University of Alberta

The "Spanking Defence":
An Analysis of *Canadian Foundation for Children, Youth and the Law v. Canada* and the Future of Reasonable Correction of Children by Force in Canada

by

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A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Master of Laws

Faculty of Law

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Spring 2011
Edmonton, Alberta

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Dedication

This thesis is dedicated to my family:

Jodie, Karen, Bart, Amy, Carly, Garrett and Ed.

Abstract

What actions constitute reasonable correction (or reasonable corporal punishment) of children pursuant to section 43 of the *Criminal Code* has been the subject of much legal debate in recent years. In this thesis, I argue that the Supreme Court of Canada's analysis of section 43 in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004) failed to sufficiently delineate the justification, as demonstrated by the fact that the Court's ruling has subsequently been manipulated and misinterpreted by lower courts across Canada. The post-*Canadian Foundation* jurisprudence has established a need for clarity, both with respect to the scope of section 43 and the provision's proper application. I argue that Parliamentary reform of section 43 is required and I conclude by suggesting an amendment to the justification that seeks to incorporate current social science views on the issue and resolve the post-*Canadian Foundation* issues.

Acknowledgements

Most of all, I would like to express my sincere appreciation and gratitude for the assistance and guidance provided to me by Professor Sanjeev Anand. His honest feedback combined with his genuine encouragement was absolutely critical in the creation of this thesis. I am thankful for the countless hours he spent editing my work and engaging me in the process of critical analysis. Most of all, I am grateful for his abiding belief in my ability to take on this project, especially at the times when I did not share his conviction.

No one believes in me more than my family. My parents may be my biggest fans. They have seen me through all the highs and lows of my education, and given me the gentle but firm encouragement I needed to succeed. My sisters give me the much needed gift of laughter and, on more than one occasion, supper. Of course, I am so thankful to my husband, Jodie, for his patience and encouragement during this process. He was constantly cheering me on from the side lines and his support made working on my thesis a much more manageable task. I feel lucky to have a family whose high expectations of me are matched only by their commitment to helping me succeed.

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INTRODUCTION

The use of corporal punishment[1] against children is a widespread and longstanding practice in Canada that continues, at least in part, due to its protection under the criminal law. Many, if not most, children in Canada have been on the receiving end of a spank from their parents.[2] Many, if not most, Canadian parents were subjected to spanking from their parents when they were children.[3] Correction of children by force has been part of Canadian law since the enactment of the first *Criminal Code*.[4] At present, the use of physical force for the "reasonable correction" of children is countenanced pursuant to section 43 of the *Criminal Code of Canada*, which reads:

> 43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.[5]

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[1] The United Nations Committee on the Rights of the Child defines corporal punishment as,

> …any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).

See Committee on the Rights of the Child, *General Comment No. 8*, CRC/C/GC/8, 42d Sess., (2006) at para. 11.

[2] Half of Canadian parents reported administering light corporal punishment (such as a slap) in a 2002 survey. See Canadian Press & Leger Marketing, *Child Abuse Report* (Montreal: Canadian Press & Leger Marketing, 2002) at 2.

[3] Over 60% of Canadian parents in the above study reported receiving light corporal punishment at least once. *Ibid.*

[4] Section 55 of the *Criminal Code* 1892 states, "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." Criminal *Code,* S.C. 1892, c. 29, s. 55 [*Criminal Code* 1892].

[5] *Criminal Code,* R.S.C., 1985, c. C-4, s. 43 [*Criminal Code*].

What actions constitute reasonable correction of children has been the subject of much legal debate in recent years, particularly following a constitutional challenge to section 43 initiated by the Canadian Foundation for Children, Youth and the Law [CFCYL],[6] which eventually made its way to the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004) [*Canadian Foundation*].[7]

In this thesis, I argue that Parliamentary reform of section 43 is required. The Supreme Court's constitutional analysis of section 43 in *Canadian Foundation* failed to create sufficient limits to the scope of the provision. While the boundaries of what constitutes "reasonable correction" created by the Supreme Court may be supported by social science literature, the court's rulings have subsequently been manipulated and misinterpreted in lower courts. The post-*Canadian Foundation* jurisprudence has established a need for clarity, both with respect to the ambit of section 43 and the provision's proper application. Therefore, Parliamentary intervention in the form of legislative amendment may be laudable.

In Part One of this paper, I critique the Supreme Court's constitutional analysis in *Canadian Foundation.* I conclude that the majority analysis in

[6]The Canadian Foundation for Children, Youth and the Law is an Ontario-based non-share capital corporation with charitable status operating under the name Justice for Children and Youth. It provides legal representation to low-income children and youth in the Toronto area struggling with child welfare, education, family and criminal law issues. The corporation is funded by its membership, who pays yearly or as a one-time donation. For more information, see Justice for Children and Youth, "Who We Are," online: Justice for Children and Youth http://www.jfcy.org/.
[7]*Canadian Foundation of Children, Youth and the Law v. Canada (Attorney General)* (2004), 2004 SCC 4, 16 C.R. (6th) 203, 234 C.L.R. (4th) 257 (S.C.C.) [*Canadian Foundation*].

Canadian Foundation essentially created a new correction by force provision by interpreting section 43 to include limits and boundaries that are not expressly, or even implicitly, part of the statutory wording. The expectation of the majority of the court in *Canadian Foundation* was that the newly created parameters to section 43 would ensure a consistent approach to the defence in the future. However, the artificial limits imposed upon the current provision by the majority in addition to the uncertain terminology used in the decision set the stage for continued inconsistencies in the application of section 43 across Canada.

In Part Two, I examine the social science on the use of physical punishment of children. My review of the social science literature reveals that glaring difficulties with respect to the methodology employed in various studies have created issues with reported results. The inability of researchers to control variable factors due to ethical and other restrictions has led to a lack of reliable data and such restrictions will continue to hamper work in this area. Social scientists are divided on the issue of whether parents should use physical punishment, but there are some areas of agreement as to what conduct constitutes inappropriate physical punishment, even among the supporters of the practice. It appears that the majority of experts would agree that, should physical punishment be administered, it should be at a sub-abusive level and that children subjected to physical discipline should also be given clear explanations for why the discipline was employed. These limits appear to be followed by the Supreme Court in *Canadian Foundation.*

In Part Three of the paper, I review the post-*Canadian Foundation* section 43 cases and I identify several issues that have arisen in the jurisprudence. First, the category of persons able to avail themselves of the section 43 defence remains unclear. Second, whether and what type of corrective force can be justified under section 43 in the context of teenagers is still ambiguous. Third, some lower courts have shown a reluctance to follow the guidelines to section 43 interpretation proposed by the Supreme Court. I conclude that these issues clearly demonstrate that *Canadian Foundation* failed in delineating a clear scope of application for section 43 and that Parliamentary intervention is required.

In Part Four, I discuss the potential options for reform of section 43. The two primary routes are the repeal of the provision, leaving parents and school teachers to rely on other codified defences as well as the common law, or the amendment of section 43. I argue that repealing section 43 would ultimately fail in providing increased clarity with respect to the law surrounding the assault of children since the most suitable alternatives to section 43, *de minimis non curat lex* and deemed consent, have yet to receive recognition by a majority of the Supreme Court of Canada. Amending section 43 to reflect both the intention of the Supreme Court in *Canadian Foundation* and the current social science consensus would be the most appropriate alternative. I suggest a codified version of the Supreme Court judgment in *Canadian Foundation.* However, the legislative provision I propose clarifies some of the ambiguities left in the wake of

the court's ruling in *Canadian Foundation* and provides much needed and long awaited clarity to this arm of the law.

PART ONE: An Analysis of *Canadian Foundation for Children, Youth and the Law v. Canada*

I. INTRODUCTION

In *Canadian Foundation*, the CFCYL unsuccessfully claimed that section 43 offends several sections of the *Charter of Rights and Freedoms* [*Charter*],[8] including a child's right to equality before the law (section 15), a child's right to be free from cruel and unusual punishment (section 12), and a child's right to security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice (section 7). Leading experts in the field of child abuse, corporal punishment, constitutional law and child psychology filed affidavits in support of the application.[9] Intervener status was granted to some special interest groups,[10] but not others.[11] Each of the courts that heard the matter upheld the constitutionality of section 43. The Ontario Court of Justice found

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[8] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[9] Some of the experts for the applicants included: Dr. Murray Straus (sociologist, University of New Hampshire); Dr. Joan Durrant (psychologist, University of Manitoba); Dr. Jim Garbarino (child abuse and youth violence expert, Cornell University); Dr. George Holden (psychologist, University of Texas); Peter Newell (international advocate on the United Nations *Convention on the Rights of the Child* (UNCRC, *infra* note 75) and corporal punishment); Prof. A. Wayne MacKay (Professor of Constitutional Law, Dalhousie University); Prof. Edward Morgan (Professor of International Law, University of Toronto); and Prof. Tammy Landau (Professor of Criminology, Ryerson Polytechnic University).

[10] The Ontario Association of Children's Aid Societies supported the applicants. The Canadian Federation of Teachers, and the Coalition for Family Autonomy (including Focus on the Family, Realistic Equal Active for Life (REAL) Women of Canada, Canadian Family Action Coalition, and Home School Legal Defence Association of Canada) intervened on behalf of the respondent. The Commission des droits de la personne et des droits de la jenuesse and the Child Welfare League of Canada were added as interveners on the appeal to the Supreme Court of Canada.

[11] Several other organizations were denied the opportunity to intervene in support of the applicants, including: Defence for Children International, the National Youth in Care Network, Society for Children and Youth B.C., Canadian Council of Provincial Child Advocates, the Repeal 43 Committee, the Canadian Nurses Association and the Canadian Association of Social Workers.

section 43 to be constitutional on July 5, 2000,[12] and the Ontario Court of Appeal upheld that ruling on January 15, 2002.[13] A majority decision of the Supreme Court of Canada, issued January 30, 2004, concurred with the two prior decisions that section 43 does not offend the *Charter.*[14]

The majority decision involved several questionable legal findings, employed unconvincing constitutional methodology and analysis, and engaged in a manner of statutory interpretation that ultimately produced a completely new provision. In *Canadian Foundation,* the majority held that the best interests of the child principle is not a principle of fundamental justice and also that children's equality challenges must be considered from the perspective of a reasonable person acting on behalf of a child who considers the child's views and developmental needs, instead of from the view of a reasonable child. The constitutional methodology employed in the majority judgment was problematic in that the test for equality appeared to commandeer the function of section 1 of the *Charter,* and the application of some legal principles (such as overbreadth) was inconsistent with prior Supreme Court jurisprudence. The most contentious part of the decision, though, was the majority's statutory analysis of section 43, which had the result of completely altering both the provision and its future application without the original wording being declared constitutionally invalid. The majority assumed a quasi-legislative role by engaging in the constitutional

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[12] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2000), 146 C.C.C. (3d) 362, 188 D.L.R. (4th) 718 (Ont. S.C.J.).
[13] *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) (*2002), 48 C.R. (5th) 218, 161 C.C.C. (3d) 178, 207 D.L.R. (4th) 632 (Ont. C.A.).
[14] *Canadian Foundation, supra* note 7.

remedy of reading in limits to the application of section 43 through restrictive statutory interpretation instead of the traditional method of reading in limits as a constitutional remedy after finding a *prima facie* infringement of the *Charter*.

Canadian Foundation included three dissenting judgments. Justice Binnie authored the first dissent. His judgment focused on an equality analysis of section 43. He found that section 43 breaches a child's right to equality before the law and that this breach is justified only insofar as it applies to parents and not to teachers. The legal analysis employed by Justice Binnie was logical, however the outcome of his decision (had it been adopted by the majority of the Court) would have left courts and children very similarly situated to their pre-*Canadian Foundation* status, which involved a great deal of uncertainty as to how the courts would treat section 43. The second dissent was written by Justice Arbour. Her judgment concentrated on a section 7 analysis. She provided an exhaustive list of inconsistent pre-*Canadian Foundation* jurisprudence to support the position that section 43 is unconstitutionally vague. In Justice Arbour's opinion, the only appropriate remedy would be to have section 43 declared invalid and leave the common law and other statutory defences to shield parents and teachers accused of assaulting children. Justice Deschamps wrote the third, and final, dissent. Her judgment focused on the equality challenge pursuant to section 15. Like Justice Binnie, Justice Deschamps found that section 43 infringes a child's right to equality before the law. However, Justice Deschamps found that the infringement could not be justified under section 1 for parents <u>or</u> teachers. The third dissent

held that the appropriate remedy would be a declaration of invalidity of section 43.

