Re Canadian Foundation for Children, Youth and the Law and Attorney General in Right of Canada; Canadian Teachers' Federation, Coalition for Family Autonomy and Ontario Association of Children's Aid Societies, Intervenors

[Indexed as: Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)]

49 O.R. (3d) 662
[2000] O.J. No. 2535
Court File No. 98-CV-158948

Superior Court of Justice
McCombs J.

July 5, 2000

Charter of Rights and Freedoms — Fundamental justice — Vagueness — Overbreadth — Best interests of child — Parental rights — Section 43 of Criminal Code justifying use of force by parents and teachers by way of correction of child or pupil — Force must not exceed what is reasonable in circumstances — Section 43 a deprivation of life, liberty and security of the person — Deprivation in accordance with principles of fundamental justice — Section not vague nor overbroad — Section not denying children fair procedure — Canadian Charter of Rights and Freedoms, s. 7.

Charter of Rights and Freedoms — Cruel and unusual treatment or punishment — Section 43 of Criminal Code justifying use of force by parents and teachers by way of correction of child or pupil — Force must not exceed what is reasonable in circumstances — Section 43 not cruel or unusual treatment or punishment — Canadian Charter of Rights and Freedoms, s. 12.

Charter of Rights and Freedoms — Equality rights — Section 43 of Criminal Code justifying use of force by parents and teachers by way of correction of child or pupil — Force must not exceed what is reasonable in circumstances — Section 43 not offending equality provisions of Charter — Canadian Charter of Rights and Freedoms, s. 15.

Section 43 of the Criminal Code provides: "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 in the circumstances." The applicant, the Canadian Foundation for Children, Youth and the Law (the "Children's Foundation") applied for a declaration that s. 43 was unconstitutional and of no force and effect. Its application was supported by the Ontario Association of Children's Aid Societies, which was granted intervenor status. The application was resisted by the Attorney General and by the two interveno rs, the Canadian Federation of Teachers and the Coalition for Family Autonomy.

Held, the application should be dismissed.

The specific constitutional questions raised by this case should be considered with the history and purpose of the legislation in mind and in its broader social and political context. The issues should be viewed in the light of the expert evidence and the current social, political, and legal context. Having regard to the history of the legislation, Parliament's purpose in enacting s. 43 was to recognize that parents and teachers require reasonable latitude in carrying out the responsibility imposed by law to provide for their children, to nurture them and to educate them. Parliament decided that these responsibilities cannot be carried out unless parents and teachers have a protected sphere of authority. That sphere of authority is intended to allow a defence to assault within a limited range of physical discipline, while at the same time ensuring that children are protected from child abuse.

Section 43 did not violate s. 7 of the Canadian Charter of Rights and Freedoms, although the first step of a s. 7 analysis was satisfied because there was in relation to s. 43 a real or imminent deprivation of life, liberty, security of the person or a combination of these interests. The deprivation, however, was in accordance with the principles of fundamental justice.

The section was not vague so as to offend the principles of fundamental justice. The question was whether the words in s. 43 can or have been given sensible meanings by the court or whether the section failed to provide sufficient foundation for legal debate or an intelligible standard. Contrary to the submission of the Children's Foundation, the notions of "correction" and "reasonable force in the circumstances" were not unconstitutionally vague. Although some of the s. 43 cases appear to be based on the subjective views of judges, the current trend of the law showed that there was a workable test for s. 43, under which a trial judge's discretion can be exercised in conformity with the Charter. A consideration of what constitutes "correction" should be informed not by the particular notions of parent or teacher, but by reference to contemporary community standards. The term "correction" is not so lacking in precision that it fails to provide sufficient guidance for legal debate or to provide an intelligible standard. The expression "reasonable in the circumstances" was also not void for vagueness. Although its interpretation was not without difficulty, the phrase provides an intelligible standard for legal debate. Many of the recent cases had adopted the test used by the Saskatchewan Court of Appeal in R. v. Dupperon, which involves examining the entire context within which the punishment took place and holds that the test should be objective and apply the standards of the community as a reference point. The courts have begun to adopt a standard of reasonableness that emphasizes contemporary community standards.

Further, s. 43 was not overbroad so as to offend the principles of fundamental justice. It was not the case that s. 43 allowed too broad a group to rely on it as a defence nor did s. 43 allow force to be used against too broad a group of individuals. Only a narrow group of people may rely on a s. 43 defence and s. 43 did not go unnecessarily beyond what was needed to accomplish the objective of giving parents reasonable latitude in child-rearing.

Section 43 did not infringe principles of fundamental justice by denying children fair procedure and equal benefit and protection of the law. The interests of children are adequately represented by the Crown, which prosecutes the case. Moreover, procedural fairness to children must be weighed against the entitlement of accused persons to procedural fairness to protect them from unwarranted denials of liberty by the state.

As for the arguments that the best interests of the child or parental rights or both should be regarded as principles of fundamental justice, it was necessary to note that fundamental justice is tied to the basic tenets of our legal system. They are not vague generalizations about what society considers ethical but instead must be capable of being defined with some precision and applied in a manner that yields an understandable result. Broad human values that inform many legal principles are not necessarily principles of fundamental justice. Viewed in the context of the criminal legislative framework, the provincial child protection legislation, other governmental initiatives, international treaties and conventions, the experiences of other countries, the responsibilities and role of parents, the best interests of children and general attitudes about whether spanking should be considered a crime, the best interests of the child principle is best understood as an important underlying social value that informs many legislative and policy initiatives, rather than as a principle of fundamental justice. The strategy adopted by Parliament recognizes the complexity of dealing with the family, the difficulties in raising children, the state's responsibility to monitor or intervene and the inherent limitations of the criminal law. This strategy accords more with the principles of fundamental justice than would outright criminalization of all conduct that would be an assault without s. 43.

Section 43 did not violate s. 12 of the Charter, which prohibits cruel and unusual treatment or punishment because s. 43 did not involve punishment or treatment in the sense contemplated by s. 12. If this conclusion was wrong, then s. 43, when properly construed, did not involve treatment or punishment that was cruel and unusual.

Finally, s. 43 did not infringe the equality rights of children. Although it subjects children to differential treatment based on age, the distinction does not have a discriminatory purpose or effect that is contrary to the purposes of s. 15(1) of the Charter.

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APPLICATION for a declaration that s. 43 of the Criminal Code, R.S.C. 1985, c. C-46 was unconstitutional.

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Allan R. O'Brien, for Canadian Teachers' Federation.

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J. Gregory Richards and Megan E. Petrie, for Ontario Association of Children's Aid Societies.

MCCOMBS J.: —

INTRODUCTION

[1] This application concerns the extent to which parents and teachers may use force to correct children, It comes before the court for the first time in the form of a constitutional challenge to a section of the Criminal Code, R.S.C. 1985, c. C-46. I have concluded that the constitutional challenge must fail, for the reasons set out in this judgment.

[2] Generally, it is criminal assault to use force against another without consent. [See Note 1 at end of document] Section 43 of the Criminal Code is an exception to that general rule. The section provides a justification for a parent, a person in the place of a parent, or a teacher who uses force to correct a child in his or her care, where the force used is "reasonable in the circumstances". [See Note 2 at end of document]

[3] Some of the parties to this application argue that s. 43 is unconstitutional, while others support retention of the section. All parties, however, agree that parents and teachers require the right to use reasonable forms of discipline to control or restrain children in their charge. That right is necessary for the protection of children, the protection of others and to teach them social values and behavioural limits. The disagreement among the parties concerns the limits of acceptable parental and teacher discipline and, in particular, whether mild forms of corporal punishment are acceptable forms of discipline.

[4] Section 43 of the Criminal Code has become a focal point in the debate about corporal punishment in child-rearing. Section 43 does not expressly delineate the nature or limits of the force that is justified other than to require that it be "reasonable in the circumstances" and be for the purposes of "correction". Because the notion of reasonableness varies with the beholder, it is perhaps not surprising that some of the judicial decisions applying s. 43 to excuse otherwise criminal assault appear to some to be inconsistent and unreasonable.

[5] There is a growing consensus that corporal punishment of children does more harm than good. It has been banned in virtually all Canadian school systems; [See Note 3 at end of document] and the federal ministry of health has mounted an educational campaign teaching that hitting children is wrong. [See Note 4 at end of document] Canadian attitudes towards corporal punishment are changing. An increasing number of Canadian adults believe that many forms of corporal punishment, at one time considered acceptable, are no longer acceptable. [See Note 5 at end of document]

[6] In the continuing debate about the use of corporal punishment in child-rearing, many child welfare groups argue that as long as s. 43 of the Criminal Code exists, parents and teachers will have a licence to abuse children in their care.

