

THE “SPANKING” LAW: SECTION 43 OF THE *CRIMINAL CODE*

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INTRODUCTION

Section 43 of the *Criminal Code* is controversial in that it expressly offers parents and teachers a defence when they use reasonable force to discipline a child. Given an increased recognition of the rights and best interests of children, many have called for an end to any form of physical punishment of children and youth in Canada, which would necessarily include the repeal of s. 43. Others, while acknowledging that abuse itself is never justified, have argued that minor physical correction is acceptable in certain circumstances and that individuals should not risk criminal prosecution as a result of their parenting techniques.

This paper reviews the content of s. 43 and its relatively recent judicial interpretation by the Supreme Court of Canada, a majority of which upheld the provision in 2004. It then discusses past proposals to repeal the section, and the legal effects that such a repeal would have, given the definition of assault in Canada’s *Criminal Code* and the availability of common law defences. Finally, public opinion on abolishing s. 43, research regarding the effects of physical punishment and international perspectives on the issue are briefly examined.

SECTION 43 OF THE *CRIMINAL CODE*

Section 43 of the *Criminal Code*⁽¹⁾ 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.

(1) *Criminal Code*, R.S.C. 1985, c. C-46.

The defence of reasonable correction appeared in Canada's first *Criminal Code* in 1892. The content has remained virtually unchanged since that time, with the exception of the removal of masters and apprentices from among the relationships covered by the defence.⁽²⁾

***CANADIAN FOUNDATION FOR CHILDREN,
YOUTH AND THE LAW v. CANADA (ATTORNEY GENERAL)***

On 30 January 2004, the Supreme Court of Canada released its decision in the case of *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.⁽³⁾ The issue was whether s. 43 is unconstitutional. Six of nine justices concluded that the provision does not violate the *Canadian Charter of Rights and Freedoms*,⁽⁴⁾ as it does not infringe a child's rights to security of the person or a child's right to equality, and it does not constitute cruel and unusual treatment or punishment. Three justices dissented in three different respects.

A. Opinion of the Majority

The majority of justices in *Canadian Foundation for Children, Youth and the Law* upheld s. 43 on the basis that it protects only parents, schoolteachers and persons who have assumed all of the obligations of parenthood. Further, it maintains a risk of criminal sanction if force is used for non-educative or non-corrective purposes, and limits the type and degree of force that may be used. The words "by way of correction" in s. 43 mean that the use of force must be sober and reasoned, address actual behaviour, and be intended to restrain, control, or express symbolic disapproval. The child must have the capacity to understand and benefit from the correction, so that s. 43 does not justify force against children under two or those with particular disabilities.

(2) Section 55 of the 1892 *Criminal Code* read: "It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances."

(3) *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, aff'g (2002), 57 O.R. (3d) 511 (C.A.), aff'g (2000), 49 O.R. (3d) 662 (S.C.) [*"CFCYL v. Canada"*].

(4) *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7 (security of the person), s. 12 (cruel and unusual punishment), and s. 15 (equality).

The words “reasonable under the circumstances” in s. 43 mean that the force must be transitory and trifling, must not harm or degrade the child, and must not be based on the gravity of the wrongdoing. Reasonableness further implies that force may not be administered to teenagers, as it can induce aggressive or antisocial behaviour, may not involve objects such as rulers or belts, and may not be applied to the head. While corporal punishment itself is not reasonable in the school context, a majority of the Supreme Court concluded that teachers may use force to remove children from classrooms or secure compliance with instructions.

B. Dissenting Opinions

In a first dissenting opinion, Binnie J. concluded that s. 43 violates children’s equality under s. 15 of the Charter. However, the infringement is justified under s. 1 as reasonable in a free and democratic society, although only with respect to parents and persons standing in their place. Because the justification rests on respecting the family environment where only limited corrective force is used to carry out important parental responsibilities, Binnie J. concluded that the defence in s. 43 should not be available to teachers.

Arbour J., also dissenting, found s. 43 unconstitutionally vague and therefore a violation of children’s security that is not in accordance with fundamental principles of justice under s. 7 of the Charter. Citing a lack of judicial consensus on what constitutes force that is “reasonable under the circumstances,” she found s. 43 to be incapable of providing clear guidance to parents, teachers and law enforcers.

In a third dissenting opinion, Deschamps J. determined that s. 43 violates s. 15 of the Charter because it “encourages a view of children as less worthy of protection and respect for their bodily integrity based on outdated notions of their inferior personhood.”⁽⁵⁾ Although reasonable flexibility in child-rearing is a valid objective, a law that permits more than only very minor applications of force unjustifiably impairs the rights of children. Deschamps J. would therefore have struck down s. 43 for both parents and teachers.