In this section, I critique the Supreme Court's constitutional analysis of section 43 in *Canadian Foundation*. I begin with a discussion of the Supreme Court's analysis of section 7 of the *Charter* in response to the CFCYL's claim that section 43 infringes a child's security of the person contrary to the principles of fundamental justice. The principles of fundamental justice alleged by the CFCYL to be infringed by section 43 were vagueness, overbreadth, the best interests of the child and procedural rights for victims. Next, I discuss the Court's analysis of section 12 of the *Charter* in response to the CFCYL's claim that section 43 allows the cruel and unusual punishment of children. Finally, I engage the Court's equality analysis under section 15 of the *Charter*. I conclude that the Supreme Court's constitutional analysis in *Canadian Foundation* involves some questionable findings leading to significant ramifications for the future application of section 43.

II. SECTION 7

Section 7 of the *Charter* holds that "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."[15] An applicant wishing to have legislation declared constitutionally invalid pursuant to section 7 must demonstrate that there has been a breach of life, liberty or security of the person

[15] *Charter*, *supra* note 8 at s. 7.

by the state, and that the breach is in conflict with an established principle of fundamental justice. There cannot be a breach of section 7 unless it is proven that an impugned law fails to comply with a principle of fundamental justice.

Life, liberty and security of the person cover a wide range of rights. The right to life is obvious. "Liberty" includes physical liberty,[16] and freedom to make "fundamental personal choices."[17] The Supreme Court has found that "security of the person" can include physical health,[18] as well as psychological integrity.[19]

"Fundamental justice" has been interpreted as including both procedural justice as well as substantive justice.[20] A principle of fundamental justice must meet three criteria: [21] (1) the principle must be a legal principle; (2) there must be consensus that the principle is fundamental to our societal notion of the fair operation of justice;[22] and (3) the principle must be identified with enough clarity to create a manageable standard for deprivations of life, liberty or security of the person.

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[16] In *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486 [*Motor Vehicle Act Reference*], the Supreme Court held that liberty (within the meaning of section 7) is engaged by legislation that imposes the possibility of imprisonment or probation.
[17] *Blencoe v. British Columbia,* [2000] 2 S.C.R. 307.
[18] *R. v. Morgentaler (No. 2),* [1988]1 S.C.R. 30.
[19] *New Brunswick v. G. (J.),* [1999] 3 S.C.R. 46 [*G.(J.)*].
[20] *Motor Vehicle Act Reference, supra* note 16.
[21] *R. v. Malmo-Levine,* [2003] 3 S.C.R. 571 [*Malmo-Levine*].
[22] In *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519 [*Rodriguez*], the Court held that a principle of fundamental justice must be "fundamental" in the sense that it would have general acceptance among reasonable people.

The relationship between section 43 of the *Criminal Code* and section 7 of the *Charter* was a key issue in *Canadian Foundation.* The Crown conceded that section 43 engages a child's right to security of the person by directly infringing upon his/her bodily integrity. [23] As stated by Justice Dickson (as he then was) in *R. v. Ogg-Moss* [*Ogg-Moss*],[24]

> …the overall effects of [section 43] are clear, no matter how its terms are defined. It exculpates the use of what would otherwise be criminal force by one group of persons against another. It protects the first group of persons, but, it should be noted, at the same time it removes the protection of the criminal law from the second. [25]

The CFCYL claimed that section 43 infringes on a child's security of the person contrary to four principles of fundamental justice:[26] (1) it is impermissibly vague; (2) it is overbroad; (3) it is not in the "best interests of the child"; and (4) it fails to acknowledge procedural rights for children.

(a) Vagueness

Vague laws violate the principles of fundamental justice for several reasons. Lack of precision in the law fails to properly advise people of the specific conduct that is prohibited, making compliance with the law difficult.[27] Similarly, vagueness in a provision may lead to arbitrary enforcement of it, both by enforcement officials and the courts. For a law to be unconstitutionally vague,

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[23] *Canadian Foundation, supra* note 7 **Error! Bookmark not defined.**at para. 3.
[24] [1984] 2 S.C.R. 173 [*Ogg-Moss*].
[25] *Ibid.* at para. 22.
[26] Sharon Greene suggests that the established principle that the innocent not be punished could also apply in this situation, since children who are vulnerable to assault by their parents are not afforded any procedural protection in their family units: Sharon D. Greene, "The Unconstitutionality of s. 43 of the Criminal Code: Children's Right to be Protected from Assault, Part I," (1999) 41 Crim. L.Q. 288 at 300.
[27] *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606.

it must fail to "sufficiently delineate an area of risk" such that citizens do not have fair notice of the provision and law enforcement has unlimited discretion.[28] The 'risk zone' refers to the scope of the law's application and the actions and behaviours that are caught by it. At a minimum, all that is required of a law is that its scope is narrow enough that "legal debate can occur as to the application of the provision in a specific fact situation."[29] If "sensible meaning" can be given to the terms of the law, it will not be found to be unconstitutionally vague.[30] In *Osborne v. Canada (Treasury Board)*,[31] the Supreme Court held that a law is unconstitutionally vague when it is uncertain to the point of being incapable of being interpreted in a way so as to constitute a restraint on government power.

In response to the CFCYL's claim that section 43 is impermissibly vague, the majority judgment in *Canadian Foundation* found that section 43 properly delineates a risk zone for criminal sanction and, for this reason, it is not unconstitutionally vague.[32] The provision properly characterizes the group who may access the justification (schoolteachers and parents) and the conduct that falls within its sphere (force by way of correction that is reasonable under the circumstances). The majority held that force used by way of correction has two

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[28] *Ibid.* at para. 62.
[29] *Ontario v. Canadian Pacific*, [1995] 2 S.C.R. 1030 at para. 75 per Gonthier J. [*Canadian Pacific*].
[30] *Re ss. 193 and 195.1 of the Criminal Code* (Prostitution Reference), [1990] 1 S.C.R. 1123 at para. 41 [*Prostitution Reference*].
[31] [1991] 2 S.C.R. 69.
[32] Katie Sykes writes that the majority judgments fails to take into account the vulnerable position of children in the s. 7 analysis: "Why would the court not inquire into the child's ability to discern a zone of risk arising from the removal of protection of the criminal law? This shift in perspective, again, takes children out of the picture in a case where, as the constitutional claimants, they are supposed to be at the centre of it" Katie Sykes, "Bambi Meets Godzilla: Children's and Parent's Rights in *Canadian Foundation for Children, Youth and the Law v. Canada*" (2006) 51 McGill L.J. 131 at 161-162.

requirements: (1) the person applying the force must intend the force to be corrective, and (2) the child receiving the corrective force must be capable of learning from the correction. According to the Chief Justice, this second requirement precludes parents from using corrective force against children under the age of two years since they are incapable of benefiting from the use of corrective force due to their limited cognitive abilities.[33] The majority further held that force that is "reasonable under the circumstances" is subject to several "implicit limitations,"[34] including:

- Conduct that causes harm or the prospect of bodily harm is not reasonable;
- Cruel, inhuman or degrading conduct is not reasonable pursuant to Canada's international treaty commitments;
- The reasonableness of the conduct will be considered in terms of the nature and context of the treatment, the duration, the physical and mental effects as well as the sex, age, and state of health of the child. The conduct should not be measured with reference to the wrongdoing of the child;
- Substantial social consensus and expert evidence on what constitutes reasonable corrective discipline should be used as guidance. The evidence before the court suggested that experts agree that corporal punishment of children under two years of age is harmful and corporal punishment of

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[33] *Canadian Foundation, supra* note 7 at para. 25.
[34] *Ibid.* at para. 29.

teenagers is harmful because it can induce aggressive or antisocial behavior;[35]

- Corporal punishment using objects such as belts is physically and emotionally harmful to children, as is corporal punishment involving slaps or blows to the child's head;
- Current social consensus informs the Court that the use of corporal punishment by teachers is not acceptable or reasonable.[36]

The Chief Justice conceded that earlier judgments considering section 43 have been "unclear and inconsistent,"[37] however she noted that the *Canadian Foundation* decision could serve as a building block to provide a uniform approach to section 43 jurisprudence across Canada.

Justice Arbour wrote a strong dissenting judgment, holding that section 43 breaches section 7 of the *Charter* and is not justified pursuant to section 1. This finding was affirmed by Justice Deschamps. Arbour J. held that the wording of section 43 is impermissibly vague and infringes on a child's right to security of the person. [38] An extensive review of pre-*Canadian Foundation* cases laid the foundation for this conclusion. [39] Arbour J. concluded that the inconsistent

[35] The Court's reference to the 'evidence' before the court is made without any direct referral to the source of the evidence and the actual evidence that was presented. The reader is left with many unanswered questions: What is the evidence? Which experts agreed? Did any disagree?
[36] *Canadian Foundation, supra* note 7 at para. 38.
[37] *Ibid.* at para 39.
[38] Specifically, Justice Arbour found the term "reasonable under the circumstances" to be unconstitutionally vague and therefore not in accordance with the principles of fundamental justice: *Ibid.* at para 192.
[39] Arbour J. refers to a litany of cases in which acquittals for assault resulted due to justification under s. 43 in the same scenarios that the majority judgment had ruled to be unreasonable applications of force. These situations included: schoolteachers who used physical disciplinary

application of section 43 over many years demonstrates that it does not delineate a proper boundary for legal debate, since the debate appears to change with every application.[40] Although she acknowledged that the term "reasonableness" has received prior recognition as a constitutionally permissible standard in other areas of criminal law, Arbour J. maintained that constitutional analysis of the term must be contextual. She concluded that "reasonable correction" pursuant to section 43 involves a degree of subjectivity linked to public policy, the appropriate relationship between the state and the family, religion, parental rights, children's rights, parenting style and individual ideas of parental authority.[41] Consequently, when Arbour J. balanced the rights of children against the multiplicity of variables influencing the application of the standard of "reasonable correction," she found that the wording of section 43 could not withstand constitutional muster. Children are entitled to a defined degree of protection from the criminal law. According to Justice Arbour, section 43 lacks a clear test and ultimately results in a "legal lottery"[42] for adults charged with assault against children, and the children who suffer at the hands of their parents and teachers. The fact that section 43 may potentially be capable of delineating an acceptable boundary for

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force; parents who used force to a child's head or face; parents who used force against teenaged children; parents who used force against children under the age of two years; and parents who used implements in disciplining their children: *Ibid.* at paras. 152-170.

[40] *Ibid.* at para. 181.

[41] *Ibid.* at para. 183.

[42] *Ibid.* at para. 191, quoting Anne McGillivray, "He'll Learn it on His Body: Disciplining Childhood in Canadian Law" (1997) 5 Int'l J. Child Rts. 193 at 228.

legal debate was dwarfed, in Arbour J.'s opinion, by the reality that it has yet to happen.[43]

Justice Arbour would have declared section 43 constitutionally infirm.[44] In doing so, she recognized that existing common law defences such as *de minimis non curat lex* would be required to protect parents from the prosecution of trifling offences unless Parliament enacts constitutionally viable legislation. She stated that, "Parliament is best equipped to reconsider this vague and controversial provision,"[45] since it can look to the Supreme Court's guidance with respect to the *Charter* issues, social norms, and expert evidence in crafting new legislation.

The majority's vagueness analysis in *Canadian Foundation* was unsatisfactory. While it is difficult for a claimant to demonstrate that a provision is unconstitutionally vague (and even harder to have a provision struck down as a result),[46] the Chief Justice failed to address the historical issues underlying section 43. Instead, she relied on the phrases "reasonable under the circumstances" and "force by way of correction" to create an entirely new provision out of section 43, using age, conduct and subjective intent as factors. Two issues arise from the

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[43] In Justice Arbour's words, "There is no need to speculate about whether s. 43 is capable, in theory, of circumscribing an acceptable level of debate about the scope of its application. It demonstrably has not done so." *Canadian Foundation, supra* note 7 at para. 181.
[44] *Ibid.* at para. 194.
[45] *Ibid.*
[46] Sanjeev Anand and Eric Colvin note that "the threshold for finding a law unconstitutionally vague is extremely high" and "provincial courts applying the test have universally rejected vagueness claims" in *Principles of Criminal Law,* 3rd ed., (Toronto: Thomson Carswell, 2007) at 394, citing Don Stuart, *Charter Justice in Canadian Criminal Law,* 4th ed., (Toronto: Carswell, 2005) at 113.

majority's approach: first, the court is inappropriately activist in its shielding of section 43 from constitutional scrutiny by using severely restrictive statutory interpretation,[47] and second, the standard of "reasonableness" created by the majority is supported by sources of evidence that are not clearly disclosed by the court. While section 43 is likely not unconstitutionally vague because the terms "correction" and "reasonable" provide an adequate basis for legal debate, the majority's approach to making this finding is problematic.