[7] The applicant, the Canadian Foundation for Youth, Children and the Law (the "Children's Foundation"), submits that s. 43 sends the wrong message that corporal punishment is "justified" -- that it is a good thing. Moreover, the Children's Foundation submits that the section's vague wording wrongly provides a shield against criminal prosecution, even, in some cases, for violent child abuse causing physical injury.

OVERVIEW OF THE APPLICATION AND THE ISSUE TO BE DETERMINED

(a) The basis for the application

[8] This case is unusual because it does not come before the court with a factual underpinning, where one of the parties has raised a constitutional issue that impacts upon a case already before the court. Instead, this case was heard with special permission of the court because it raises a serious legal question and there is no other reasonable and effective way for the issue to be raised.

[9] The Children's Foundation has applied under the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 14.05(3)(g.1) for a declaration [See Note 6 at end of document] that s. 43 of the Criminal Code is unconstitutional and of no force and effect. The Foundation also seeks a declaration striking down any common law parental right to use corporal punishment. The application is resisted by the respondent, the Attorney General.

(b) The parties to the application

[10] The Children's Foundation is a not-for-profit organization advocating on behalf of children's rights. It points out that s. 43 has, until now, escaped judicial constitutional scrutiny because persons accused of child abuse are hardly likely to challenge a provision which could lead to their acquittal. The Attorney General concedes that the application should proceed and that the applicant should be granted standing. [See Note 7 at end of document]

[11] Three intervenors have been granted status, but with conditions limiting their participation to areas where their expertise and perspective would be helpful.

[12] The Children's Foundation is supported by the Ontario Association of Children's Aid Societies, while the respondents are supported by the Canadian Federation of Teachers, and the Coalition for Family Autonomy. [See Note 8 at end of document] (Hereinafter, I will refer to these organizations as the "Children's Aid Societies" (or the "CAS"), the "Teachers' Federation" and the "Family Autonomy Coalition", respectively.)

(c) The issue

[13] The issue to be determined is whether s. 43 is unconstitutional and must be struck down or whether it can be construed in a manner that accords with the values enshrined in the Charter, protecting children from child abuse, while at the same time ensuring that responsible parents and teachers are protected from unfair criminal prosecution.

THE EVIDENCE

[14] Although no witnesses testified at the five-day hearing, dozens of volumes of affidavits of experts and cross-examination transcripts were filed by the parties. There was evidence from front-line child protection workers, legal experts in children's rights and international human rights, and experts in research methodology. Their evidence was supplemented by a significant body of studies either conducted by or referred to by the expert witnesses. The evidence and the materials have provided valuable insight into issues of child-rearing, child behaviour and development, the effects of corporal punishment, and a host of other issues related to the treatment of children.

[15] Of the 25 witnesses, the applicant's roster includes internationally recognized experts on child development and behaviour, an expert on the approach to corporal punishment taken by other countries, an expert on child abuse and the effects of violence on children, a front-line child protection worker, legal scholars with expertise in human rights law, an international children's rights advocate, and a leading expert on the effect of corporal punishment on children. The respondent's witnesses include a law professor with expertise in children's rights issues, a leading expert o n the effect of parenting styles on children, a Canadian diplomat, experts on research methodology, and a clinical and empirical research psychologist who has conducted studies on the effectiveness of spanking in achieving behaviour modification in children. Witnesses for the Teachers' Federation include front-line educators with important, practical insight into the real world faced by teachers.

[16] Much of the expert testimony concerns the effects of corporal punishment, including spanking. [See Note 9 at end of document] Not surprisingly, there is debate among the experts about the conclusions that can be drawn as to the connection between physical punishment and harmful outcomes in children. What is remarkable, however, is the extent to which the experts agree on issues related to the physical punishment of children.

[17] The social science expert evidence filed by parties on both sides of this issue reveals major areas of consensus. Some of these areas seem obvious; others may counter conventional beliefs about the value of corporal punishment as a corrective or teaching measure.

(a) Areas of agreement among the experts on both sides of the issue

1. Corporal punishment of very young children: Hitting a child under two is wrong and harmful. With very young children, even mild spanking [See Note 10 at end of document] has no value and can destroy a child's sense of

security and self-esteem, essential components of a healthy nurturing environment. A child under two will not understand why he or she is being hit.

2. Corporal punishment of teenagers: Is not helpful and potentially harmful. There is a consensus that corporal punishment of teenagers achieves only short-term compliance and carries with it the danger of alienation from society, along with aggressive or otherwise anti-social behaviour.

3. Use of objects in corporal punishment: Corporal punishment using objects such as belts, rulers, etc., is potentially harmful both physically and emotionally and should not be tolerated.

4. A slap or blow to the head: Corporal punishment should never involve a slap or blow to the head.

5. Injury: Corporal punishment which causes injury is child abuse.

6. Resort to spanking for correction: None of the experts goes so far as to advocate or recommend spanking, or other forms of corporal punishment, as a form of child discipline. They agree that other forms of discipline, such as withdrawal of privileges or removing a child from the room, are equally effective in most cases.

7. Absence of evidence of benefits of spanking: There is general agreement among the experts that the only benefit of spanking to be found in the research is short-term compliance.

8. "Time out" as an effective alternative to spanking: The experts all endorsed the "time out" method as an effective and appropriate method of child discipline. [See Note 11 at end of document]

9. Spanking is not child abuse: Most of the social science witnesses and professionals, agree that spanking as defined here [See Note 12 at end of document] is not child abuse.

10. Only abusive physical punishment should be criminalized:

The consensus among the experts is that not every instance of physical discipline by a parent should be criminalized. Many believe that the desirable objective of changing societal attitudes regarding child discipline would be best achieved through educational incentives, rather than the use of criminal sanctions to prosecute non-abusive physical punishment. The experts agree that extending the reach of criminal law in this way would have a negative impact upon families and hinder parental and teacher efforts to nurture children.

(b) Areas of controversy among the experts on both sides of the issue

[18] Having identified many of the areas where the experts are in general agreement, I turn now to a brief discussion of the areas in which there is controversy.

[19] The experts disagree about the reliability of opinions concerning the purported harmful effects of corporal punishment, including spanking. The main reason for the controversy is that the issue of child abuse does not readily lend itself to ethical scientific research. It is not possible to conduct studies with sufficiently rigorous adherence to proper scientific method to produce statistically reliable results. The ethical impediments to empirical studies of child abuse are obvious. Consequently, there is no empirical evidence establishing a definitive, long-term causal link between corporal punishment and negative outcomes for children. In other words, it cannot be said with scientific certainty that corporal punishment causes long-term harm. Conversely, there is no reliable empirical evidence that non-abusive or mild forms of physical discipline, such as spanking, have a positive corrective effect upon children.

[20] Despite the absence of statistically reliable empirical evidence, the experts generally agree that there is a significant body of "associational" evidence that corporal punishment is a risk factor linked to poor outcomes in children. However, the reliability of the studies is tainted by the fact that other significant variables were present in the studies, variables such as adverse social conditions and other forms of negative parental behaviour. In short, it is impossible to determine with scientific precision whether corporal punishment leads to negative outcomes or whether it is simply a factor among other negative environmental factors that cumulatively impact negatively upon a child's future.

[21] Finally, the experts disagree as to whether the existence of s. 43 impairs educational efforts to discourage corporal punishment and whether the availability of the defence discourages police from laying assault charges. There is agreement, however, that s. 43 should be clarified, particularly the term "reasonable force", so as to give better guidance to parents, police and child protection workers.

POSITIONS TAKEN BY THE PARTIES

(a) Position of the applicant, the Children's Foundation

[22] While conceding that forceful restraint is appropriate in some circumstances, the Children's Foundation opposes the physical punishment of children, including spanking as defined in this application. It submits that s. 43 sanctions the assault of children -- society's most vulnerable members -- even though the weight of the evidence is that physical punishment does not benefit children and may well be harmful. Moreover, in the applicant's submission, corporal punishment teaches children that physical aggression is an appropriate response to frustration.

[23] The applicant further submits that the use of the word "justified" in s. 43 sends a message that the law regards corporal punishment as rightful behaviour, thereby undermining efforts to educate parents and teachers against the use of punitive force.