(5) *CFCYL v. Canada*, para. 232.

PROPOSALS FOR REFORM

In 1984, the Law Reform Commission of Canada recommended the repeal of s. 43 as a defence for teachers.⁽⁶⁾ A majority of the Commission suggested that s. 43 be maintained for parents, primarily out of concern that the criminal law would otherwise unduly encroach on family life for every trivial slap or spanking.⁽⁷⁾

There have been several legislative attempts to abolish corporal punishment over the past decade, all in the form of private members' bills introduced in the Senate or House of Commons.⁽⁸⁾ The most recent one was introduced in the Senate in November 2004, receiving second reading in March 2005.⁽⁹⁾

LEGAL EFFECTS OF A REPEAL OF SECTION 43

A. Application of Other *Criminal Code* Provisions

If s. 43 were repealed, the general assault provisions of the *Criminal Code* would apply to a parent, teacher or guardian who uses force against a child without the latter's consent. A statutory defence based on "reasonable correction" would no longer be available. Because s. 265 of the *Criminal Code* prohibits the non-consensual application of force and s. 279 prohibits forcible confinement of another person without lawful authority, there is concern that the abolition of the defence in s. 43 would criminalize parental conduct short of what is usually considered corporal punishment, such as restraining an uncooperative child in a car seat or physically putting a child to bed.

(6) Law Reform Commission of Canada, *Assault*, Working Paper 38, Ministry of Supply and Services, Ottawa, 1984, pp. 44 and 53.

(7) *Ibid.*, pp. 44-45 and 53.

(8) See, e.g., *An Act to amend the Criminal Code (protection of children)*, Bill C-305, 2nd Session, 35th Parliament, 1996 (MP Robinson); *An Act to amend the Criminal Code and the Department of Health Act (security of the child)*, Bill S-14, 2nd Session, 35th Parliament, 1996 (Sen. Carstairs); *An Act to amend the Criminal Code (protection of children)*, Bill C-276, 1st Session, 36th Parliament, 1997 (MP Davies); *An Act to amend the Criminal Code and the Department of Health Act (security of the child)*, Bill C-368, 1st Session, 36th Parliament, 1998 (MP Ianno); *An Act to amend the Criminal Code (protection of children)*, Bill C-329, 1st Session, 37th Parliament, 2001 (MP Davies).

(9) *An Act to amend the Criminal Code (protection of children)*, Bill S-21, 1st Session, 38th Parliament, 2004 (Sen. Hervieux-Payette).

Possible responses are that such actions could be defended under common law doctrines, which are discussed below, or on the basis of a child's implied consent to allow a parent to care for and nurture him or her. Alternatively, law enforcers may, in practice, exercise discretion not to prosecute. Comparisons might be made to various types of unwanted contact between adults that legally constitute assault but are addressed through other measures, such as public education and workplace policies, or not addressed at all. Varying degrees of culpability, depending on the severity of the physical force used, may also be addressed through sentencing.

B. Resort to Common Law Defences

If the defence of reasonable correction in s. 43 were repealed, common law defences would remain.⁽¹⁰⁾ The common law defence of necessity precludes criminal responsibility in emergency situations for involuntary conduct aimed at protecting oneself or others. As it is based on true involuntariness of an action, the defence has been interpreted narrowly.⁽¹¹⁾ Three elements must be present: imminent peril or danger, the absence of a reasonable legal alternative, and proportionality between the harm inflicted and the harm avoided. While the defence might be available, for example, to a parent preventing a child from running into the street, it would not be available to a parent who, with or without thinking, strikes a child who is misbehaving.

The defence of *de minimus*⁽¹²⁾ is an alternative common law defence that precludes punishment for a trivial or technical violation of the law. Compared to that of necessity, this defence is more likely to relieve parents and guardians of criminal convictions resulting from minor forms of physical punishment. However, it may not be as available to teachers, given society's growing lack of acceptance of the use of corporal punishment in schools. The *de minimus* defence depends on whether the offence may be viewed as not serious, and the offender not deserving of criminal sanction.

(10) Common law defences are expressly available by virtue of s. 8(3) of the *Criminal Code*. Certain statutory defences, though limited in scope, would also remain available, such as those permitting no more force than is necessary to protect oneself (e.g., ss. 34, 35 and 37), to protect others (e.g., s. 37), or to protect property (e.g., s. 39).

(11) See, e.g., *R. v. Perka*, [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1 and *R. v. Latimer*, [2001] 1 S.C.R. 3, 193 D.L.R. (4th) 577.