The *Charter* plays an important role in balancing the power and control of the state with the rights and freedoms of individuals. When the court becomes an additional legislator, it throws off that balance. The proper role of courts in *Charter* litigation is to determine the constitutionality of a law and apply the appropriate remedy. When a law is struck down as unconstitutional, courts will often provide suggestions for an alternative law that would be in compliance with the *Charter* and maintain the same objectives as the original law.[48] In their seminal paper "The Charter Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)," Peter W. Hogg and Allison A. Bushell note that between 1982 and 1997, 80% of cases in which the Supreme Court of Canada struck down a law due to *Charter* breaches

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[47] In *Canadian Criminal Law: a Treatise*, 5th ed., (Scarborough: Carswell, 2007) at 530, Don Stuart comments, "Reading in to that extent bespeaks excessive judicial activism."

[48] For example, the Supreme Court held that the "rape shield" provisions of the *Criminal Code,* R.S.C. 1970, c. C-34 s. 246.6 [now R.S.C. 1985, c. C-46, s. 276] and s. 246.7 [now R.S.C. 1985, c. C-46, s. 277], which restricted the accused person's ability to question the complainant on her sexual history, infringe an accused person's right to a fair trial pursuant to ss. 7 and 11(d) of the *Charter* in *R. v. Seaboyer*, [1991] 2 S.C.R. 577. The judgment written by Justice McLachlin offered an alternative legislative scheme that was later adopted and codified by Parliament and upheld by the Supreme Court of Canada in *R. v. Darrach,* [2000] 2 S.C.R. 443.

resulted in the legislature either repealing the law or enacting an alternative law. [49]

Hogg and Bushnell write,

> …the decisions of the [Supreme Court of Canada] usually leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective can usually be accomplished, albeit with some new safeguards to protect individual rights.[50]

All three of the dissenting judgments in *Canadian Foundation* rejected the majority's approach to interpreting the "reasonable" component of section 43. Justice Arbour found that the majority overstepped the boundaries of statutory interpretation and noted, "At some point, in an effort to give sufficient precision to provide notice and constrain discretion in enforcement, mere interpretation ends and an entirely new provision is drafted."[51] Arbour J. further wrote that while the result achieved by the majority judgment is "a laudable effort to take the law where it ought to be,"[52] the "restrictive approach [used by the majority] can only be arrived at if dictated by constitutional imperatives."[53] Furthermore, it is not the role of the courts to broaden criminal culpability by limiting the applicability of statutory defences.[54] Justice Binnie noted that the majority's holding "pushes the boundary between judicial interpretation and judicial amendment."[55] Justice Deschamps echoed Justice Binnie's concerns by stating that the majority had turned statutory interpretation into an exercise in legislative

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[49] Peter W. Hogg & Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 74 at 97 [Hogg & Bushell].
[50] *Ibid.* at 105.
[51] *Canadian Foundation, supra* note 7 at para. 190.
[52] *Ibid.* at para. 135.
[53] *Ibid.* at para. 132.
[54] *Ibid.* at para.135.
[55] *Ibid.* at para. 81.

drafting.[56] Deschamps J. also wrote that the ordinary meaning of section 43 cannot support the interpretation provided by the majority.[57] The Chief Justice responded to all these concerns in her judgment by noting that it is the function of appellate courts to "define the scope of criminal defences."[58]

The majority strictly construed the definition of correction that is "reasonable under the circumstances" by placing several limitations on the proper interpretation of the term "reasonable." The majority's interpretation of the necessary elements of "reasonable" correction is questionable. While it may be assumed that empirical evidence and data was presented at lower courts, the Supreme Court majority judgment failed to expressly cite or refer to any of this evidence. The lack of clarity surrounding exactly how and why the majority chose its specific criteria for "reasonableness" means that it will be impossible for lower courts to accommodate the changing social landscape when it comes to corrective force; "reasonableness" becomes a moving target that is impossible to anticipate. It would have been helpful if the Chief Justice had referred to particular studies and forms of data in coming to her conclusions vis-à-vis the limitations of section 43. That way, evolving social science data could be used to continue to refine the scope of what constitutes reasonable correction of children by force.

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[56] *Ibid.* at para. 215.
[57] *Ibid.* at para. 217.
[58] *Ibid.* at para. 43.

In *Canadian Foundation*, the Chief Justice held that "reasonableness" is a flexible standard in criminal law that can "accommodate evolving mores,"[59] and as such, it is not unconstitutionally vague. According to the majority, a "meaningful standard of conduct" can be elucidated with the aid of judicial interpretation.[60] Justice Binnie agreed in his dissent that "reasonableness" is a constitutionally permissible standard.[61] Arbour J. countered with the opinion that that the limits of "reasonableness" imposed by the majority cannot be anticipated by those hoping to gain advantage of the justification (i.e. parents and teachers), or by those expected to enforce the provision (i.e. enforcement officials).[62] The restrictions imposed on section 43 by the majority did not emerge from existing case law, nor were they self-evident.

Section 43 does, in fact, have a "risk zone" in that it justifies <u>only</u> force that is "corrective" and "reasonable."[63] The boundaries of those terms are certainly appropriate fodder for legal debate as to their application in particular circumstances. The real issue is whether section 43 can be applied with enough precision to achieve its objective, which is justifying the appropriate use of corrective force against children by their caregivers, without also justifying other assaults against children that do not properly fall in that category. In this sense, section 43 is much more problematic in terms of overbreadth and not vagueness.

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[59] *Canadian Foundation, supra* note 7 at para. 36.
[60] *Prostitution Reference, supra* note 30.
[61] *Ibid.* at para. 73.
[62] *Ibid.* at para. 189.
[63] Sharon D. Greene disagrees, noting that the phrase "by way of correction" is vague since its application "provides largely unfettered discretion." Greene, *supra* note 26 at 307.

(b) Overbreadth

Perhaps the strongest argument of the CFCYL was that section 43 is unconstitutionally overbroad. "Overbreadth" was determined to violate the principles of fundamental justice in *R. v. Heywood*.[64] Writing for the majority, Justice Cory held that a law restricting an accused person's liberty rights will be unconstitutional due to "overbreadth" if the means of the law is too "sweeping" in relation to the objective. In other words, even if a law has a valid objective, it must be executed in a way that does not unduly restrict the life, liberty or security of the person of individuals affected by the law. If a law "applies without prior notice to the accused, to too many places, to too many people, for an indefinite period with no possibility of review", it is unconstitutionally overbroad.[65] Overbreadth can refer to geographic scope, duration, or the subset of individuals to whom the law applies. A law will be unconstitutionally overbroad if it restricts life, liberty or security of the person "far more than is necessary to accomplish its goal."[66]

The CFCYL submitted that, on its face, section 43 is overbroad due to its inability to distinguish between children under the age of two, children over the

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[64] [1994] 3 S.C.R. 761 [*Heywood*].
[65] *Ibid.* at para. 48.
[66] *Ibid.* In *R. v. Clay,* [2003] 3 S.C.R. 735, the Supreme Court appeared to have restricted the application of overbreadth to a standard of gross disproportionality, meaning that a provision must be grossly disproportionate to its objective in order for the provision to be overbroad. It is noteworthy that the majority in *Canadian Foundation,* which was decided within one year of *Clay,* did not mention *Clay,* nor rely on its "grossly disproportionate" standard in considering the CFCYL's claim that section 43 was overbroad. From this, it may be inferred that the Supreme Court is implicitly denouncing the grossly disproportionate test for overbreadth outlined in *Clay* in favor of a test of simple disproprotionality.

age of twelve and children of all other ages.[67] It was submitted that physical correction of children under the age of two years is useless, since they are unable to learn from the experience, and corporal punishment of teenagers puts them at risk for antisocial behavior.[68] In other words, the CFCYL argued that section 43 is overly inclusive of the subset of individuals who are vulnerable to section 43, making the provision overbroad. Chief Justice McLahlin provided a circuitous response to the CFCYL's argument, holding that section 43 is not overbroad because it applies solely to the limited scope of reasonable correction and not all forms of physical punishment.[69] She wrote that because children under two years of age cannot learn from physical correction, the provision cannot apply to them and they are not included within the ambit of the justification. Similarly, since teenagers suffer psychological harm from receiving corporal punishment, it would be unreasonable to use physical correction on teenagers and the provision necessarily cannot apply to children over the age of twelve.

The syllogistic reasoning offered by the majority in *Canadian Foundation* fails to adequately address the CFCYL's claims of overbreadth;[70] the majority

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[67] In a pre-*Canadian Foundation* article, Sharon Greene suggests that s. 43 is also overbroad in its description of who may use force by way of correction on a child, which included parents, school teachers and "persons standing in the place of parents." Greene, *supra* note 26 at 309.
[68] In the CFCYL's factum, it is suggested that the Crown is in agreement with these conclusions: "Taking the Crown's case at its highest, experts such as Baumrind and Larzelere only condone non-abusive, minimal physical punishment for children between certain ages. Professor Bala also stated that corporal punishment is "contraindicated for adolescents." Cheryl Milne, *Canadian Foundation for Children, Youth and the Law v. The Attorney General in Right of Canada: Factum of the Appellant*, (2003) [unpublished, archived at http://www.jfcy.org/PDFs/factum.doc] at p. 29 [CFCYL Factum].
[69] *Canadian Foundation, supra* note 7**Error! Bookmark not defined.** at para. 46.
[70] Peter Hogg writes, "The Supreme Court of Canada acknowledged that the evidence bore out these claims [that s. 43 fails to distinguish children under the age of two and over the age of twelve years], but answered them with a syllogism. Because the law "does not permit force that

should have found a more persuasive manner of dealing with the challenge. As one critic writes,

> A cynic might conclude, from reading the *Canadian Foundation* case, that all that government need to do to ensure the constitutionality of legislation that would otherwise infringe a person's right to security of the person would be to throw in the word "reasonable."[71]

Overbreadth is a difficult concept both practically and theoretically, due in part to the large amount of discretion the doctrine offers the court.[72] The Supreme Court's application of the overbreadth principle has been inconsistent in the past,[73] so it is unsurprising that their analysis of overbreadth in *Canadian Foundation* is unconvincing. Section 43 certainly appears to be overbroad in terms of the scope of persons to whom it applies since it fails to distinguish between children under the age of two, children over the age of twelve, and

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cannot correct or is unreasonable", and because all examples of overbreadth would involve applications where force could not correct or would be unreasonable, therefore the law could not be overbroad." Peter W. Hogg, *Constitutional Law of Canada,* looseleaf (Scarborough: Thomson Canada Limited, 2007) at para. 47.15.

[71] Cheryl Milne, "The Limits of Children's Rights under Section 7 of the Charter: Life, No Liberty and Minimal Security of the Person" (2005) 17 Nat'l J. Const. L. 199 at 208-209.

[72] The principle against overbreadth holds that a law must not be overly sweeping in accomplishing its objective. However, the objective or purpose of a law is determined by the court, which offers a great deal of discretion to the judge hearing the constitutional challenge as to whether a law is overbroad. Hogg, *supra* note 70 at para. 47.15.

[73] The Supreme Court has wavered in its application of the overbreadth doctrine. After the seminal case of *Heywood, supra* note 65, the Court refused to find that section 13(1)(a) of the Ontario *Environmental Protection Act,* R.S.O. 1980, c. 141 was overbroad by prohibiting the discharge of a smoke into the natural environment in *Canadian Pacific*, *supra* note 29 even though, on a literal reading of its terms, the provision would effectively disallow homeowners from spreading gravel on their icy sidewalks, or discharge smoke in a wilderness area. The next Supreme Court finding of overbreadth was *R. v. Demers*, [2004] 2 S.C.R. 489, in which the Court found that the *Criminal Code* provisions outlining the Review Board procedure for accused persons declared temporarily unfit to stand trial were overbroad because they also captured accused persons who were permanently unfit to stand trial and were no longer dangerous to the public. Legislation has rarely been found to be unconstitutional due to overbreadth at the Supreme Court of Canada. However, a law found to be overbroad cannot be upheld under s. 1 of the *Charter,* since it would fail the 'minimum impairment' part of the s.1 analysis. Hogg, *supra* note 70 at para. 47.15.

children between the ages of two and twelve even though the impact of physical correction is markedly different depending on the age of the child. The provision is also overbroad in the range of conduct it justifies. All types of physical correction that are considered "reasonable" by the criminal justice system are permitted, with the only limit being that the parent has a subjectively corrective purpose at the time the punishment was imposed.

(c) Best Interests of the Child

In *Canadian Foundation,* the CFCYL claimed that section 43 is unconstitutional because it does not conform with the principle of the "best interests of the child." The "best interests of the child" is a legal principle that is recognized by the United Nations *Convention on the Rights of the Child* ("UNCRC") in the following manner: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[74] Prior to *Canadian Foundation,* it appeared as though the Supreme Court of Canada and other Canadian appellate courts considered the best interests of the child principle to be a principle of fundamental justice.[75] In *New Brunswick (Minister of Health) v. G. (J.)* (1999),[76] the Supreme Court of Canada held that a parent must be able to meaningfully participate in

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[74] *Convention on the Rights of the Child,* 20 November 1989, Can. T.S. 1992 No. 3, art. 3 [UNCRC].