[24] According to the applicant, s. 43 violates the "fundamental justice" component of s. 7 of the Charter [See Note 13 at end of document] because it is impermissibly vague and overly broad. The applicant points to the wide variation in judicial interpretation of the reasonableness standard, observing that s. 43 has often been applied by courts to acquit persons accused of assaulting children where injury has been caused or where weapons such as belts, paddles and sticks have been used. [See Note 14 at end of document]

[25] The Children's Foundation also submits that s. 43 is inconsistent with the United Nations Convention on the Rights of the Child, to which Canada is a signatory. [See Note 15 at end of document]

[26] The applicant's position is that s. 43 violates a child's right to security of the person under s. 7 of the Charter, and that the violation is not in accordance with principles of fundamental justice. Moreover, in the applicant's submission, s. 43 violates the equality provisions contained in s. 15 of the Charter. [See Note 16 at end of document] Further, the applicant argues that s. 43 subjects children to cruel and unusual treatment or punishment, thereby violating s. 12 of the Charter. [See Note 17 at end of document] Finally, the applicant submits that these purported violations cannot be saved as reasonable limits under s. 1 of the Charter. [See Note 18 at end of document]

(b) Position of the Children's Aid Societies, the intervenor supporting the position of the applicant

[27] The CAS submits that s. 43 contributes to an environment where violence towards children is accepted. The CAS suggests that Canadian children have suffered serious harm because of the justification for assault contained in s. 43, and that the provision undermines efforts to protect children.

[28] One responsibility of Children's Aid Societies is to identify children in dangerous environments and to intervene on their behalf, obtaining judicial authorization where necessary, under relevant provincial legislation, to remove a child from the dangerous environment. The CAS submits that there have been occasions where judicial authorization has been refused because of the existence of s. 43. The CAS also argues that some cases demonstrate a widely held belief that parents have a "right" to use physical force on children, because s. 43 provides a "justification" to what would otherwise be a criminal assault.

[29] The CAS observes that the evidence discloses a strong link between corrective force and child abuse, citing studies suggesting that a substantial majority of child abuse cases involve misguided attempts to discipline the child. The CAS also argues that parents and teachers do not need s. 43 to maintain order and to protect themselves and

others, because the power of lawful restraint flows from the common law and other sections of the Criminal Code and, in any event, physical force for the purpose of restraint and maintaining order, rather than for correction, is not captured by s. 43.

[30] Finally, it is the position of the CAS that there is no evidence that corporal punishment, including mild spanking, produces long-term beneficial outcomes for children. Put succinctly, the CAS asks the rhetorical question: "Why does the law say it is alright to hit children when there is no evidence that it does any good, and a good deal of evidence that it is harmful?"

(c) Position of the respondent, the Attorney General of Canada

[31] The Attorney General acknowledges that there have been cases in which judges have invoked s. 43 to acquit people of causing serious harm to children. The Attorney General submits, however, that the decisions reflect the values of an earlier time and, in some cases, were simply wrongly decided. The Attorney General submits that, properly interpreted, s. 43 excuses parents and teachers from only a narrow range of mild to moderate corrective force. The respondent refers to these forms of corporal punishment as normative or customary forms of physical punishment. The Attorney General observes that almost all of the experts acknowledge that such conduct is not child abuse. The Attorney General further submits that the applicant's evidence, linking physical punishment and negative outcomes for children, is not scientifically reliable.

[32] The Attorney General argues that s. 43 represents a policy decision within the proper authority of Parliament. That policy choice has two components. The first component is to create, through s. 43, a protected sphere of activity within which parents and teachers are excused from criminal liability. The second component is the concurrent pursuit, through Health Canada, of a policy designed not only to discourage parents from using physical force for correction, but also to encourage new norms for healthy parent-child relations. The Attorney General submits that the two policy components are not inconsistent, but instead represent a measured approach to a highly sensitive and complex social issue. The two-pronged policy, in the Attorney General's submission, recognizes the important role that parents and teachers play in nurturing and educating children, and creates a protected sphere of activity within which they can carry out that important function. At the same time, the Attorney General argues, s. 43 that when interpreted in accordance with constitutional standards, ensures that children are protected from child abuse.

(d) Position of the Family Autonomy Coalition, the intervenor supporting the position of the Attorney General

[33] The Family Coalition adopts the submissions of the Attorney General and submits that, although there have been what it calls "bad cases" -- acquittals where courts have held plainly unreasonable force to be reasonable -- recent s. 43 decisions have developed a workable framework that meets constitutional standards, and also protects children from child abuse. The Family Coalition submits that if s. 43 were declared

unconstitutional, spanking would become a crime and the result would be unwarranted governmental intrusion deep into the family unit, a result t hat benefits neither the public nor children.

[34] The Family Coalition does not claim that corporal punishment is an effective method of child-rearing. Instead, its focus is on the importance of preserving the autonomy of the family as the most important environmental factor in child development. Indeed, the Coalition agrees that the time has come when it should no longer be considered reasonable by the courts to use objects for corporal punishment nor to apply force to the head. The Coalition also concedes that it is not a reasonable use of force to apply corporal punishment to teenagers or very young children. The Coalition concedes that these acts do not deserve protection under s. 43. Its position, in summary, is that s. 43, properly construed, is constitutional. By creating a protected sphere of activity permitting the use of reasonable force for correction, s. 43 protects children, yet recognizes the importance of the family as the central influence in child-rearing

(e) Position of the Canadian Teachers' Federation, the intervenor in support of the Attorney General

[35] The Teachers' Federation adopts the submissions of the Attorney General and the Family Coalition. In addition, it addresses how removing s. 43 would detrimentally affect the work of teachers. Emphasizing that it does not support the use of corporal punishment by teachers, [See Note 19 at end of document] the Teachers' Federation submits that teachers must be free to restrain children when necessary. Such restraint authority is needed to facilitate effective teaching and to maintain orderly classrooms. The federation contends that teachers must have the authority to restrain an unruly or aggressive student, and to remove such a stude nt from the classroom. The Federation submits that striking down s. 43 would have a chilling and detrimental effect on the ability of teachers to perform their jobs.

CONSTITUTIONAL ANALYSIS

(a) General Approach to Constitutional Analysis

[36] Parliament, rather than the courts, is best situated to pronounce upon complex social issues and courts should be very reluctant to interfere with validly enacted legislation. The legislation must, however, meet constitutional criteria and, although Parliament is entitled to judicial deference, courts have a responsibility to strike down legislation which violates the Constitution.

[37] Constitutional analysis must proceed with the legislative purpose in mind and in its broader social and political context: R. v. Mills, [1999] 3 S.C.R. 668 at pp. 714-15, 139 C.C.C. (3d) 321. Courts must presume that Parliament intended to act constitutionally, and give effect to this intention where possible: Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at p. 1078, 59 D.L.R. (4th) 416; R. v. Mills, supra, at p. 711.

[38] It is irrelevant that s. 43 of the Criminal Code was in place long before the Charter. Parliament has chosen to leave it intact. If possible, therefore, the section must be construed so that it meets constitutional criteria.

[39] The specific constitutional questions raised by this case should be considered with the history and purpose of the legislation in mind. Further, the issues should be viewed in the light of the expert evidence gathered by the parties and in the current social, political and legal context. I will start with a brief discussion of the history and purpose of s. 43.

(b) Legislative History

[40] The right of parents and teachers to use reasonable corrective force has its roots in the British common law. It has been part of the Criminal Code since 1892. [See Note 20 at end of document]

(c) Purpose of the Legislation to Create a Protected Sphere of Authority for Parents and Teachers

[41] Although the constitutionality of s. 43 was not in issue, the Supreme Court of Canada considered its purpose and effect in the case of R. v. Ogg-Moss, [1984] 2 S.C.R. 173, 14 C.C.C. (3d) 116. The appellant was a careworker who had used physical punishment to discipline a mentally challenged adult. The court rejected the argument that s. 43 could protect his actions.

[42] Dickson J. noted that the effect of s. 43 is to excuse one group of persons from using force that would otherwise lead to criminal liability, while at the same time removing the protection of the criminal law from another group. He also observed that its purpose is rooted in historical notions of the best interests of children. Dickson J. referred, at p. 185, to Blackstone's Commentaries on the Laws of England:

> He [the parent] may lawfully correct his child being under age, in a reasonable manner, for this is for the benefit of his education.

[43] The passage shows that the common law conferred a protected sphere of authority upon a parent to allow for the correction of a child by the use of reasonable force. It was viewed as one of the parental rights needed to carry out the corresponding obligations of support, education and protection.

[44] In Ogg-Moss, Dickson J., at p. 183, explained that s. 43, by using the word "justified", excuses parents and teachers who use reasonable corrective force because "it considers such an action not a wrongful, but a rightful one." The Children's Foundation relies on this observation to submit that Parliament's retention of the word "justified" in s. 43 shows that Parliament's purpose is to declare reasonable corrective force to be morally rightful conduct. In other words. Parliament's purpose is to say that hitting children is a good thing, not a bad thing.