(12) The full maxim is *de minimus non curat lex* and has been stated to mean that the law does not care for small or trifling matters: see Jean Héту, "De minimus non curat praetor: une maxime qui a toute son importance!" *Revue du Barreau*, Vol. 50, 1990, p. 1065.

C. Provincial Laws

Under their legislative authority over education and child protection, some provinces and territories have already prohibited corporal punishment in schools and childcare facilities.⁽¹³⁾ Quebec removed references to a “right of correction” from its *Civil Code* in 1994.⁽¹⁴⁾ However, legislation is inconsistent across the country. Should Parliament repeal s. 43 under its criminal law power, physical punishment of children would become unlawful in all Canadian jurisdictions. Any provincial or territorial law that remained inconsistent would yield to the paramount federal statute. The repeal of s. 43 would therefore create legal consistency across Canada.

PUBLIC OPINION AND SOCIAL SCIENCE RESEARCH

The issue of whether parents should be permitted to use physical punishment on their children is divisive in Canada. A national survey in 2003⁽¹⁵⁾ indicated that a large majority (69%) of Canadians were in favour of repealing s. 43 of the *Criminal Code* with respect to teachers. However, this majority was less supportive (51%) with respect to ending the provision for parents. The same survey found that respondents were more inclined to support the removal of s. 43 if guidelines were developed to prevent prosecutions of minor slaps or spansks (60%), research demonstrated that physical punishment is ineffective and potentially harmful (61%), or research showed that ending s. 43 would decrease abuse (71%).

(13) Physical punishment is prohibited under legislation governing day cares in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut and under legislation governing schools and education in British Columbia, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut: see Nico Trocmé *et al.*, *Physical abuse of children in the context of punishment*, Centre of Excellence for Child Welfare, Information Sheet #8E, Ottawa, 2003.

(14) Reasonable and moderate correction was permitted under art. 651 of the *Civil Code of Quebec* (1980) (*An Act to establish a new Civil Code and to reform family law*), S.Q. 1980, c. 39, but did not reappear in the *Civil Code of Quebec* (1994), S.Q. 1991, c. 64. Opinion differs as to whether a right of correction, ancillary to the rights of custody, supervision and education, remains in Quebec’s general law: see Claire Bernard, “Corporal Punishment as a Means of Correcting Children,” *Commission des droits de la personne et des droits de la jeunesse*, Québec, November 1998.

(15) Toronto Public Health, *National Survey of Canadians’ Attitudes on Section 43 of the Criminal Code*, September 2003.

Over 100 organizations and individuals in Canada have endorsed a position stating that physical punishment of children and youth plays no useful role in their upbringing, and calling for the same protection from assault as that given to Canadian adults.⁽¹⁶⁾ Other groups, conversely, support the parental protection offered by s. 43 and argue that parents should be free to decide how to discipline their children, provided that it is fair, reasonable and never abusive.⁽¹⁷⁾

There is a growing body of research indicating that corporal punishment has detrimental effects on children.⁽¹⁸⁾ It places children at risk of physical injury, physical abuse, impaired mental health, a poor parent/child relationship, and increased childhood and adolescent aggression and antisocial behaviour.⁽¹⁹⁾ However, other researchers dispute these findings. The two main criticisms are that research on the negative effects of corporal punishment does not adequately distinguish between physical punishment and physical abuse, and research cannot determine whether the negative outcomes attributed to physical punishment are actually caused by the punishment.⁽²⁰⁾

INTERNATIONAL PERSPECTIVES

In 1991, Canada ratified the United Nations *Convention on the Rights of the Child*, article 19 of which mandates the protection of children from all forms of physical or mental violence, injury or abuse.⁽²¹⁾ In response to reports from Canada regarding the action it

(16) Joan Durrant, Ron Ensom and Coalition on Physical Punishment of Children and Youth, *Joint Statement on Physical Punishment of Children and Youth*, Ottawa, September 2004 and March 2005.

(17) E.g., Coalition for Family Autonomy and REAL Women of Canada.

(18) See, e.g., Elizabeth Gershoff, "Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review," *Psychological Bulletin*, Vol. 128, No. 4, 2002. See also Murray A. Straus, David Sugarman and Jean Giles-Sims, "Spanking by Parents and Subsequent Antisocial Behavior of Children," *Archives of Pediatrics and Adolescent Medicine*, Vol. 151, No. 8, August 1997.

(19) See, e.g., Joan Durrant and Ron Ensom, *Physical punishment of children*, Centre of Excellence for Child Welfare, Information Sheet #7E, Ottawa, 2004.