[75] It should be noted that most provincial child welfare statutes explicitly require that state actions regarding children be done only in the best interests of the child. For example, see section 2 of the Alberta *Child, Youth and Family Enhancement Act,* R.S.A. 2000, c. C-12. This is also true of the custody provisions in the federally-enacted *Divorce Act,* R.S.C. 1985, c. 3 (2nd Supp.), ss. 16 & 17.

[76] *G.(J.), supra* note 19.

proceedings when the government seeks a judicial order suspending the parent's custody of his/her child if the court is to determine what is in the best interests of the child. Justice Arbour pushed the best interests issue even further in her dissent in *Winnipeg Child and Family Services v. K.L.W.* (2000), when she stated that the best interest of the child must be evaluated in child apprehension proceedings as a constitutional requirement.[77] Finally, in *Quebec (Ministre de la Justice) c. Canada (Ministre de la Justice)* (2003),[78] the Quebec Court of Appeal noted that the best interests of children must be considered in the context of young offender proceedings as a constitutional imperative.

The "best interests of the child" principle failed to receive *Charter* recognition as a principle of fundamental justice in *Canadian Foundation*. The Chief Justice agreed that the "best interests of the child" is an established legal principle, but rejected the proposition that this legal principle meets the standard of being a principle of fundamental justice.[79] The majority found that the best interests of the child is not fundamental to our societal notion of justice since a child's best interests may be outweighed by other concerns.[80] To buttress this finding, the Chief Justice quoted the UNCRC, which states the best interest of the

[77] *Winnipeg Child and Family Services v. K.L.W.* [2000] 2 S.C.R. 519.
[78] (2003), 10 C.R. (6th) 281 (Que. C.A.).
[79] Chief Justice McLachlin acknowledges the prevalence of the best interests of the child principle in Canadian legislation in *Canadian Foundation, supra* note 7 at para. 9: "Family law statutes are saturated with references to the "best interests of the child" as a legal principle of paramount importance…".
[80] The Chief Justice notes (as an example) that a parent may be put in jail even if it is not in their child's best interests: *Ibid.* at para 10.

child is _a_ primary consideration when it comes to decisions regarding children and not _the_ primary consideration.[81]

Canadian Foundation marks the first time that the Supreme Court suggested that a legal principle must take precedence over all other concerns in order to be a principle of fundamental justice under section 7.[82] It is a difficult proposition to maintain, as it would lead to the illogical conclusion that there could be only a few principles of fundamental justice that are very narrow so as not to be subordinated to each other.[83] In a criticism of this proposition, Mark Carter writes, "…rather than being expected to "trump" all other principles, the principles of fundamental justice are in a necessary and on-going tension with the many competing standards that comprise the complex character of the concept of justice."[84]

Furthermore, as noted by Sanjeev Anand in a case comment on *Canadian Foundation,* the proposition that a principle of fundamental justice must outweigh all other concerns negates the utility of undertaking a section 1 analysis of section 7 breaches, which has been the convention of the Court in the past.[85] Indeed, the

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[81] UNCRC, *supra* note 74 at Art. 3(1).
[82] Sykes, *supra* note 32 at 163.
[83] Mark Carter, "The Children's Trilogy: *Canadian Foundation for Children…*, *D.B.*, *C.A.* and the Relationship Between the "Best Interests of the Child" Principle and the "Principles of Fundamental Justice" in S. Anand, ed., *Paradoxes in Children's Rights: Essays in Honor of Professor Nicholas Bala* (2009), [forthcoming in 2010].
[84] *Ibid.*
[85] Sanjeev Anand, "Reasonable Chastisement: A Critique of the Supreme Court's Decision in the 'Spanking' Case" (2004) 41 Alta. L. Rev. 871 at 875.

Court has held that there may be certain circumstances in which a section 7 breach can be justified under section 1.[86]

The majority also declined to recognize the best interests of the child principle as a principle of fundamental justice under section 7 because the principle is too vague to be applied with enough precision to create a justiciable standard.[87] The Chief Justice writes that "reasonable people may well disagree about the result that [the best interests of the child principle's] application will yield."[88] While it may be true that the best interests of the child principle is somewhat nebulous, it has been suggested that vagueness, which is a recognized principle of fundamental justice by the Supreme Court, is an equally or more ambiguous standard.[89]

Canadian Foundation resulted in the categorical elimination of the best interests of the child principle as a principle of fundamental justice.[90] Mark

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[86] Justice Lamer (as he then was) wrote in *obiter* that a breach of s. 7 can be justified in exceptional situations such as natural disasters, war, epidemics and "the like": *Motor Vehicle Act Reference, supra* note 16 at para. 85. Minority opinions of the SCC have also justified s. 7 breaches under s. 1. Ironically, some of the minority decisions upholding s. 7 breaches under s. 1 were written by Chief Justice McLachlin. See, for example, *R. v. Hess,* [1990] 2 S.C.R. 906, in which the Chief Justice upholds a breach of s. 7 under s. 1 for the offence of a man having sexual intercourse with a female under the age of 14 years who is not his wife. The Chief Justice found that, while the offence does not require sufficient *mens rea* to be constitutional, it is justified by the objective of protecting female children from the harm of premature sexual intercourse pursuant to s. 1. See also *R. v. Penno*, [1990] 2 S.C.R. 865, in which Chief Justice Lamer (in dissent) justifies an infringement of s. 7 under s. 1 in cases of denying a defence of intoxication to the offence of driving while impaired by alcohol.

[87] *Canadian Foundation, supra* note 7 at para. 11.

[88] *Ibid.*

[89] Anand, *supra* note 85 at 875.

[90] Interestingly, it was probably unnecessary for the majority to find that the best interests of the child principle fails to meet the standard of a principle of fundamental justice, as it appears that the majority concludes that the continued usage of section 43 is in a child's best interests when the provision is properly construed and applied.

Carter has argued that the best interests of the child principle has only been removed from the criminal context as a principle of fundamental justice, but that the principle can still apply in other contexts such as child welfare proceedings and young offender proceedings.[91] This conclusion is unlikely, as it is difficult to conceptualize how the best interests of the child principle could reach the threshold of being a principle of fundamental justice in one context, but not another. It is an interesting concept to consider, but has yet to receive jurisprudential support.

(d) Procedural Rights

Independent procedural rights for alleged victims of criminal offences had not been recognized as a principle of fundamental justice in Canada prior to *Canadian Foundation*. By putting this issue forward, the CFCYL argued that the Supreme Court should accept that procedural rights for alleged victims, particularly child victims, is a principle of fundamental justice. This argument was not accepted in the majority decision, nor was it addressed in any of the dissenting judgments. McLachlin C.J.C. did away with the issue in short order, holding that Canadian jurisprudence has yet to recognize procedural rights for alleged victims.[92] She further wrote that even if child complainants did possess independent procedural rights, the interests of the child are adequately represented

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[91] In Carter, *supra* note 83.
[92] *Canadian Foundation, supra* note 7 at para. 6. While recognizing procedural rights for alleged victims as a principle of fundamental justice would be a new development for the Court, prior Supreme Court jurisprudence provides a basis for this claim. In *RJR-MacDonald Inc. v. Canada (Attorney-General),* [1995] 3 S.C.R. 199 at para. 135, McLachlin C.J.C. commented that "the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential."

by the Crown at trial.[93] According to the majority decision, there was no reason to conclude that separate representation for children in a section 43 context would be "either necessary or useful."[94]

The majority's reasoning pertaining to why children and other complainants do not receive constitutionally protected procedural rights is unpersuasive. Chief Justice McLachlin offered two reasons: First, she held that Canadian *Charter* jurisprudence does not recognize procedural rights for alleged victims. As shown below, there are a plethora of statutory rights provided to victims of crime and complainants in criminal proceedings, even within the *Criminal Code*. Statutory rights are not the same as *Charter* rights, but they can inform the court as to current social consensus, which can in turn inform the recognition of previously unarticulated principles of fundamental justice. Second, the majority held that the Crown could sufficiently satisfy any procedural rights children may hold in any event. This is erroneous, as the role of the Crown is not to act on behalf of an alleged victim, but on behalf of the public. The interests of society and the interests of a child complainant will not necessarily coincide.

Victims of crime and complainants in criminal proceedings receive several statutory rights in Canada. The *Criminal Code* mandates that witnesses who are disabled or under the age of eighteen have the opportunity to testify outside the

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[93] The Chief Justice wrote, "The Crown's decision to prosecute and its conduct of the prosecution will necessarily reflect society's concern for the physical and mental security of the child." *Canadian Foundation, supra* note 7 at para. 6.
[94] *Ibid.*

courtroom or behind a screen unless the judge is of the opinion that the order would interfere with the proper administration of justice.[95] The *Code* further provides that self-represented accused persons are not allowed to cross-examine child witnesses unless the accused person can convince the judge that it is required for the proper administration of justice; when an accused person is not conducting the cross-examination of a child witness, the court must appoint counsel for the purpose of conducting that cross-examination.[96] These provisions are intended to prevent re-victimization of alleged victims by the accused person in court. Victims have the right to read or present their 'victim impact statements'[97] and courts are required to consider the victim impact statements in sentencing an offender.[98] Finally, provinces across the country have enacted legislation regulating and enforcing the rights of victims.[99] These statutes offer various rights to victims of crime, some of which are procedural, from providing financial assistance to a victim of crime,[100] to the right to provide views on the

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[95] *Criminal Code*, *supra* note 5 at s. 486.2(1). Section 486.2(2) of the *Code* allows for any witness to testify outside the court room or behind a screen if the judge is of the opinion that the order is necessary to obtain a full and candid account from the witness.
[96] *Ibid.* at s. 486.3(1). Section 486.3(2) of the *Code* allows for any witness to be cross-examined by outside counsel instead of a self-represented accused person if the judge is of the opinion that such an order is necessary to obtain a full and candid account from the witness.
[97] *Ibid.* at s. 722(2.1).
[98] *Ibid.* at s. 722.(1).
[99] See the Nova Scotia *Victims' Rights and Services Act,* S.N.S, 1989, c. 14, the Alberta *Victims of Crime Act,* R.S.A. 2000, c. V-3, the New Brunswick *Victims Services Act*, S.N.B. 1987, c. V-2.1, the Northwest Territories' *Victims of Crime Act,* R.S.N.W.T. 1988, c. 9 (Supp.), the British Columbia *Victims of Crime Act,* R.S.B.C. 1996, c. 478, the Nunavut *Victims of Crime Act,* R.S.N.W.T.(Nu.) 1988, c. 9 (Supp.), Prince Edward Island's *Victims of Crime Act,* R.S.P.E.I. 1988, c. V-3.2, the Saskatchewan *Victims of Crime Act,* S.S. 1995, c. V-6.011, the Manitoba *Victims Bill of Rights,* C.C.S.M. c. V-55, the Quebec *Act Respecting Assistance for Victims of Crime,* R.S.Q. c. A-13.2.
[100] *Victims of Crime Act,* R.S.P.E.I. 1988, c. V-3.2, s. 11.

prosecution of an accused person,[101] to requiring that the Attorney-General provide victims with legal advice and representation.[102]

The fact that victims rights have yet to receive *Charter* recognition should not be determinative of whether they exist as principles of fundamental justice, since the Supreme Court has stated in the past that, "Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves."[103] The Supreme Court could create victim's rights under the *Charter* on that basis. In his article "Victims' Rights and the Charter," Kent Roach writes that the *Charter* was enacted at a time when victim's rights received little recognition. He goes on to hypothesize that the *Charter* may well have included rights for victims had it been enacted ten or twenty years later.[104] The statutory provisions protecting the rights of victims of crime and complainants of crime may be suggestive of a growing societal consensus of the importance of these rights. Since a principle of fundamental justice requires that the principle be fundamental to our societal notion of the fair operation of justice, the growing societal

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[101] *Victims Bill of Rights,* C.C.S.M. c. V-55, s.14.
[102] *Victims of Crime Act,* R.S.B.C. 1996, c. 478, s. 3.
[103] *Motor Vehicle Act Reference, supra* note 16 at para. 66. This can be compared to the Supreme Court's approach in *R. v. Prosper,* [1994] 2 S.C.R. 236, in which the court placed a great deal of emphasis on the original intent of the drafters of the *Charter.*
[104] Kent Roach, "Victims' Rights and the Charter," (2005) 49 Crim. L.Q. 474 at 474.

consensus as to the importance of victim's rights may lend itself to the creation of a new principle of fundamental justice. [105]

Currently, there are some recognized *Charter* rights for victims of crime, or complainants in criminal trials. The primary significance of victims of crime under the *Charter* arises during a justification analysis under section 1 of the *Charter,*[106] particularly in situations in which the Crown is attempting to justify a limitation to the *Charter*-protected rights of an accused person.[107] In *R. v. Seaboyer* (1991), the Supreme Court held that it is important to "take all measures possible to ease the plight of the witness, [but] the constitutional right to a fair trial must take precedence in the case of conflict."[108] Complainants have standing to intervene in a criminal trial in situations that directly impact their rights. For example, an alleged sexual assault victim can argue against the disclosure of his/her therapeutic records insofar as it infringes on his/her section 8 *Charter* right to be secure against unreasonable search or seizure.[109] Standing has also been granted to family members of an alleged murder victim to argue for a publication

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[105] In *Rodriguez, supra* note 22 the Supreme Court considered the societal consensus on assisted suicide in concluding that the right to die was not a principle of fundamental justice.