[45] In my view, there is little merit to the argument that the purpose of the legislation should be identified by consideration of whether a particular defence has been called a justification rather than an excuse. The reason is that the distinction has no practical difference in contemporary criminal law. At one time, the distinction was all important. In the Middle Ages, justifications absolved offenders from liability, while excuses merely mitigated punishment. [See Note 21 at end of document] Then, an excuse might mean prison rather than death. A justification, on the other hand, meant freedom. This was hardly an academic distinction, as it is today.

[46] In contemporary criminal law, both kinds of defences have the same effect -- they lead to acquittal. In my opinion, it would be wrong to define Parliament's legislative purpose based upon a distinction rooted in history that today has no practical difference.

[47] Having regard to the history of the legislation, I conclude that Parliament's purpose in maintaining s. 43 is to recognize that parents and teachers require reasonable latitude in carrying out the responsibility imposed by law to provide for their children, to nurture them and to educate them. That responsibility, Parliament has decided, cannot be carried out unless parents and teachers have a protected sphere of authority within which to fulfil their responsibilities. That sphere of authority is intended to allow a defence to assault within a limited domain of physical discipline, while at the same time ensuring that children are protected from child abuse.

[48] With the legislative history and purpose of s. 43 in mind, I turn now to the issues raised by the applicant.

THE CONSTITUTIONAL ISSUES

[49] The following constitutional questions will be dealt with:

1. Does s. 43 of the Criminal Code infringe s. 7 of the Charter?
2. Does s. 43 of the Criminal Code infringe s. 12 of the Charter?
3. Does s. 43 of the Criminal Code infringe s. 15(1) of the Charter?

Issue 1: Does s. 43 of the Criminal Code violate s. 7 of the Charter?

[50] For convenience, I reproduce s. 7 of the Charter:

> 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.

(a) The approach to analyzing an alleged s. 7 infringement

[51] Where an infringement of s. 7 is alleged, the analysis has three main stages. The first question is whether there exists a real or imminent deprivation of life, liberty, security of the person or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle or principles: see R. v. White, [1999] 2 S.C.R. 417 at pp. 435-36, 174 D.L.R. (4th) 111 at pp. 128-29.

[52] The parties agree that the first stage has been met. That is, s. 43 involves a potential deprivation of the "security of the person" interest of children and s. 7 of the Charter will be violated if the deprivation contravenes the principles of fundamental justice.

(b) Does s 43 violate principles of fundamental justice?

[53] The Children's Foundation submits that s. 43 violates several principles of fundamental justice. The submission may be summarized as follows:

(i) s. 43 is void for vagueness;

(ii) s. 43 is overbroad;

(iii) s. 43 sanctions procedural unfairness;

(iv) s. 43 denies children equal treatment under the law; and

(v) s. 43 infringes an additional principle of fundamental justice that the applicant submits applies to this case, that all laws that affect children should be interpreted in accordance with the best interests of the child.

I will deal with each of these issues in turn.

(i) The vagueness argument: Is s. 43 so vague as to offend principles of fundamental justice?

[54] People are entitled to know what the law is. When a law does not give fair notice of the conduct deemed to be criminal, an accused person may be deprived of liberty and security in a manner that does not accord with the principles of fundamental justice: Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65. It follows that if a law is so imprecise that it fails either to provide sufficient foundation for legal debate or to provide an intelligible standard, then it is void for vagueness: see R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289; and Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577.

[55] There is a need for flexibility in the law, in order to meet changing societal values. The courts play an important role in the interpretation of legislation. Laws need not provide absolute certainty, but must provide a standard of intelligibility which allows for an interpretation that meets constitutional values: see Nova Scotia Pharmaceutical, supra, at pp. 626-27; R. v. Butler, [1992] 1 S.C.R. 452, 70 C.C.C. (3d) 129.

[56] In deciding if a law prescribes an intelligible standard for legal debate, courts must look to how it has been judicially interpreted: R. v. Butler, supra. The role of the courts in giving meaning to legislative terms should not be overlooked. The question is whether the words in the Criminal Code can or have been given sensible meanings by the courts, or whether they are so pervasively vague that they allow a "standardless sweep": see Reference re ss. 193 and 195.1(1) (c) of the Criminal Code, supra, para. 54.

[57] The Children's Foundation submits that there are two components of s. 43 that are unconstitutionally vague: the notion of "reasonable force in the circumstances" and the notion of "correction".

[58] For convenience of reference, I reproduce s. 43:

> 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 in the circumstances.

(Emphasis added)

[59] The Children's Foundation asserts that these emphasized terms are unconstitutionally vague because they fail to provide fair notice to individuals as to what conduct is permitted or prohibited. The Foundation also submits that the decided cases show no consensus as to what conduct is "by way of correction" rather than merely punitive or vengeful. Further, the applicant submits that the standard of force, defined only as what is "reasonable in the circumstances", is vague and too susceptible to the tastes and values of individual judges.

[60] Standards which escape precise technical definition, such as "reasonable" and "correction", are an inevitable part of the law: Butler, supra, at p. 491. Reliance on judicial discretion does not render the provision unduly vague, because absolute precision in the law exists rarely, if at all: Irwin Toy, supra, para. 54, at p. 983.

[61] I agree with the applicant that a review of the s. 43 cases shows that courts have applied divergent standards in deciding what constitutes reasonable force, and that, in some circumstances, judges seem to have imposed their own personal views rather than an objective standard of reasonableness22. Some of the cases in which s. 43 has been applied to acquit people, particularly the earlier cases, seem to have sanctioned violent child abuse. In my view, however, the current trend of the law demonstrates that there is

a workable test for s. 43, under which a trial judge's discretion can be exercised in conformity with the Charter.

Judicial interpretation of s. 43

[62] All parties in this application acknowledge that there have been cases where s. 43 was applied to excuse applications of force that, in light of today's standards and the unprecedented body of expert evidence filed on this application, should rightly be characterized as assault. However, the history of s. 43 decisions shows a gradual reduction of the amount of force tolerated as reasonable by our courts. [See Note 23 at end of document] The standard of reasonableness has been influenced by changes in public attitudes. Corporal punishment of children may have been universally tolerated and even encouraged in earlier times, but this is no longer the case today: see, for example, R. v. Campeau (1951), 14 C.R. 202 at p. 213, 103 C.C.C. 355 (Que. C.A.) and R. v. Baptiste (1980), 61 C.C.C. (2d) 438 (Ont. Prov. Ct.) at p. 443.

[63] It must be acknowledged, however, that even some of the recent decisions have invoked s. 43 to find reasonable doubt where the evidence disclosed injury and the use of objects to impose corporal punishment on children. For example, in the following cases, acquittals were entered on the basis of s. 43. In R. v. Burtt (1986), 75 N.B.R. (2d) 259 (Q.B.), a mother, using a wrapped-up extension cord, hit her 15-year-old daughter on her arms, shoulders and buttocks, causing abrasions and broken skin. She was acquitted of assault causing bodily harm. In R. v. Robinson (1986), 1 Y.R. 161 (Terr. Ct.) a father struck his 12-year-old daughter with a leather belt four to five times, causing bruising. He was acquitted. In R. v. Fritz (1987), 55 Sask. R. 302 (Q.B.), the uncle of two 13-and 14-year old girls was acquitted after he ordered them to strip to their underwear, then strapped them with a plastic belt across the buttocks and thighs. In R. v. Pickard, [1995] B.C.J. No. 2861 (Prov. Ct.), online: QL, a father tried to forcibly remove his 15-year-old son from the room and, in the midst of a scuffle, punched him in the back of the neck, knocking him down, causing scratches and a bruise on his forehead. Section 43 was invoked to acquit him.

[64] There has clearly been variation in the test applied in determining what constitutes reasonable force. Some judges have felt bound by precedent, [See Note 24 at end of document] while others have concluded that an objective standard of reasonableness should be interpreted by reference to contemporary community standards. [See Note 25 at end of document]

[65] The Attorney General, the Family Coalition, and the Teachers' Federation have all submitted that the existence of what they called "bad cases" does not render s. 43 unconstitutional.

[66] The Children's Foundation and the Children's Aid Societies, on the other hand, submit that conflicting judicial interpretations of s. 43 permit and perpetuate child abuse. Although they acknowledge a gradual reduction in the amount of force tolerated as reasonable by our courts, they argue that recent decisions show that s. 43 is still being

invoked to excuse assault involving injury and the use of weapons. They submit that it is impossible to protect children while s. 43 remains the law.

Is the term "correction" in s. 43 void for vagueness?

