse and exploitation

## A LOOK AT THE LAW – QUESTIONS

1. Three different branches of law were applied in this case. Which is considered to be the most important and given the greatest weight in the consideration of cases?

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2. What difficulties arise out of the use of the term “reasonable” in Section 43?

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3. Section 1 of the *Charter* has come to be known as the “reasonable limits clause” because it clearly states that limits can be set on your rights and freedoms. In *R. v. Oakes* (1986), the Supreme Court of Canada established criteria to these “reasonable limits” in what is commonly referred to as the “Oakes test”. This test is used to determine if a law can survive a challenge based on section 1 of the *Charter*. There are two parts to this test.

- i. The government’s objective in limiting a constitutionally protected right must be “pressing” and “substantial”.
- ii. There must be proportionality with respect to the balancing of the rights of the individual and the needs and best interest of society.

Apply the “Oakes test” to this case by following the steps below.

1. Is the purpose of section 43 of the *Criminal Code* important enough that it warrants the limitation of constitutionally protected rights and freedoms? (If “no”, then the law is unconstitutional. If “yes”, go on to question 2.) \_\_\_\_\_
2. a) Is there a “rational connection” between the limit on children’s rights and the government’s intended objective in section 43? \_\_\_\_\_  
b) Is the limitation of the right as minimal as possible in achieving the objective?  
\_\_\_\_\_
- c) Does the benefit derived from section 43 outweigh the severity of the infringement?  
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If you answered “no” to any of the questions above, then section 43 should be deemed to be unconstitutional. If not, then it passes the “Oakes test” and section 43 would survive a challenge based on section 1 of the *Charter*.