[106] When the rights of an accused person are in conflict with the rights of a complainant, the court may be deferential to Parliament's judgment as to the appropriate balance between those rights. Kent Roach notes that courts can be more deferential to governmental action under s. 1 in cases involving victims' rights and interests. *Ibid.* at 482. For more on the idea of "dialogue" between the Supreme Court and Parliament, see Hogg & Bushell, *supra* note 49, and Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wrights, "*Charter* Dialogue Revisited- Or "Much Ado About Metaphors"" (2007) 45 Osgoode Hall L.J. 1.

[107] The rights of racial minorities, sexual assault victims, women, and children have been considered when the Court has been called upon to rule whether to limit an accused person's right to freedom of expression. See *R. v. Keegsrta,* [1990] 3 S.C.R. 697 [*Keegstra*], *Canadian Newspapers Co. v. Canada (Attorney General), supra* note 7, *R. v. Butler*, [1992] 1 S.C.R. 452, and *R. v. Sharpe,* [2001] 1 S.C.R. 45 [*Sharpe*] . See also Roach, *supra* note 104 at 481.

[108] *Seaboyer, supra* note 48 at para. 62.

[109] *R. v. O'Connor,* [1995] 4 S.C.R. 411; *R. v. Mills,* [1999] 3 S.C.R. 668 (S.C.C.).

ban.[110] However, the *Charter* does not provide alleged victims with full standing in a criminal trial.[111] Roach concludes, "The existing Charter seems better designed to provide some protection when the state invades witnesses' privacy and mental integrity in a situation where evidence relating to that witness may not be required to ensure a fair trial for the accused"[112] but that, "The extent to which victims' rights have been recognized by the Charter should not be overstated."[113]

The fact that victims of crime and complainants in criminal proceedings receive procedural and substantive rights in Canadian criminal proceedings lends itself to the conclusion that procedural rights for victims and complainants may be a legal principle, which satisfies the first branch of the "principle of fundamental justice test" from *R. v. Malmo-Levine*. Statutory provisions can be indicative of standing social consensus of particular issues.[114] The Chief Justice used the incorporation of the best interest of the child principle into domestic and international law as part of her determination that it was a legal principle; rights for victims are also found in multiple Canadian statutes, if not also under the *Charter*.[115] Where victims' procedural rights would fall on the second and third branches of the test is uncertain: one might anticipate that there is a substantial social consensus that procedural rights of victims and complainants are fundamental to our societal notion of justice, but it is doubtful that the procedural

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[110] *French Estate v. Ontario (Attorney General),* 1996 CanLII 8289 (Ont. S.C.).
[111] Roach, *supra* note 104 at 481.
[112] *Ibid.* at 482.
[113] *Ibid.*
[114] *Rodriguez, supra* note 22.
[115] *Canadian Foundation, supra* note 7 at para. 9.

rights of victims and/or complainants can be identified with enough clarity to create a manageable standard for deprivations of life, liberty or security of the person at the present time.

However, McLachlin C.J.C. stated that the Crown would adequately represent a child complainant's procedural rights if they do, in fact, hold such rights. Her reasoning for such a statement is faulty. She wrote, "The child's interests are represented at trial by the Crown. The Crown's decision to prosecute and its conduct of the prosecution will necessarily reflect society's concern for the physical and mental security of the child."[116] This is incorrect. The Crown's decision to prosecute is based on the public interest and the existence of a reasonable likelihood of conviction.[117] While the views and interests of the complainant may play an important role in the conduct of a prosecution, they are not determinative. It is erroneous to assume that the interests of a child complainant are always consistent with the discretion exercised by the Crown. Katie Sykes notes that independent counsel for children could provide "valuable

[116] *Ibid.* at para. 6.

[117] Michel Proulx and David Layton consider the proper role of the Crown in criminal proceedings in *Ethics and Canadian Criminal Law*, (Toronto: Irwin Law Inc., 2001). At page 640, they write that the role of the Crown is to act in the furtherance of justice and not for a particular party. The Supreme Court has also written on the role of the Crown in criminal proceedings, most notably in *Boucher v. The Queen,* [1955] S.C.R. 16 at 24 where Justice Rand writes,

> The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

See also *R. v. Power*, [1994] 1 S.C.R. 601 and *R. v. Cook*, [1997] 1 S.C.R. 1113.

insights" for trial judges in assessing the new guidelines established in *Canadian Foundation* for "reasonable correction" in individual circumstances.[118]

(e) Conclusion

The majority should have found that section 43 breaches section 7 and undertaken a section 1 analysis. It is clear (and undisputed) that section 43 violates children's security of the person by infringing upon their bodily integrity. There were at least two clear principles of fundamental justice upon which this breach could have been founded: the best interests of the child principle and the principle of overbreadth. It is doubtful that child victims have constitutionally protected procedural rights, but this point required further consideration than the majority provided. Unconstitutional vagueness is a difficult standard to meet, but it is certainly arguable that section 43 infringes upon this established principle of fundamental justice as well. While a section 1 analysis may have resulted in the justification of the continued use of section 43 based on the policy concerns outlined by the Chief Justice in her section 15 analysis, it should have played a role in the outcome of *Canadian Foundation.* The lack of section 1 analysis by the majority detracts from the final decision. In the alternative, the Chief Justice could have avoided the criticism regarding her activist approach to interpreting section 43 by simply finding section 43 to be unconstitutional in its current form and using the remedy of 'reading down' to legitimize the end result.

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[118] Sykes, *supra* note 32 at 161.

III. SECTION 12

Section 12 of the *Charter* provides protection against cruel and unusual treatment or punishment. The Supreme Court of Canada has established that to receive protection under section 12, an applicant must demonstrate: (1) the state has imposed punishment or treatment upon him/her; and (2) the treatment or punishment is cruel and unusual.[119]

A successful section 12 claimant must demonstrate a sufficient nexus between the state and the imposition of the treatment or punishment.[120] The CFCYL argued that section 43 subjects children to cruel and unusual punishment at the hands of their parents and teachers. They claimed the state was responsible for the infliction of corrective force by parents "[b]y exempting children from protection from assault, and saying it is *right* to hit children" [emphasis in original].[121] The majority rejected the argument that corrective force inflicted by parents may constitute treatment by the state.[122] Codified justification of parental use of corrective force is not properly defined as treatment imposed by the state. In *Rodriguez v. British Columbia (Attorney General)* (1993), a woman suffering from Lou Gehrig's disease challenged the constitutionality of section 241(b) of the *Criminal Code,* which prohibits assisted suicide, as being a form of cruel and unusual punishment. In that case, the Supreme Court held, "…to hold that the

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[119] *Rodriguez, supra* note 22.
[120] The *Charter* only applies to state action by virtue of s. 32(1) of the *Charter,* which reads: This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and (b) to the legislature and governments of each province in respect of all matters within the authority of the legislature of each province.
[121] CFCYL Factum, *supra* note 68 at para. 85.
[122] *Canadian Foundation, supra* note 7 at para. 48.

criminal prohibition in section 241(b), without the appellant being in any way subject to the state administrative or justice system, falls within the bounds of section 12 stretches the ordinary meaning of being "subjected to ... treatment" by the state."[123]

Section 43 differs from section 241(b) in that section 43 offers a justification for specific conduct and section 241(b) prohibited a particular action. Even so, it is still unlikely that a court would find that justification of the exercise of reasonable corrective force by a parent constitutes "treatment" by the state since children are not in any way subject to the state administrative or justice system beyond the fact that the provisions of the *Criminal Code* affect their rights. Cases in which the state is held liable for section 12 infringements exclusively involve situations in which "the individual is in some way within the special administrative control of the state."[124]

Corrective force imposed by teachers, on the other hand, involves a clear state nexus since many teachers are employed by the state. Indeed, it would be difficult to find that teachers are not state actors when they administer physical punishment on their students. It was conceded by the Chief Justice in *Canadian Foundation* that teachers "may be employed by the state,"[125] but she declined to engage in that line of analysis, opting instead to turn immediately to the question of whether the conduct is "cruel and unusual." *Canadian Foundation* also failed to conclusively define corrective force as a type of "treatment" or "punishment."

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[123] *Rodriguez, supra* note 22 at para. 67.
[124] *Ibid.*
[125] *Canadian Foundation, supra* note 7 at para. 48.

The majority accepted that the use of corrective force by teachers raises the question of whether corrective force constitutes “treatment” by the state. Despite this recognition, the majority skirts deciding the issue by turning immediately to an analysis of whether the conduct (be it “treatment” or otherwise) is cruel and unusual such that it infringes section 12.

It is interesting that the majority refused to define the conduct justified under section 43 as a treatment or punishment. One would expect that the administration of corrective force, particularly by state-employed teachers, would clearly fall under the definition of “treatment” as it has been understood in previous jurisprudence. The term “treatment” has been interpreted to have a broader meaning than “punishment.”[126] In *Chiarelli v. Canada (Minister of Employment and Immigration)* (1992), Justice Sopinka wrote, “The *Concise Oxford Dictionary* (1990) defines "treatment" as "a process or manner of behaving towards or dealing with a person or thing...."”.[127] In *Rodriguez,* he added, “There must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute "treatment" under section

[126] In *Soenen v. Director of Edmonton Remand Centre* (1983), 6 C.R.R. 368 (Alta. Q.B.) at p. 239, Justice McDonald wrote, “Moreover, the word "treatment" is a more general word than "punishment", and there is no apparent common denominator between the two which, even if the order of the words were reversed, could call the *ejusdem generis* rule into play.” See also *R. v. Blakeman*, (1988), 48 C.R.R. 222 (Ont. H.C.) and *Howlett v. Karunaratne*, (1988), 64 O.R. (2d) 418, referenced at para. 67 of *Rodriguez, supra* note 22.
[127] *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at para. 31. The court held that while deportation may constitute “treatment” under s. 12, it was not cruel or unusual as per the facts of that case.

12."[128] Certainly, the application of physical force by a state agent against an individual would constitute "treatment" under this broad definition.

A punishment or treatment found to be "cruel and unusual" must meet a high threshold. The Supreme Court of Canada has held on numerous occasions that the treatment or punishment must be "so excessive as to outrage standards of decency"[129] and grossly disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable."[130] The terms "cruel and unusual" are to be considered conjunctively in determining whether a punishment meets the threshold of section 12.[131] In a dissenting judgment in *R. v. Smith* (1987) [*Smith*], McIntyre J. held that a punishment will be cruel and unusual if it meets any of the following three criteria:

> (1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
> (2) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or
> (3) The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.[132]

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[128] *Rodriguez, supra* note 22 at para. 67.
[129] *Miller v. R.*, [1977] 2 S.C.R. 680 at p. 688; *R. v. Smith,* [1987] 1 S.C.R. 1045 at para. 86 [*Smith*]; *R. v. Goltz*, [1991] 3 S.C.R. 485 at 499; *R. v. Wiles*, [2005] 3 S.C.R. 895 at para. 4 [*Wiles*]; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at paras. 95-96; *R. v. Ferguson,* [2008] 1 S.C.R. 96 at para. 14 [*Ferguson*]; *R. v. Luxton,* [1990] 2 S.C.R. 711, *R. v. Lyons*, [1997] 2 S.C.R. 309.
[130] *R. v. Morrisey*, [2000] 2 S.C.R. 90 at para. 26; *Wiles*, *ibid.* at para. 4; *Ferguson, ibid.* at para. 14.
[131] In *Miller. v. R*, *supra* note 129 at 682, the court wrote that the terms should be considered as "interacting expressions colouring each other, so to speak, and hence to be considered together as a compendious expression of a norm."
[132] *Smith, supra* note 129 at para 17. Le Dain J. concurred with McIntyre J.'s statement of the test for cruel and unusual punishment at para. 119. It should be noted that the role of arbitrariness in a s. 12 analysis was not agreed upon: Le Dain and McIntyre JJ. held that arbitrariness plays a role in a s. 12 analysis; Wilson J. held that arbitrariness is "quite fundamental" in determining whether

The CFCYL used this test to argue that section 43 is cruel and unusual based on all three grounds. They argued: (1) assault degrades the dignity of children; (2) corporal punishment of children is unnecessary and harmful; and (3) punishment administered under section 43 is arbitrary since section 43 does not have ascertainable standards.[133]

In *Canadian Foundation,* Chief Justice McLachlin held that the conduct justified by section 43 cannot be "cruel and unusual." Section 43 only exculpates the use of reasonable corrective force, which necessarily implies that the range of permissible conduct does not include behavior that is cruel or unusual to the extent that it would outrage standards of decency and engage section 12 of the *Charter.* According to the Chief Justice, "Conduct cannot be at once both reasonable and an outrage to standards of decency. Corrective force that might rise to the level of "cruel and unusual" remains subject to criminal prosecution."[134] This holding was affirmed by Justice Binnie, who wrote, "...nor would section 43 condone corrective force that is "cruel and unusual"."[135]

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a punishment is cruel and unusual; La Forest J. refused to comment on the role of arbitrariness in s. 12 analysis; and Lamer J. (Dickson C.J.C concurring) simply noted that arbitrariness is a "minimal factor" in determining whether a punishment is cruel and unusual. It should be noted that the precedential value of *Smith* was somewhat undermined in *Goltz, supra* note 129, and some other subsequent section 12 jurisprudence. In *Goltz,* the Supreme Court appeared to take a more case-by-case approach to section 12 challenges, relying on a balance between the individualized factors before the court (the characteristics of the offender and the circumstances of the offence) and the societal factors at play (the necessity of the punishment to achieve a valid penal purpose, sentencing principles engaged, the existence of alternatives, and disproportionality with punishments for other crimes in the same jurisdiction.) See Kent Roach, "Searching for Smith: The Constitutionality of MMS" (2001) 39 Osgoode Hall L.J. 367.