[67] For s. 43 to apply, the force used on a child must be intended for correction: Brisson v. Lafontaine (1864), 8 L.C. Jur. 173 at p. 175. Punishment motivated by anger, or administered with an intent to injure the child, is not for the purpose of correction. As well, the accused must honestly and reasonably believe that the child is guilty of conduct deserving of punishment: Brisson, supra; R. v. Dupperon (1984), 16 C.C.C. (3d) 453, 37 Sask. R. 84 (C.A.). Moreover, the child must be capable of being corrected: Ogg-Moss, supra, at p. 194. Therefore a parent or teacher who applies force on a child who is either too young to appreciate corrective force or mentally handicapped and clearly unable to learn from corrective force is not protected by s. 43.

[68] In determining whether the force applied meets the "correction" criterion, courts increasingly have focused on the controlling emotion of the person administering the force: see R. v. L. (V.), [1995] O.J. No. 3346 (Prov. Div.), online: QL. If anger was the motivation, that will weigh against a finding that the purpose of the force was corrective, although the presence of anger does not necessarily preclude such a finding: R. v. J. (O.), [1996] O.J. No. 647 (Prov. Div.), online: QL, per MacDonnell J. Where anger was the overriding motive, then the force should not be regarded as corrective: R. v. Bielenik [1999] O.J. No. 4104 (C.J.), online: QL, per Hackett J.

[69] A consideration of what constitutes "correction" should be informed, in my view, not by the particular notions of the parent or teacher, but by reference to contemporary community standards. If, for example, a parent were to use force to teach a child racist or other values that run contrary to contemporary community standards, such actions, in my view, should not be viewed as "corrective". At the same time, however, judges must, in a diverse society, respect cultural differences and be careful not to impose their own values when considering whether the purpose of the force was "corrective".

[70] In my view, the term "correction" contained in s. 43 is not so lacking in precision that it fails to provide sufficient guidance for legal debate or to provide an intelligible standard. It is not void for vagueness.

Is the expression "reasonable in the circumstances" in s. 43 void for vagueness?

[71] Although interpretation of the meaning of the phrase "reasonable in the circumstances" is not without difficulty, [See Note 26 at end of document] the phrase clearly provides an intelligible standard for legal debate. In recent years, many courts have found the following factors outlined by the Saskatchewan Court of Appeal in Dupperon, supra, at p. 460, to be a useful test by which to measure the reasonableness of the force used:

> In determining that question the court will consider, both from the objective and subjective standpoint, such matters as the nature of the offence calling for correction, the age and character of the child and the likely effect of the punishment on this particular child, the degree of gravity of the punishment, the circumstances under which it was inflicted, and the injuries, if any, suffered.

[72] The Dupperon test requires a court to determine the reasonableness of the force in the circumstances of each case. This approach involves examining the entire context within which the punishment took place, and holds that the test should be objective, applying the standards of the community as a reference point. Many of the recent cases adopt the Dupperon test to assess the notion of reasonable force: see W. (J.O.), J. (O.), L. (V.), James, Bielenik, supra.

[73] In Bielenik, supra, Hackett J. recently provided a thoughtful elaboration upon the Dupperon test. She held that in examining the nature of the offence, one should consider the age of the child, any previous incidents that put the whole matter into context and the seriousness of the misconduct by the child. She also held that the force used must relate to, and be reasonably proportional to, the misconduct at issue. In her view, in examining the degree and gravity of the discipline, the relevant issues are whether the child was injured; whether an object was used; the part of the body that was struck: the nature of the injuries; whether the discipline was in fact for the purpose of correction.

[74] The courts, in my view, correctly, have begun to adopt a standard of reasonableness that emphasizes contemporary community standards. [See Note 27 at end of document]

[75] A review of the decided cases clearly shows that s. 43 provides an appropriately flexible standard of reasonableness. The factors that have been developed through judicial interpretation of s. 43 provide for the exercise of judicial discretion. This flexibility allows a court to take appropriate account of community standards, and to consider the growing evidence that certain types of corporal punishment are harmful and wrong.

[76] I conclude that s. 43, in requiring that the force used be "reasonable in the circumstances", provides an intelligible standard for legal debate. The phrase is not unconstitutionally vague.

(ii) The overbreadth argument: Is s. 43 overbroad, thereby offending principles of fundamental justice?

[77] Section 43 is potentially overly broad in two ways. First, it may allow too broad a group of people to rely on the defence. Second, it may permit force to be used against too broad a group of individuals.

(ii)(a) The group of people who may rely on the defence

[78] Only a narrow group of people may rely on the s. 43 defence. Courts have been careful to limit its reach. The Supreme Court in Ogg-Moss, supra, refused to extend the definition of "teacher" to include a care-worker dealing with mentally challenged adults. Instead, the court restricted the definition to one who provides formal instruction in a children's school. The court also limited the definition of a "person standing in the place of a parent" to only those who assume all the obligations of parenthood. [See Note 28 at end of document] Further, the court held that delegation of parental power cannot simply be inferred from the tact of placing a child in the care of another. [See Note 29 at end of document]

(ii)(b) Does s. 43 permit the use of force against too broad a group?

[79] The Children's Foundation argues that s. 43 is overly broad because it permits the use of force on too broad a group. A "child" is defined as anyone under 18 years of age, yet the experts agree that any use of force against teenagers is counterproductive and that physical discipline should not be used on children under the age of two.

[80] To fail constitutional standards, it is the enactment, not each word in it, that must be overly broad -- going beyond what is needed to accomplish the government objective: R. v. Heywood [1994] 3 S.C.R. 761 at pp. 793-94, 94 C.C.C. (3d) 481.

[81] In my view. s. 43 does not go unnecessarily beyond what is needed to accomplish the governmental objective of giving parents reasonable latitude in child-rearing. In deciding whether s. 43 excuses otherwise criminal conduct, a court must take the age of the child into account in deciding whether the force used was reasonable. Courts will take into account the fact that there is strong agreement among social scientists that children under two should not be subjected to corporal punishment. Courts have already recognized that a child's very young age may prevent any reliance on s. 43 as a defence to physical discipline. [See Note 30 at end of document]

[82] I therefore find that s. 43 is not overly broad.

(iii) Does s. 43 infringe principles of fundamental justice by denying children fair procedure and equal benefit and protection of the law?

[83] The applicant argues that s. 43 denies procedural justice to children who are subjected to corporal punishment. I do not accept this argument. The interests of children are adequately represented by the Crown, which prosecutes the case. Moreover, procedural fairness to children must be weighed against the entitlement of accused persons to procedural fairness to protect them from unwarranted denials of liberty by the state. Although victims' interests are becoming increasingly important in the context of the criminal law, [See Note 31 at end of document] those interests must be weighed against the right of accused persons to due process. In my view, having regard to the

context and purpose of the legislation, the defence contained in s. 43 does not deny due process to children who are alleged to be victims of assault.

(iv) Should the principles of the "best interests of the child" and "parental rights and responsibilities" be regarded as principles of fundamental justice?

Overview

[84] The Children's Foundation and the CAS submit that the notion of the best interests of the child should be viewed as a principle of fundamental justice. The submission is resisted by the Attorney General and the Family Coalition, who submit that the parental right to make decisions concerning children should be viewed as a component of the best interests of the child. Both are important, and both further the same objective.

[85] In order to address the issue of whether the best interests of the child and/or parental rights should be viewed as principles of fundamental justice, it is necessary to make some preliminary observations.

[86] Fundamental justice requires that a fair balance be struck among competing individual and societal interests. [See Note 32 at end of document] Principles of fundamental justice are not absolute, but vary according to the context in which they are invoked. [See Note 33 at end of document] They are tied to the basic tenets of our legal system and must have general acceptance among reasonable people as being fundamental to our societal notion of justice. [See Note 34 at end of document] They are not vague generalizations about what society considers ethical or moral, but instead must be capable of being defined with some precision and applied in a manner that yields an understandable result. [See Note 35 at end of document] Thus, broad human values that inform many legal principles are not necessarily principles of fundamental justice.

The importance of context

[87] The most important consideration in evaluating potentially applicable principles of fundamental justice is the larger context in which s. 43 exists. This larger context includes the existing criminal legislative framework, the provincial child protection legislation, other governmental initiatives, international treaties and conventions, the experiences of other countries, the responsibilities and role of parents, the best interests of children, and general attitudes about whether spanking should be a crime. I turn now to a consideration of that larger context.

The broader contextual considerations

Criminal legislative framework

[88] The offence of assault is defined in s. 265 of the Code as "the intentional application of force to another person, directly or indirectly, without the consent of that

person". This broad definition, standing alone, would make criminal any mild or moderate forms of physical discipline, including spanking as defined in this case. Without s. 43, other forms of restraint would be criminal, such as putting an unwilling child to bed, removing a reluctant child from the dinner table, removing a child from a classroom who refused to go, or placing an unwilling child in a car seat. All parties to this application agree that these are common and necessary applications of force.