(20) See, e.g., Robert E. Larzelere and Brett R. Kuhn, "Comparing Child Outcomes of Physical Punishment and Alternative Disciplinary Tactics: A Meta-Analysis," *Clinical Child and Family Psychology Review*, Vol. 8, No. 1, March 2005. See also Diana Baumrind, "Does Causally Relevant Research Support a Blanket Injunction Against Disciplinary Spanking by Parents?" Invited Address at the 109th Annual Convention of the American Psychological Association, San Francisco, August 2001.

(21) *Convention on the Rights of the Child*, 20 November 1989, CAN. T.S. 1992 No. 3, art. 19(1): "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

has taken to meet the requirements of the Convention, the United Nations Committee on the Rights of the Child recommended that physical punishment of children in schools and families be prohibited and that s. 43 be removed.⁽²²⁾ At the same time, international covenants recognize the integrity of the family unit and indicate that parents have the primary responsibility for the upbringing and development of the child.⁽²³⁾ Further, in *Canadian Foundation for Children, Youth and the Law*, a majority of the Supreme Court of Canada considered the *Convention on the Rights of the Child* and concluded that it did not explicitly require state parties to ban all corporal punishment of children.⁽²⁴⁾

At least 15 countries have legislated bans on corporal punishment in both the home and school.⁽²⁵⁾ Other countries, or jurisdictions within them, have passed laws prohibiting force of certain types or in certain contexts. Although many countries have legislated against corporal punishment, most of the approximately 190 parties to the *Convention on the Rights of the Child* have not. Further, those that have, including Sweden, Finland, Denmark, Norway and Austria, have apparently instituted non-criminal measures and reserve assault only for more serious conduct.⁽²⁶⁾ Because the definition of assault in Canada's *Criminal Code* is based on the non-consensual nature of the contact, there may be greater risk in Canada in extending the criminal law. It may be important to ensure that other defences are available so that parents are not criminally convicted for minor forms of physical punishment.

(22) United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: Canada*, CRC/C/15/Add.37, 20 June 1995, paras. 14 and 25, and CRC/C/15/Add.215, 27 October 2003, para. 32. In response to Canada's second report, the Committee stated that "it is deeply concerned that the State party has not enacted legislation explicitly prohibiting all forms of corporal punishment and has taken no action to remove section 43 of the *Criminal Code*, which allows corporal punishment."

(23) *International Covenant on Civil and Political Rights*, 16 December 1966, Can. T.S. 1976 No. 47, art. 23(1): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Can. T.S. 1976 No. 46, art. 10(1): "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." *Convention on the Rights of the Child*, art. 18(1): "Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child."

(24) *CFCYL v. Canada*, para. 33.

(25) Austria, Bulgaria, Croatia, Cyprus, Denmark, Finland, Germany, Hungary, Israel, Iceland, Latvia, Norway, Romania, Sweden and the Ukraine. Source: Global Initiative to End All Corporal Punishment of Children, London, U.K.

(26) Sweden, for example, has legislated against physical punishment of children in its *Code of Parental Responsibilities*: see Adamira Tijerino, "Under Scrutiny: Corporal Punishment and Section 43 of the Criminal Code of Canada," Draft Document, B.C. Institute Against Family Violence, Vancouver, 2001 (section V).

CONCLUSION

In general, nobody disagrees with the proposition that children should be free from physical abuse and injury, and this is clearly not what the debate surrounding s. 43 of the *Criminal Code* is about. Rather, the debate is about the effects of minor forms of physical punishment and the appropriateness of using the criminal law to enforce a particular view of what constitutes proper parenting. Some are confident that prosecutorial discretion and existing common law defences will continue to prevent individuals from being charged or convicted for trivial slaps and spansks. Others fear that parents may face intervention from neighbours or passersby, investigations by police and even imprisonment for limited punishment of their children, or for a momentary but arguably human lapse of judgment.

Child welfare and protection laws go some distance in the prevention and detection of child abuse, and public education campaigns exist to encourage parents not to use even minor forms of physical punishment on their children. Given these developments, advocates for the repeal of s. 43 say that the provision sends the mixed message that it may be acceptable to strike a child. But those against the removal of s. 43 from the *Criminal Code* worry about an inverse message if the provision is repealed: criminal prosecution and conviction may result from any physical contact or restraint that is used against a child. As with most social issues, it is clear that there is no Canadian consensus, which is all the more understandable, given that even the Supreme Court of Canada and the United Nations Committee on the Rights of the Child have expressed divergent views on the acceptability of s. 43.