[133] CFCYL Factum, *supra* note 68 at para. 86.

[134] *Ibid.* at para. 49.

[135] *Ibid.* at para. 72.

It has long been recognized that corporal punishment offends section 12 of the *Charter*. In *Smith*, Justice Lamer wrote, "..some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed…".[136] Section 43 was criticized by the Saskatchewan Court of Appeal in *R. v. Dupperon* (1984) for justifying corporal punishment of children even after corporal punishment of criminals had been abolished.[137] There are several international treaties, to which Canada is a signatory, that prohibit the use of corporal punishment against children.[138]

The majority decision in *Canadian Foundation* can only be reconciled with *Smith* is if it is read to distinguish between corporal punishment of children by their parents and corporal punishment of other persons by the state. None of the terms are defined in the decision. However, at paragraph 46 of *Canadian Foundation,* the Chief Justice writes, "There may be instances in which a parent or school teacher reasonably uses corrective force to restrain or remove an adolescent from a particular situation, falling short of corporal punishment."[139] From this quote, it can be argued that, according to the majority, corporal punishment of children is a (more excessive) species of corrective force. In other

[136] *Smith, supra* note 129 at para. 89.
[137] *R. v. Dupperon* (1984), 43 C.R. (3d) 70 (Sask. C.A.).
[138] The Chief Justice provides two examples of treaties to which Canada is a signatory that prohibit the use of violence, cruelty, or degrading treatment against children in *Canadian Foundation, supra* note 7 at paras. 32-34: the UNCRC, *supra* note 74 and the *International Covenant on Civil and Political Rights, 1966,* C.T.S. 1976/47; 999 U.N.T.S. 171.
[139] *Canadian Foundation, supra* note 7 at para. 46.

words, corrective force is an umbrella term that embraces corrective restraint (the type of force teachers and parents of teenagers are justified in using) and corporal punishment (the type of force a parent is justified in using on children between the ages of two and twelve.)

It is unlikely that section 43 meets the standard of "cruel and unusual punishment" to infringe section 12 of the *Charter,* particularly in its application to parents. The majority was correct in noting that section 12 cannot apply to section 43 as it relates to the use of corrective force by parents since the state is not sufficiently involved to warrant *Charter* analysis. *Canadian Foundation* limits the application of section 43 to teachers in situations when it is required to remove children from classrooms or to secure compliance with instructions in appropriate circumstances;[140] this limited application is not so outrageous as to violate our standards of decency and necessitate a finding of a section 12 breach. However, this analysis depends upon the definition of "corrective force" being mutually exclusive from "corporal punishment." The use of corporal punishment against anyone, particularly children, cannot withstand section 12 scrutiny when one considers prior holdings of the Supreme Court of Canada in conjunction with Canada's international obligations. It is unlikely that any infringement of section 12 could be justified under section 1; as stated by Peter Hogg, "[Section 12] may be an absolute right. Perhaps it is the only one."[141]

[140] *Ibid.* at para. 38.
[141] Hogg, *supra* note 70 at para 38.14(f).

IV. SECTION 15

Section 15(1) of the *Charter* reads:

> **15 (1)** Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Equality jurisprudence under the *Charter* has undergone a remarkable evolution. Originally, courts used a 'similarly situated' test, under which a claimant could prove an infringement of his/her equality rights by demonstrating that a law discriminated against a claimant when compared to others who were in the same situation as the claimant.[142] The Supreme Court of Canada did away with this form of analysis in *Andrews v. Law Society of British Columbia* (1989), noting the test to be deficient in that it could be used to justify discrimination against vulnerable groups.[143] In *Andrews,* Justice McIntyre held for the majority that the appropriate method for determining discrimination was first to determine whether the claimant possessed one of the qualities listed under section 15 or an analogous quality, and then to decide whether the law created a distinction by imposing a burden or denying a benefit to the claimant based on that quality.[144]

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[142] For a discussion of the "similarly situated test" see Hogg, *supra* note 70 at para. 55.6(d).
[143] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*].
[144] *Ibid.*

The *Andrews* test was modified in *Law v. Canada* (1999).[145] Writing for a unanimous court, Justice Iacobucci outlined a new analysis to be used for section 15 claims. Pursuant to *Law,* a section 15 claimant must demonstrate:

> (1) A law draws a distinction between the claimant and others or imposes substantively differential treatment between the claimant and others;
> (2) The differential treatment is based on an enumerated or analogous ground;[146]
> (3) The law has a purpose or effect that is substantively discriminatory in that it violates the claimant's human dignity.[147]

Justice Iacobucci suggested four sub-factors that may be considered in determining whether the human dignity of a claimant has been infringed [the "human dignity test"]:

> (a) The existence of pre-existing disadvantages;
> (b) Any correspondence between the distinction and the claimant's characteristics or circumstances;
> (c) The existence of ameliorative purposes or effects on other groups;
> (d) The nature of the interest affected.[148]

The Supreme Court of Canada recently re-examined Justice Iacobucci's human dignity test in *R. v. Kapp* (2008) [*Kapp*].[149] For the majority, Chief Justice McLachlin and Justice Abella acknowledged that, "…human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors,

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[145] *Law v. Canada,* [1999] 1 S.C.R. 497 [*Law*].
[146] The enumerated grounds are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Some of the analogous grounds found by the SCC include citizenship (*Andrews, supra* note 143), sexual orientation (*Vriend v. Alberta,* [1998] 1 S.C.R. 493 [*Vriend*]), and possibly marital status (*Miron v. Trudel,* [1995] 2 S.C.R. 418).
[147] *Law, supra* note 145.
[148] *Lovelace v. Ontario,* [2000] 1 S.C.R. 950 [*Lovelace*]; *Law, ibid.*.
[149] [2008] 2 S.C.R. 283 [*Kapp*].

cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be."[150] The majority in *Kapp* re-framed the *Law* analysis for determining whether an impugned law has a discriminatory effect on a claimant. In *Kapp,* the Court essentially married the *Andrews* analysis to the *Law* analysis in the following way:

> The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)[151]

The Court concluded that Justice Iacobucci's human dignity factors should not be used as "legistlative dispositions,"[152] but instead as a method of determining whether a law has a disciminatory impact on a claimaint based on perpetuating disadvantage and stereotyping.[153] Ultimately, the impact of *Kapp* on section 15 *Charter* jurisprudence has not been particularly dramatic since it failed to make any substantive changes to the existing methodology under section 15.

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[150] *Ibid.* at para. 22.
[151] *Ibid.* at para. 23.
[152] *Ibid.* at para. 24
[153] *Ibid.*

In *Canadian Foundation,* the CFCYL argued that section 43 clearly and seriously violates the equality rights of children.[154] It was submitted that the provision denies children the protection of the criminal law by justifying the use of otherwise criminal force against the child when that force is administered by a parent in a manner that is both reasonable and corrective. The CFCYL asserted that children are denied equal protection of the law based solely on their age, which is an enumerated ground under section 15(1) of the *Charter.* It was further argued that section 43 has a substantively discriminatory effect that violates the human dignity of children since it justifies the violation of children's physical security in a fashion that is likely humiliating and inherently disrespectful.[155]

Members of the Supreme Court came to three different conclusions with respect to whether section 43 unjustifiably infringed section 15 of the *Charter.* The majority held that section 43 does not infringe the equality rights of children in *Canadian Foundation.* The majority decision accepted that section 43 is a law that distinguishes between children and adults on the basis of age, satisfying the first two components of the *Law* equality analysis. However, the Chief Justice found that section 43 did not have the effect of violating the essential human dignity of children based on the second factor of Justice Iacobucci's human dignity test. She held that section 43 is "firmly grounded" in the needs and circumstances of children,[156] meaning that the distinction made between children and adults corresponds to children's characteristics and circumstances. Binnie

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[154] CFCYL Factum, *supra* note 68 at para. 55.
[155] *Ibid.* at para 66.
[156] *Canadian Foundation, supra* note 7 at para. 68.

and Deschamps JJ. both dissented, holding that section 43 infringes the equality rights of children. Justice Binnie ultimately found that the infringement of section 15 could be justified under section 1 of the *Charter* insofar as it applied to parents, but not in its application to school teachers. Justice Deschamps came to the conclusion that the infringement cannot be justified in its application to parents or school teachers under section 1.

The first two criteria of the *Law* equality analysis were easily satisfied by the CFCYL. McLachlin, Binnie and Deschamps JJ. all agreed that section 43 distinguishes between children and others by removing the protection of the criminal law from their body of rights based solely upon their age, which is an enumerated ground under section 15(1) of the *Charter*.[157] The respondent Attorney-General conceded this point,[158] but also argued (unsuccessfully) that the primary distinction created by section 43 is based on the relationship between the parent and child.[159]

Age is unique when analyzing equality rights. In *McKinney v. University of Guelph* (1990) [*McKinney*],[160] La Forest J. engaged in a detailed discussion of age-based discrimination. *McKinney* was a case involving a challenge to a

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[157] Chief Justice McLachlin notes that "Section 43 makes a distinction on the basis of age, which s. 15(1) lists as a prohibited ground of discrimination." *Ibid.* at para. 52. Justice Binnie writes, "it cannot be disputed that s. 43 intentionally withholds from children the benefit available to everyone else (i.e., adults) of the protection of the assault provisions of the *Criminal Code* in the circumstances therein contemplated, and that the only reason for this withholding is that they are children." *Ibid.* at para. 90. Finally, Justice Deschamps notes, "Clearly, s. 43 on its face, as well as in its result, creates a distinction between children and others." *Ibid.* at para 221.
[158] *Ibid.* at para. 88.
[159] *Ibid.* at para. 222.
[160] [1990] 3 S.C.R. 229 [*McKinney*].

mandatory retirement scheme. The Supreme Court acknowledged that mandatory retirement distinguishes between groups based upon age, but that there can be meritorious, or at least justifiable, reasoning for this action. Age, according to Justice La Forest, is not the same as other enumerated grounds in several ways. Significantly, there may be a correlation between age and ability, which is not the case for the other enumerated grounds of discrimination such as race, religion or sex.[161] Age is also a condition that everyone experiences at some point during their life; everyone begins young and expects to survive to be elderly.[162] Finally, many laws distinguish between people based on age: voting, driving, drinking, contracting and marrying are some examples. While it is true that people generally attain personal capacity for these activities at different times, the use of age as a qualifier allows for the state to avoid the responsibility and burden of individualized testing.[163] Determination of these age-based limits is the responsibility of the legislature and the courts must use deference when analyzing these limits.[164]

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[161] At paragraph 88 in *McKinney, ibid.,* Justice La Forest writes, "To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability…"

[162] *Ibid.*

[163] Hogg, *supra* note 70 at para. 55.18.

[164] In *McKinney*, *supra* note 160 at para. 73, the Court writes, "It may be argued that in these days, 65 is too young an age for mandatory retirement. At best, however, this is an exercise in "line drawing", and in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*], at pp. 781-82, 800-801, this Court made it clear that this was an exercise in which courts should not lightly attempt to second-guess the legislature."