[89] The fact that such commonly accepted forms of parental discipline would become criminalized without s. 43 is a very significant consideration.

[90] It must also be borne in mind that even with s. 43 in place, the criminal law prohibits parents and teachers from using unreasonable, non-corrective force on children in their charge. Recognizing that children are vulnerable and deserving of special protection, Parliament has also chosen, through various provisions in the Criminal Code, to proscribe other forms of child abuse. [See Note 36 at end of document]

Provincial legislation

[91] In addition, every province and territory in Canada has legislation which enables the state to act to protect a child at risk or in need of protection. In Ontario the legislation is the Child and Family Services Act, R.S.O. 1990, c. C.9. Each jurisdiction has its own definition of a child in need of protection, but all the definitions include physical abuse. The Ontario Child Welfare Eligibility Spectrum is designed to assist Children's Aid Societies and workers in making decisions about the need for intervention. This document considers physical punishment to be abusive not only when generally unacceptable methods of punishment are used, but also when generally accepted modes of punishment are used to excess. [See Note 37 at end of document]

[92] The child protection system operates independently from the criminal justice system: see Nova Scotia (Minister of Community Services) v. M. (B.) (1998), 42 R.F.L. (4th) 208, 168 N.S.R. (2d) 271 (C.A.). Section 43 has no application in determining when a child is in need of protection under the child protection system. In M. (B.), supra, at paras. 75-77, Pugsley J.A. observed that "a parent may not be criminally responsible for using force against a child, yet the child nevertheless may be in need of protective services".

[93] There is a framework in place in each province and territory to monitor the family and deal with issues of child protection as they arise. This framework addresses such issues in a flexible manner with the goal of assisting families. The provincial framework reflects the reality that criminalization is often too blunt and heavy-handed an instrument with which to address many of the problems concerning the welfare of children.

[94] The empirical evidence presented in this application has not persuaded me that s. 43 significantly impedes the objectives of child protection workers.

Educational incentives

[95] The provincial/territorial child protection system is not the only protection for children outside the criminal law. The federal government has implemented public education programs regarding effective methods of disciplining children without using corporal punishment. [See Note 38 at end of document]

International law and other countries

(i) The Convention on the Rights of the Child

[96] The United Nations' Convention on the Rights of the Child, Can. T.S. 1992 No. 3, was ratified by Canada in 1991. The Children's Foundation contends that the Convention articles and the work of the U.N. Committee on the Rights of the Child demonstrate that Canada's continued preservation of s. 43 violates its obligations under the Convention. The applicant points to Article 19 of the Convention, which provides that State parties should take all appropriate measures to protect a child from all forms of physical or mental harm, violence and neglect while in the care of parents.

[97] The Committee, established through Article 43 of the Convention, is an important source for the interpretation of its principles and standards. The Committee does not have decision-making powers: rather, its mandate is to report and monitor. The Committee's first report, submitted in May 1994, recommended that corporal punishment of children be prohibited, that the government consider introducing new legislation to stop family violence, and that the government launch educational campaigns to change attitudes about corporal punishment of children:

> The Committee suggests that the State Party examine the possibility of reviewing the penal legislation allowing corporal punishment of children by parents, in schools and in institutions where children may be placed . . .
>
> . . . the Committee recommends that the physical punishment of children in families be prohibited . . . In connection with the child's right to physical integrity as recognized by the Convention . . . and in light of the best interests of the child the Committee further suggests that the . . . [government] . . . consider the possibility of introducing new legislation and follow-up mechanisms to prevent violence within the family, and that educational campaigns be launched with a view to changing attitudes in society on the use of physical punishment in the family and fostering the acceptance of its legal prohibition: Report of the Committee on the Rights of the Child, General Assembly Official Records, Fifty-first Session. Supplement no. 41 (A/ 51/41), United Nations, New York, 1996.

[98] The Committee clearly recommends that the physical punishment of children be prohibited. It is important to consider, however, that prohibition need not necessarily involve the use of criminal sanctions.

[99] Moreover, many other articles of the Convention merit contextual consideration:

-- Article 3 provides that the best interests of the child shall be a primary consideration in all government action concerning children, and recognizes that the rights and duties of parents must be taken into account when undertaking such action.

-- Article 5 recognizes that states should respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance to the child.

-- Article 18 recognizes that parents are presumed to have the best interests of their children as their main concern, and have primary responsibility for their upbringing and development.

(ii) Other countries

[100] In eight European countries, there are explicit bans on physical punishment. [See Note 39 at end of document] In 1979, Sweden became the first country to enact, in its civil code, a specific prohibition of corporal punishment. Significantly, however, no criminal penalty is attached to this provision. Following the enactment of this civil prohibition, the government embarked upon a national education campaign. Peter Newell, a human rights advocate and expert on children's rights internationally, summarized the campaign as follows:

> The campaign emphasized that while the purpose of the new legislation was to make it clear that spanking and beating were no longer allowed in Swedish law, it did not aim at punishing more parents: Affidavit of Peter Newell, Applicant's Application Record, Vol. VI at p. 1827.

[101] Finland, Denmark, Norway and Austria have also mounted legislative reforms and educational campaigns similar to those of Sweden. Although each country has prohibited corporal punishment, none has gone so far as to expand the application of criminal sanctions.

[102] These forms of civil prohibition on the physical discipline of children are clearly meant to have an educative rather than punitive effect. They do not expand the reach of the criminal law, but operate in conjunction with educational campaigns that seek to change attitudes about parental discipline.

[103] The United Kingdom has recently initiated a consultation process to review the law concerning the physical discipline of children, in response to the European Court of Human Rights ruling in the case of A.K. v. U.K. [See Note 40 at end of document] In that case, the European Court ruled that the way in which the common law defence of reasonable chastisement was applied in U.K. law had failed to protect a boy from "inhuman and degrading treatment" involving beatings with a cane, and was in

contravention of the European Convention on Human Rights. The British government has responded with a consultation document: Protecting Children, Supporting Parents: A Consultation Document on the Physical Punishment of Children. [See Note 41 at end of document] At p. 6, the document expresses the view that it would be inappropriate to outlaw all physical punishment of a child by a parent, because to do so would be intrusive and incompatible with the aim of helping and encouraging parents to fulfil their role and obligations to their children. The document shows that the U.K. government's objective is not only to avoid heavy-handed state intrusion into family life, but also to implement supportive, educative policies which assist in responsible parenting. However, the government recognizes that the common law defence of reasonable chastisement should be reformed. It proposes that the common law defence be set out in a statute requiring the court to consider specific factors in determining if the force falls within the defence. [See Note 42 at end of document] The document also proposes, at p. 14, that this statutory reform might deem certain forms of punishment, including punishment likely to cause injury to the head, and punishment involving the use of implements, as never reasonable.

[104] A review of the methods other countries have adopted for dealing with the corporal punishment of children demonstrates a consensus that the most appropriate way of addressing this issue is to develop educational and other social programs designed to change social attitudes, rather than to expand the reach of the criminal law.

Best interests of the child

[105] The applicant submits that it is a principle of fundamental justice that laws that affect children should be interpreted and applied in a manner that reflects the "best interests of the child", and that s. 43 is inconsistent with this fundamental principle because it does not consider the child's rights or best interests and has been interpreted and applied in a manner that justifies physical harm to children.

[106] Clearly, the best interests of children are of central importance in Canadian law: see, for example, Young v. Young, [1993] 4 S.C.R. 3 at p. 74, 108 D.L.R. (4th) 193; and Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at pp. 861-62, 174 D.L.R. (4th) 193 at p. 231, per L'Heureux-Dubé J. In the context of family law, the principle of the best interests of the child has been used to develop judicial guidelines concerning child access and custody issues. While these formulations are useful in the family law context, they do not readily lend themselves to a consideration of the principles of fundamental justice in s. 7 of the Charter.

[107] In my view, the "best interests of the child" principle is best understood as an important underlying social value that informs many legislative and policy initiatives, rather than as a principle of fundamental justice under s. 7 of the Charter. Nevertheless, the principle is of crucial importance to the contextual consideration of the applicable principles in this case.

Parental liberty

[108] The Attorney General and the Family Coalition submit that parents have a right or liberty interest to make decisions for their children, which must be balanced against the interests of the child.

[109] It is presently an unresolved question whether s. 7 of the Charter includes personal autonomy, and whether, if it does, that autonomy includes a parental right to make decisions for a child: see R.J. Sharpe and K.E. Swinton, The Charter of Rights and Freedoms (Toronto: Irwin Law, 1998), at p. 147.