(a) The Human Dignity Test [165]

The protection of an essential core of human dignity underlies many, if not all, *Charter* protected rights.[166] Denise Reaume writes that the underlying moral conception of human dignity requires that all human beings are treated as though they possess "intrinsic, incomparable and indelible worth," in and of themselves, simply for being a human being.[167] Nowhere in the *Charter* is the idea of human dignity so important, however, than under section 15.[168] Equality rights jurisprudence has established that a section 15 claimant must demonstrate a violation of his/her essential human dignity to succeed in proving a breach of his/her equality rights.

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[165] The human dignity component to section 15 equality challenges has been widely criticized since its creation and initial use in *Law, supra* note 145. Many equality challenges subsequent to *Law* have failed based upon the inability of the applicants to establish a violation of essential dignity. See e.g. *Nova Scotia v. Walsh,* [2002] 4 S.C.R. 325 and *Gosselin v. Quebec,* [2002] 4 S.C.R. 429 [*Gosselin*]. In "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299 at 312-313, Donna Greschner calls upon the Supreme Court to reconsider the human dignity component to section 15, noting it to be "too vague, general, malleable and emotive," providing "precious little guidance." This is echoed by Christopher D. Bredt and Adam M. Dodek in "Breaking the *Law's* Grip on Equality: A New Paradigm for Section 15" (2003) 20 Sup. Ct. L. Rev. (2d) 33 at 47, where they write that "Human dignity is a hopelessly abstract concept." Peter Hogg has criticized the human dignity test for being "vague, confusing and burdensome to equality claimants" in his seminal text, *Constitutional Law of Canada*, *supra* note 70 at para. 55.9(b). In his article "What is Equality? The Winding Course of Judicial Interpretation" (2005) 29 Sup.Ct. L. Rev. (2d) 39, Hogg notes that the Supreme Court Justices will often disagree with lower courts and even each other as to whether a claimant's essential human dignity has been violated by an impugned law. In "The Supreme Court's New Equality Test: A Critique," (2000) 8 Canada Watch 16 at 16, Christopher Bredt and Ira Nishisato criticize the human dignity test on two grounds: (1) it relies heavily on context, is overly complex, and is therefore difficult for trial judges to apply; and (2) it "eviscerates" section 1 of the *Charter*. Several academics have suggested that the human dignity test be removed from *Charter* discourse altogether due to its inherent inconsistencies. See also R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 Sask. L. Rev. 1 at 25.

[166] Fyfe, *ibid.* See also *Kapp, supra* note 149 at para. 22 per McLachlin C.J.C., where she writes, "In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity."

[167] Denise G. Reaume, "Discrimination and Dignity" (2003) 64 La. L. Rev. 645 at 675.

[168] Joan Small writes in her case comment, *"Canadian Foundation for Children Youth and the Law v. Canada (Attorney General)*: The Supreme Court of Canada Gives Children's Human Rights a Hiding" (2004) 3 J. L. & Equal. 209 at 222, "Canada has adopted a value driven equality jurisprudence, based on the concept of human dignity," which "concerns self-respect and self-worth, physical and psychological integrity and empowerment."

A court considering whether a law violates the human dignity of an equality claimant must do so from the perspective of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant."[169] An equality analysis is objective in that it is taken from the point of view of a reasonable person, but subjective in that the reasonable person is put in the same position as the claimant. In *Canadian Foundation,* Chief Justice McLachlin held that considering the section 43 equality challenge from the vantage point of a "reasonable, fully apprised preschool-aged child" was a "fiction."[170] She did not comment on the perspective of a school-aged or teenaged child. Therefore, the perspective adopted by the majority was that of a reasonable person acting on behalf of a child who seriously considers the child's views and developmental needs. In the same paragraph, the Chief Justice wrote, "…a court assessing an equality claim involving children must do its best to take into account the subjective viewpoint of the child, which will often include a sense of relative disempowerment and vulnerability."[171] Although she took special note of the unique circumstances of children in discussing the appropriate perspective from which to view an equality challenge on their behalf, she failed to actually consider the view of the child at any point of her section 15 analysis. Justice Deschamps parted with the perspective adopted by the majority, writing that the appropriate

[169] *Law*, *supra* note 145 at para. 60.
[170] *Canadian Foundation, supra* note 7 at para. 53.
[171] *Ibid.*

perspective from which to consider a violation of human dignity is simply that "of a reasonable person in the place of the claimant."[172]

The perspective adopted by the majority for analyzing equality claims of children is, in many ways, bizarre. Sanjeev Anand makes the salient point that there was no reason the Court could not take the view of a reasonable child, since every member of the Court was a child at one point in time.[173] Certainly, if the Supreme Court of Canada is able to consider an equality challenge from the perspective of a reasonable homosexual man,[174] a reasonable widow,[175] or a reasonable First Nations female,[176] it must be able to adopt the vantage point of a reasonable child. Discrimination based on age is the only type of discrimination that every member of the Supreme Court of Canada has encountered in his/her lifetime. It also may encompass the only form of discrimination that most judges of the Supreme Court have faced. Addressing the question of perspective, Cheryl Milne writes, "There is indeed some distance to go before children's equality rights can be recognized if we need to first convince the court that a child is a person."[177]

After applying the human dignity test from the perspective of a reasonable person acting on behalf of a child who seriously considers the child's views and

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[172] *Ibid.* at para. 223. Justice Binnie does not address the perspective to be used when assessing human dignity violations of children.
[173] Anand, *supra* note 85 at 877.
[174] *Vriend, supra* note 146.
[175] *Law, supra* note 145.
[176] *Lovelace, supra* note 148 at 106.
[177] Milne, *supra* note 71 at 200.

developmental needs, the majority dismissed the CFCYL's claim that section 43 infringes on the equality rights of children. The majority held that section 43 does not have the effect of violating the essential human dignity of children. In terms of the first factor to be considered in the *Law* human dignity test, it was acknowledged by the Chief Justice that children suffer a pre-existing disadvantage and are a vulnerable group in society.[178] The majority then considered the second factor of the *Law* human dignity test, and found that the use of reasonable force in a corrective context did correspond to the developmental needs of children. The third factor of the test, the potentially ameliorative effect of the provision, was not raised and therefore did not receive analysis. Finally, concerning the fourth factor, the majority held that the physical integrity of children is a "profound interest" that is placed in jeopardy by the continued usage of section 43.[179] In the end, the majority held that section 43 does not have a discriminatory effect on children. While the provision treats children and adults differently based solely on their age, equal treatment before and under the law is not synonymous with identical treatment.[180] According to the majority, section 43 is in line with the rights of children since it "does not devalue or discriminate against children, but responds to the reality of their lives by addressing their need for safety and security in an age-appropriate manner."[181]

[178] *Canadian Foundation, supra* note 7 at para. 56.
[179] *Ibid.*
[180] *Ibid* at para. 51.
[181] *Ibid.*

The correspondence factor of the human dignity test was the greatest obstacle for the majority to overcome in finding that section 43 does not infringe the equality rights of children. According to the Chief Justice, "Children depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process."[182] The majority wrote that Parliament uses section 43 to balance the competing needs of punishing harmful force used by parents against their children and protecting the use of reasonable force by parents in an attempt to educate their children.[183] The conclusion of the majority was that a reasonable person acting on behalf of a child apprised of all the circumstances would not conclude that a child's dignity is offended by section 43 in a fashion that would mandate a *Charter* remedy.[184] Justice Deschamps pointedly disagreed in her dissent, stating "Far from corresponding to the actual needs and circumstances of children, s. 43 compounds the pre-existing disadvantage of children as a vulnerable and often-powerless group whose access to legal redress is already restricted."[185] She further wrote,

> This line of argument [that the central aspect of the objective is to protect children and families from the intrusion of the criminal law] seeks to impermissibly shift the nature of the legislative purpose from one of *parental rights* to one of *child protection*. This is not merely a shift in the emphasis of the legislative objective but a significant reclassification of it. At the time s. 43 was passed, the objective of affording parents and teachers

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[182] *Ibid.* at para. 58.
[183] *Ibid.* at para. 59.
[184] Joan Small criticized the approach of the majority in assessing the human dignity of children, writing "There was no attempt to examine the presumption that the child's best interests are met within the family; on the contrary, the best interests of the child were considered to be exactly consistent with the best interests of the family." See "Parents and Children: Welfare, Liberty, and *Charter* Rights" (2005) 4 J. L. & Equal. 103 at 113.
[185] *Canadian Foundation, supra* note 7 at para. 231.

> reasonable latitude was based in the traditional notions of children as property, capable of learning through physical violence.[186]

Justice Binnie echoed Justice Deschamps, finding that section 43 is designed to protect parents and not children. In his words, "A child "needs" no less protection from the *Criminal Code* than an adult does. This is why, in my view, the social justification for the immunity of parents and teachers should be dealt with under s. 1."[187]

The application of the human dignity test by the majority was flawed in several ways. The human dignity test is meant to be a contextual analysis that takes the particular circumstances of each challenge into special consideration. *Canadian Foundation* is an example of a case in which the factors were not applied with appropriate precision or care. Justice Binnie criticized the majority's use of the human dignity test in his dissent, writing "[the "dignity requirement"] provides a useful and important insight into the purpose of s. 15(1), but it should not become an unpredictable side-wind powerful enough to single-handedly blow away the protection that the *Criminal Code* would otherwise provide."[188] The majority's use of the correspondence factor was the most egregious aspect of the judgment.[189] This single factor somehow prevailed over every single other

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[186] *Ibid.* at para. 235. Justice Deschamps also points to the title of the provision ("Protection of Persons in Authority"), noting it to be concerned only with the protection of authority figures with no apparent connection to protecting children.
[187] *Ibid.* at para. 100.
[188] *Ibid.* at para. 72.
[189] It has been noted by several academics that many equality challenges are decided based on the correspondence factor. Discrimination based on age is difficult to establish as an affront to human dignity. In *Law, supra* note 145, a woman was denied survivor benefits under the Canada Pension Plan based on the fact that she was too young to receive them. The Supreme Court upheld the

section 15 consideration to arrive at a finding of constitutionality, even though Justice Iacobucci explicitly stated in *Law* that "there are undoubtedly other [human dignity factors], and not all four factors will necessarily be relevant in every case."[190] The societal benefit to section 43 is best addressed as part of a justificatory analysis under section 1 of the *Charter*, as discussed below.

With respect to the correspondence factor, a particularly controversial statement referring to the intentions of Parliament vis-à-vis section 43 was made in the majority judgment. In *Canadian Foundation,* the Chief Justice stated that Parliament's use of section 43 was intended to accommodate the competing needs of families and children and to respond to the "reality of [children's] lives by addressing their need for safety and security in an age-appropriate manner."[191] This is simply not true. Parliament has played a very limited role in the evolution of section 43.[192] Section 43 was never a product of Parliamentary planning or debate, but rather the result of direct codification of the existing criminal law in Canada, originally adopted from the criminal law in England, which was

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policy on the basis that it corresponded to the circumstances of the claimant inasmuch as youthful survivors were more capable of working than elderly survivors. In *Gosselin, supra* note 165, the denial of welfare benefits to people under 30 years of age was upheld based on the fact that the welfare program was attempting to provide the youthful beneficiaries with work skills and training programming. Peter Hogg writes, "The correspondence factor seems to have become the key to the impairment of human dignity…it seems to come down to an assessment by the Court of the legitimacy of the statutory purpose and the reasonableness of using a listed or analogous ground to accomplish that purpose." Hogg, *supra* note 70 at para. 55.9(c).

[190] *Law, supra* note 145 at para. 62. Rahool Parkwash Agarwal adds, "Using the correspondence factor to essentially trump the other factors undermines the Court's initial intention to apply a purposive and contextual approach to claims of discrimination." in "An Autonomy-Based Approach to Section 15(1) of the Charter" (2007) 12 Rev. Const. Stud. 83 at 97.

[191] *Canadian Foundation, supra* note 7 at para. 51.

[192] *Criminal Code 1892, supra* note 3.

appropriated from ancient Roman law.[193] The justification created by section 43 of the *Criminal Code* followed quite naturally from a history rich in honouring the rights of authority figures to use force as a method of enforcing power and not from legislative or Parliamentary policy or decision-making.[194] There is nothing to indicate that Parliament's intentions were anything other than adopting and continuing that history. The only Parliamentary recognition section 43 has received apart from codification has involved very minor changes to the provision, such as changing the title of the provision,[195] removing apprentices as part of the group vulnerable to the use of corrective force,[196] and replacing the term "lawful" to the current wording of "justified."[197] It is noteworthy that section 43 was unaltered for almost 50 years at the time *Canadian Foundation* was decided.