[110] Sharpe and Swinton note that "while the view that the protection of section 7 extends to fundamental personal choices has not yet secured the support of a majority in any case, B. (R.) suggests that the issue remains very much alive".

[111] The authors also observe that:

> . . . future cases are likely to raise difficult questions about the scope of the personal autonomy . . . interests protected by section 7. They may arise, for example . . . with respect to parental control of children, such as the scope of a parent's right to use corporal punishment.

[112] In B. (R.) v. Children's Aid Society of Metropolitan Toronto, supra, the Supreme Court discussed the issue of the extent of parental rights to make decisions for their children. The views of the various judges reflects the controversial nature of the debate about the scope of s. 7. Four members of the court found that the liberty interest in s. 7 of the Charter includes personal autonomy, which includes the right of a parent to make fundamental decisions for a child. Three judges held that while s. 7 may include a parental right to make decisions for children in certain contexts, that right would not include the right to make decisions that "grossly invaded" the best interests of the child. Lamer C.J.C. disagreed with both of these views, finding that s. 7 of the Charter did not include a parental liberty interest. Sopinka J. found it unnecessary to deal with the issue.

[113] Although there is controversy regarding the parameters of parental liberty in the context of s. 7 of the Charter, it seems clear that whatever parental liberty interests regarding child-rearing are contained in s. 7, they cannot be regarded as independent from the best interests of the child. In a very real sense, parental liberty interests and the best interests of children are opposite sides of the same coin. This view was articulated, albeit in a different context, by L'Heureux-Dubé J. in Young, supra, at pp. 37-38:

> The power of a custodial parent is not a "right" with independent value which is granted by courts for the benefit of the parent, but is designed to enable that parent to discharge his or her responsibilities and obligations to the child. It is, in fact, the child's right to a parent who will look after his or her best interests. Indeed, courts have recognized that there is no magic to the parental tie and will, when the best interests of the child warrant, grant custody to a third party.

In my view, it is not necessary, in deciding this application, to attempt to define the parameters of parental liberty contained in s. 7 of the Charter.

Criminalizing conduct

[114] The Law Reform Commission and the Ouimet Committee on Corrections have advocated the doctrine of restraint in the use of criminal law and the criminal justice system. The Federal government accepted these recommendations in its policy statement entitled The Criminal Law in Canadian Society (Ottawa, 1982) at p. 42 where it stated:

> Restraint should be used in employing the criminal law because the basic nature of criminal law sanctions is punitive and coercive and since freedom and humanity are valued so highly, the use of other, non coercive, less formal, more positive approaches is to be preferred whenever possible and appropriate. It is also necessary because, if the criminal law is used indiscriminately to deal with a vast range of social problems of widely varying seriousness in the eyes of the public, then the authority, credibility and legitimacy of the criminal law is eroded and depreciated.

[115] The Law Reform Commission specifically recommended retaining a special exception for parents reasonably disciplining their children [See Note 43 at end of document]:

> . . . a repeal [of s. 43] if taken by itself could have unfortunate consequences . . . . For it would, in principle, if not always in practice, expose the family to the incursion of state law enforcement for every trivial slap or spanking. And is this the society in which we want to live?

[116] The degree of deference a court should accord to Parliament's policy choices will depend upon the situation the law is attempting to redress. Courts should exercise particular deference to Parliament in evaluating the constitutionality of legislation dealing with complex social issues: RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at pp. 331-32, 100 C.C.C. (3d) 449, per McLachlin J.

[117] The Ontario Court of Appeal in R. v. Ruzic (1998), 41 O.R. (3d) 1 at p. 22, 128 C.C.C. (3d) 97 at p. 121 has noted that courts should exercise deference when considering the constitutionality of defences to criminal charges, observing that:

> The courts have consistently called for deference to Parliament's determination of the scope of statutory defences because defences have a large policy component.

Conclusion as to whether s. 43 of the Criminal Code violates the principles of fundamental justice contained in s. 7 of the Charter

[118] Parents and teachers require a protected sphere of authority within which to fulfil their respective roles. The sphere of authority must be limited by the best interests of the child. Section 43 represents Parliament's recognition that not all use of force upon children should be regarded as criminal. The section is narrowly circumscribed. Only a narrow class of persons is protected: parents, people standing in the place of parents, and teachers. Section 43 also tailors the use of force to the specific end of correction. Finally, s. 43 requires that even if a parent acts with the valid objective of correction, if the force is not reasonable in the circumstances, it will not be protected by s. 43. Section 43 accords with the principles of fundamental justice and gives parents a limited sphere of parental authority. Within this sphere, parents who use force in disciplining their children are protected from criminal sanctions so long as the force used is "reasonable in the circumstances". In my view, when the notion of reasonableness is properly construed, having regard to standards of community tolerance based on harm, s. 43 strikes the correct balance between the right of children to be protected from child abuse, and the protection of parents and teachers from unwarranted criminal prosecution.

[119] It is not correct to say that s. 43 sends the message that hitting children is acceptable. Parliament is not being contradictory or hypocritical in preserving the s. 43 defence while simultaneously adopting a multi-faceted strategy to discourage corporal punishment of children. The law does not criminalize all behaviour which society does not condone.

[120] In my view, the strategy adopted by Parliament recognizes the complexity of dealing with the family; the difficulties in raising children; the state's responsibility to monitor or intervene; and the inherent limitations of the criminal law. In my view, this strategy more properly accords with the principles of fundamental justice than would outright criminalization of all conduct that would fall under the assault provisions without s. 43.

[121] In the result, I conclude that, although s. 43 of the Criminal Code infringes the s. 7 Charter right to security of the person, the infringement is in accordance with principles of fundamental justice.

Issue 2: Does s. 43 of the Criminal Code violate s 12 of the Charter, which prohibits cruel and unusual punishment?

[l22] Section 12 of the Charter provides:

> 12. Everyone has the right not to be subject to any cruel and unusual treatment or punishment.

[123] In order to come within the protection of s. 12, a claimant must establish that he or she has been subjected to treatment or punishment at the hands of the state and that such treatment or punishment is cruel and unusual: Rodriguez, supra, at pp. 608-09. The initial question is whether the provisions of s. 43 amount to treatment or punishment.

(a) Punishment

[124] In Rodriguez, the Supreme Court considered the applicability of s. 12 in the context of a Criminal Code provision that had the effect of imposing cruel and unusual punishment on someone other than an accused person. Sopinka J., for the majority of the court, held that the negative effects of a Criminal Code provision upon a person not facing a criminal charge could not amount to being subjected by the state to any form of punishment within the meaning of s. 12. The same reasoning applies to this application.

(b) Treatment

[125] "Treatment", however, has a broader scope than punishment. In Rodriguez, Sopinka J. stated that treatment might include things imposed by the state in contexts other than penal or quasi-penal. However, Sopinka J. found that. in the realm of state action, there was a necessary distinction between merely prohibiting certain behaviour and actually subjecting individuals to "treatment". He held that there must be an active state process in operation involving an exercise of state control over the individual, in order for the action, prohibition, or inaction to be considered treatment: pp. 611-12.

[126] In my view, s. 43 does not involve "treatment" of children in the sense contemplated by s. 12 of the Charter.

(c) Cruel and unusual

[127] If I am wrong in concluding that s. 43 does not involve "treatment" or "punishment" of children, then, in my view, for the reasons I have already outlined, s. 43, when properly construed, involves treatment or punishment that is neither cruel nor unusual.

(d) Conclusion

[128] For these reasons I conclude that s. 43 does not violate s. 12 of the Charter.

Issue 3: Does s. 43 of the Criminal Code violate the equality provisions contained in s. 15 of the Charter?

[129] The relevant portion of s. 15(1) of the Charter provides:

> 15(1) Every individual is equal before and under the law and has the right tc the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on . . . age.

[130] In my view, s. 43 does not infringe the equality rights of children. Although it subjects children to differential treatment based on age, the distinction does not have a discriminatory purpose or effectthat is contrary to the purpose of s. 15(1). The age distinction in s. 43 is an appropriate response to the unique circumstances of children's

psychological development and limitations, in light of their needs and capabilities and the relationship of parents and children.

[131] Section 43 does not have the effect of furthering a pre-existing disadvantage and, properly construed, it does not increase the vulnerability of children, particularly when viewed in the context of other legislation designed to protect children. Finally, s. 43 does not represent state action based upon stereotypes about children. Instead, s. 43 is based upon the inherent capacities and circumstances of childhood, and demands an individual assessment of a person's situation and needs: see Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at pp. 548-49, 170 D.L.R. (4th) 1.

CONCLUSION

[132] These reasons for judgment are not intended to be taken as a wholehearted endorsement of the provisions of s. 43 of the Criminal Code. The evidence shows that public attitudes toward corporal punishment of children are changing. There is a growing body of evidence that even mild forms of corporal punishment do no good and may cause harm. There has been disparity in the judicial application of s. 43 of the Criminal Code.

[133] It may well be that the time has come for Parliament to give careful consideration to amending s. 43 to provide specific criteria to guide parents, teachers and law enforcement officials. Specific criteria would assist trial judges, who are vested with the difficult task of deciding sensitive, emotionally charged allegations of criminality against parents and teachers, and would also help achieve the desirable objective of ensuring greater uniformity in judicial decisions involving allegations of assault on children.

[134] Judges, however, are not legislators, nor should they be. My task in this application is limited to a determination of the application to strike down s. 43 of the Criminal Code, and its common law underpinnings, as unconstitutional. For the reasons outlined in this judgment, I conclude that the application must be dismissed.

Application dismissed.

Notes

Note 1: See s. 265 of the Criminal Code.

Note 2: Section 43 provides:

> 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 in the circumstances.

Note 3: See, for example, the Newfoundland Schools Act, 1997, S.N. 1997, c. S-12.2, s. 42; the British Columbia School Act, R.S.B.C. 1996, c. 412, s. 76; and see the Ontario School Board Association's 1986 directive "Discipline Resource Guide: Intermediate and Senior Divisions", pp. 30-32.

Note 4: Health Canada, Behaviour (Ottawa: Minister of Public Works and Government Services Canada, 1997), at p. 20.

Note 5: J. Durrant, "Public Attitudes Toward Corporal Punishment in Canada", in D. Frehsee, W. Horn and K. Bussman, eds., Family Violence Against Children (New York: Walter de Grutyer, 1996), p. 107.

Note 6: The declaration is sought under s. 24(1) of the Canadian Charter of Rights and Freedoms and under s. 52(1) of the Constitution Act, 1982.

Note 7: Professor P.W. Hogg states the rule for public interest standing, "the courts will grant standing as a matter of discretion to the plaintiff who establishes (1) that the action raises a serious legal question, (2) that the plaintiff has a genuine interest in the resolution of the question, and (3) that there is no other reasonable and effective manner in which the question may be brought to court": P.W. Hogg, Constitutional Law of Canada, 4th ed. (Toronto: Carswell, 1997), at pp. 1370-71.

Note 8: The Family Coalition is comprised of the following groups: Focus on the Family, the Canadian Family Action Coalition, the Home School Legal Defence Association of Canada and REAL Women of Canada. It provides an important perspective concerning the critical importance of the family as the most important influence on our children.

Note 9: All social science witnesses in this application accepted a definition of spanking as "the administering of one or two mild to moderate 'smacks' with an open hand, on the buttocks or extremities which does not cause physical harm."

Note 10: See definition of "spanking", note 9, supra.

Note 11: The "time out" method involves placing a child in a chair or room, sometimes using mild force, and requiring the child to remain there for a period of time until he or she calms down: affidavit of Mark W. Roberts, respondent application record, vol. X at p. 3152.

Note 12: See note 9, supra.

Note 13: Section 7 of the Charter provides:

> 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.

Note 14: A discussion of these anomalous decisions is undertaken later in these reasons for judgment, at paras. 62 to 66 [pp. 682-83 post].

Note 15: The Convention was adopted by the General Assembly of the U.N. in 1989, at which time Canada was a signatory. Canada ratified the Convention in 1991.

Note 16: Section 15(1) of the Charter provides, in part:

> 15(1) Every individual is equal before and under the law and has the right tc the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... age ...

Note 17: Section 12 of the Charter provides:

> 12. Everyone has the right not to be subjected to any cruel or unusual treatment or punishment.

Note 18: Section 1 of the Charter provides:

> 1 ... guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Note 19: As noted earlier, at note 3 [at para. 5, p. 643 ante], corporal punishment has been banned in virtually all Canadian school systems.

Note 20: See G.P. Rodrigues, ed., Crankshaw's Criminal Code of Canada, R.S.C. 1985, vol. 1, looseleaf ed. (Toronto: Carswell, 1993) at p. 1-326; Anne McGillivray, "'He'll Learn it on His Body': Disciplining Childhood in Canadian Law" (1997), 5 International Journal of Children's Rights 193, at pp. 207-08.

Note 21: Don Stuart, Canadian Criminal Law, 2nd ed. (Toronto:

Carswell, 1987), at p. 389.

Note 22: See, for example, R. v. K. (M.) (1992), 16 C.R. (4th) 121, 74 C.C.C. (3d) 108 (Man. C.A.).

Note 23: As the court stated in R. v. M. (R.W.) (1995), 103 C.C.C. (3d) 375 (P.E.I. Prov. Ct.), Thompson C.J.: "The case law establishes that we have moved a considerable distance from the position enunciated [historically]. In my view, we are now at a point where striking a child with an object in areas of the body which can and does result in visible injury of even a relatively short duration is clearly excessive."

Note 24: See R. v. Jones, [1998] O.J. No. 1438 (Prov. Div.), online: Quicklaw at para. 19.

Note 25: See Baptiste, supra and R. v. W. (J.O.), [1996] O.J. No. 4061 (Prov. Div.), online: Quicklaw, where the application of community standards is accepted. For the opposite view, see R. v. Peterson (1995), 98 C.C.C. (3d) 253, 39 C.R. (4th) 329 (Ont. Prov. Div.).

Note 26: Courts have often observed that no clearly discernible test has emerged from the available case law: see, for example, James, supra; J. (O.), supra.

Note 27: See, for example, R. v. Atkinson, [1994] 9 W.W.R. 485 (Man. Prov. Ct.) at para. 16: "In determining what is reasonable under the circumstances the court must consider the standards of the contemporary Canadian community."

Note 28: Ogg Moss, at pp. 129-30.

Note 29: Ibid, at p. 130.

Note 30: A chart compiled by the Coalition for Family Autonomy detailing the circumstances of 99 criminal cases involving charges related to child discipline from 1965 to 1999 was submitted to the court. Of the 99 cases, in every case involving a child under two, a conviction was entered. Further, of the 20 cases involving two-, three-or four-year-olds, only five resulted in acquittals.

Note 31: See, for example, the recent victims' rights amendments to the Criminal Code, adding s. 722(2.1) and s. 737. See also R. v. Mills, supra.

Note 32: Cunningham v. Canada, [1993] 2 S.C.R. 143 at pp. 151-52, 80 C.C.C.(3d) 492 and Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at pp. 590-91, 85 C.C.C. (3d) 15.

Note 33: See B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1.

Note 34: Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289.

Note 35: Rodriguez, supra, at p. 594.

Note 36: For example, the Criminal Code proscribes parental failure to provide the necessities of life (s. 215), child abandonment (s. 218), child pornograph (s. 163.1), and child sexual abuse (ss. 150.1 to 153)

Note 37: Ontario Association of Children's Aid Societies, Ontario Child Welfare Eligibility Spectrum, published October 30, 1997.

Note 38: The 1999 Guide to Federal Programs and Services for Children and Youth, published by Health Canada, lists a variety of existing federal programs and services that focus on children and young people. Many of these programs address issues of child development, parenting skills, child care, and family violence. For example, the program "Nobody's Perfect" is a parent support and education program for parents with children up to age 5. It is accompanied by a resource called "Behaviour", supra, note 4 [at p. 667 ante], which states at p. 20, "No matter how angry you are it's never okay to spank children. It's a bad idea and it doesn't work." The text then continues to detail how a parent can effectively discipline a child without using physical violence. Health Canada also publishes educational videotapes such as "Welcome to Parenting: The First Six Years" and "Never Shake a Baby: What Parents and Caregivers Need to Know". Health Canada also sponsors a community action program for children that funds community-based coalitions that establish and deliver services to meet the developmental needs of children living in conditions of risk.

Note 39: Sweden, Finland, Denmark, Norway, Austria, Cyprus, Croatia, Latvia.

Note 40: September 23, 1998 (100/1997/884/1096), Eur. Ct. H.R.

Note 41: United Kingdom, Department of Health, Protecting Children, Supporting Parents: A Consultation Document on the Physical Punishment of Children (Attorney General, Copyright 2000).

Note 42: The nature and context of the treatment, its duration, its physical and mental effects and in some instances the sex, age and health of the victim: p. 13.

Note 43: Law Reform Commission of Canada, Working Paper 38 Assault (Ottawa 1984), at p. 44.