Binnie and Deschamps JJ. did not agree with the majority decision that section 43 respects the human dignity interest of children. They both found that section 43 violates the human dignity of children. As Justice Binnie noted, "there

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[193] One of the dominant features of Roman law was the theory of *pater familias,* which provided the father unlimited power to act on behalf (and in control) of those living in his household and under his rule, including his wife, children, other relatives, and slaves. The *pater potestas* ("father's power") enabled the father to sell, kill, or abandon his children. It was assumed that the power of *pater familias* would be invoked in the best interests of the family. For a general introduction to the history of the Roman law, see Barry Nicholas, *An Introduction to Roman Law,* (Oxford: Clarendon press, 1962) or Hans Julius Wolff, *Roman Law: An Historical Introduction*, (Norman: University of Oklahoma Press, 1951).

[194] F. C. DeCoste, "On "Educating Parents": State and Family in *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)"* (2004) 41 Alta. L. Rev. 870 at 882.

[195] The title of the justification was changed from "Discipline of Minors" to "Correction of Child by Force" in 1906. See *Criminal Code*, R.S.C. 1906, c. 146, s. 63.

[196] Apprentices were removed in the 1953-54 revisions. See *Criminal Code*, 1953-54, c. 51, s. 43.

[197] This was changed to the current wording in the 1953-1954 revisions. The change was made without any apparent discussion by Parliament, as noted by the majority in *Canadian Foundation, supra* note 7 at para. 65.

can be few things that more effectively designate children as second-class citizens than stripping them of the ordinary protection of the assault provisions of the *Criminal Code"* and that this is "destructive of dignity from any perspective, including that of a child."[198] He continued, "Few things are more demeaning and disrespectful of fundamental values than to withdraw the full protection of the *Criminal Code* against deliberate, forcible, unwanted violation of an individual's physical integrity."[199]

Applying the *Law* test, Justice Binnie agreed with the majority that the CFCYL had established (1) children are vulnerable and face a pre-existing disadvantage, (2) children's physical integrity is an interest that deserves constitutional protection, and (3) section 43 does not have an ameliorative purpose for a more disadvantaged group.[200] However, he respectfully disagreed that the "correspondence" factor of the human dignity test was satisfied in the case of section 43, and held instead that the relationship between section 43 and the circumstances of children violated the essential human dignity of children.[201] Justice Binnie wrote that the human dignity test is not meant to be an exercise in justification, but an analysis to determine whether the unequal treatment of a particular group was appropriate. Correspondence between the distinction and its purpose cannot be made out in his opinion, since the distinction affects the child

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[198] *Ibid.* at para. 72.
[199] *Ibid.* at para. 106.
[200] *Ibid.* at para. 91.
[201] *Ibid.* at para. 102.

and the benefit accrues to the parent.[202] The social benefit of the use of corrective force is more properly situated in a section 1 justificatory analysis.

Justice Deschamps held that "The withdrawal of the protection of the criminal law for incursions on one's physical integrity would lead the reasonable claimant to believe that her or his dignity is being harmed."[203] She found the differential treatment afforded to children under section 43 amounts to a discrimination based on the human dignity test factors: (1) the differential treatment removes physical protection from children; (2) children are an historically disadvantaged group in Canadian society; (3) there is no ameliorative purpose to section 43 for children, only for their parents;[204] and (4) the removal of the protection of the criminal law tends to compound children's pre-existing disadvantages and vulnerabilities.[205] She concluded that section 43 has the effect of violating the human dignity of children and therefore discriminates against them, breaching the equality rights of children under the law.

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[202] *Ibid.* at para. 100.
[203] *Ibid.* at para. 224.
[204] She held that the ameliorative effect, if any, of the provision could only be found to accrue to parents and teachers who are accused of assaulting children and are afforded the section 43 defence. Courts have long recognized children to be a vulnerable group facing a pre-existing disadvantage in society. Parents and teachers are not in the same position. As Justice Deschamps wrote in *Canadian Foundation, supra* note 7 at para. 228, "It is difficult to see, however how [parents and teachers], as a group, could be seen as more disadvantaged than children, as a group." It has been commented that the human dignity test can be used to compound power relations in Canadian society. Joan Small writes, "[I]n *Canadian Foundation,* the odd rationale is that, since a child needs a family, no reasonable person who cares for that child would consider it against her dignity that she is disentitled to protection from assault from her carers. Dignity therefore acts in collusion with the oppressive provision, rather than as the standard by which to scrutinize it." Small, *supra* note 168 at 224-225. In the same vein, Sophia R. Moreau notes one of the penultimate 'wrongs' of unequal treatment between individuals to be the potential effect of perpetuating "oppressive power relations." See "The Wrongs of Unequal Treatment" (2004) 54 U. Toronto L.J. 291 at 304.
[205] *Canadian Foundation, supra* note 7 at paras. 223-232.

(b) Section 1

Section 1 of the *Charter* provides, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In effect, section 1 permits the state to override *Charter* protected rights when it is sufficiently justified. The burden of justifying a *Charter* breach lies with the state on a standard of a balance of probabilities.[206]

Justification of a *Charter* breach pursuant to section 1 requires the state to fulfill various criteria. First, the state must demonstrate that the *Charter* breach in question is "prescribed by law." This is easily established in the case of an impugned statute, or even regulation. It becomes more complex when it comes to government policy or procedure.[207] Second, the state must show that the limiting breach is both reasonable and "demonstrably justified in a free and democratic society."

The second portion of the section 1 analysis is broken down into two requirements [the "*Oakes* test"].[208] First, the objective of the impugned law must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[209] Second, the means of limiting the *Charter* right must be

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[206] Hogg, *supra* note 70 at para 38.4.
[207] *Ibid.* at 38.7(a).
[208] *R. v. Oakes*, [1986] 1 S.C.R.103.
[209] *Ibid.*

reasonable and demonstrably justified pursuant to a broad proportionality test, which consists of three inquiries:[210] (1) whether the violation is rationally connected to the objective; (2) whether the violation minimally impairs the *Charter* right in question; and (3) whether the objective and the effect of the impugned law are proportionate to each other, taking into account the salutary and deleterious effects of the measures.[211]

Section 1 is mentioned by all four judgments in *Canadian Foundation.* The majority found it unnecessary to deal with the provision at any length since they found that section 43 did not breach sections 7, 12 or 15 of the *Charter.*[212] Justice Arbour held that section 1 could not justify the continued application of section 43 since, in her analysis, section 43 is unconstitutionally vague and as such, it is incapable of passing the "prescribed by law" requirement for justification under section 1.[213] Section 1 played a key role in the dissenting judgments of Justice Binnie and Justice Deschamps, who both found that section 43 breaches section 15.

Justice Binnie and Justice Deschamps began their section 1 analyses in much the same manner. The "prescribed by law" requirement is easily fulfilled in the circumstance of section 43, which is a statutory provision in the *Criminal Code,* and does not receive mention in either judgment. Both judgments framed

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[210] *Ibid.* at paras. 69-71.
[211] *Dagenais v. CBC,* [1994] 3 S.C.R. 835 added the consideration of the salutary and deleterious effects to the final step of the proportionality branch of the *Oakes* test.
[212] *Canadian Foundation, supra* note 7 at para. 70.
[213] *Ibid.*at para. 193. See also Hogg, *supra* note 70 at para 38.7(c).

the objective of section 43 as providing protection for families from the unnecessary intrusion of the criminal law,[214] which was sufficiently pressing and substantial to satisfy the first branch of the *Oakes* test. However, the judgments diverge at the second step of the *Oakes* test. While both of the justices held that the means of section 43 were rationally connected to the objective,[215] satisfying the first inquiry of the second step of the *Oakes* test, they came to very different conclusions with respect to the remainder of the inquiries in the *Oakes* test, ultimately arriving at completely different results. Justice Binnie concluded that section 1 would justify the continued application of section 43 with respect to parents, but not for teachers.[216] Justice Deschamps found that section 1 would not justify the equality violation occasioned by section 43 in either context, and accordingly held that section 43 should be struck down. [217]

According to Binnie J., section 43 , as it applies to parents, satisfies both of the remaining inquiries under the second step of the *Oakes* test. For him, the minimum impairment inquiry of the second step of the *Oakes* test is fulfilled since the wording of section 43 "allows for adjustment over time."[218] In his opinion,

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[214] According to Justice Binnie at paragraph 121 of *Canadian Foundation*, *ibid.* the objective of section 43 is, "…limiting the intrusion of the *Criminal Code* into family life." At paragraph 234 of *Canadian Foundation,* Justice Deschamps found that the objective of section 43 is to provide a "protected sphere of authority" for parents. The Supreme Court has acknowledged on several occasions that the private lives of families deserve protection from state interference. In *Winnipeg Child and Family Services v. K.L.W., supra* note 77, Justice L'Heureux-Dube writes that parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit. In *G.(J.),supra* note 19, Justice Lamer notes that parents are presumed to act in their child's best interests and that a child may be seriously affected by interference with the parent-child relationship.
[215] *Canadian Foundation, supra* note 7 at paras. 121 and 237.
[216] At paragraph 128 of *Canadian Foundation, ibid.*
[217] *Ibid.* at para. 242.
[218] *Ibid.* at para. 122.

the flexibility of section 43 to adjust to various circumstances allows the section to minimally impair the violation of children's equality rights with the aid of "interpretive guidance" from the courts.[219] Finally, Binnie J. found that section 43 meets the proportionality requirements required under a section 1 analysis due to section 43's limited application to circumstances in which force is applied for corrective purposes within reasonable limits.[220] He held that the salutary effects of section 43 outweigh the deleterious effects of the provision based in part on the protection given to children under provincial child welfare regimes, and also on the assumption that it is beneficial for children to keep families out of criminal courts.[221]

Justice Deschamps concluded that section 1 cannot justify the continued use of section 43 according to her application of the remainder of the *Oakes* test. She held that section 43 fails to minimally impair the violation of children's rights. While Parliament is not obliged to choose the least possible intrusive means to meet an objective,[222] Deschamps J. held that "Section 43 could have been defined in such a way as to be limited only to very minor applications of force rather than being broad enough to capture more serious assaults on a child's body."[223] She also discussed the final proportionality component of the second branch of the *Oakes* test and found that the salutary effects of section 43 were not

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[219] *Ibid.*
[220] *Ibid.* at para. 123.
[221] *Ibid.* at paras. 123-124.
[222] This is in accordance with Chief Justice Dickson in *Edwards Books., supra* note 164 at para. 131, who wrote that a challenged law must impair rights "as little as is reasonably possible," as opposed to his earlier position in *Oakes, supra* note 209 at para. 70 where he held that the law must impair rights "as little as possible," aff'g *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295.
[223] *Canadian Foundation, supra* note 7 at para. 238.

proportionate to its deleterious effects. She noted, "Although there is a benefit to parents, children, teacher and families to escape the unnecessary intrusion of the criminal law into the private realm of child-rearing, when there is harm to a child this is precisely the point where the disapprobation of the criminal law becomes necessary."[224]

The conclusions of Justice Binnie and Justice Deschamps can be traced to their applications of the minimum impairment test. One justice found that section 43 minimally impairs the section 15 rights of children and the other did not. The minimum impairment test has been called the "heart and soul of s. 1 justification,"[225] since many decisions turn on the analysis of this factor. Context and policy can become important factors in a section 1 analysis.[226] Several considerations play a role in the minimum impairment inquiry,[227] such as deference to Parliament, social science evidence, underlying social issues,[228] and whether the law provides protection to a vulnerable group[229] or balances the interests of two or more groups.[230]

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[224] *Ibid.* at para. 241.
[225] Hogg, *supra* note 70 at para. 28.11(a).
[226] In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 87, Bastarache J. wrote that the objective of an impugned provision requires the court to review the social problem it addresses, as does the proportionality of the means used to address the objective. "The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context…context is the indispensable handmaiden" of an analysis under s. 1.
[227] Hogg, *supra* note 70 at para. 38.11(b).
[228] In *Canada (Attorney-General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 at para. 43, the court wrote, "…a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem."
[229] In *Sharpe, supra* note 107, the court considered the particular vulnerability of children in examining whether anti-child pornography laws minimally impair the right to freedom of expression guaranteed by section 2(b) of the *Charter*.
[230] In *Keegstra, supra* note 107, the Supreme Court had to weigh the freedom of expression rights (s. 2(b)) of an accused person promoting hate propaganda against the equality (s. 15) and

Binnie J.'s analysis under the minimum impairment test is questionable. There is no prior Supreme Court jurisprudence indicating that flexibility of application creates a less drastic incursion onto the *Charter* rights of a claimant than an inflexible application. The fact that section 43 has not been applied with the appropriate amount of rigor in the past should serve as evidence that the flexibility of the provision is what takes the law outside the realm of minimum impairment of children's equality rights. It appears that Justice Binnie placed too much emphasis on the novel consideration of the potential flexibility of the application of the law instead of focusing on established jurisprudence, which would likely have landed him at a conclusion more along the lines of Justice Deschamps.

Justice Deschamps' application of the minimum impairment test was more thorough than that of Justice Binnie. She correctly acknowledged that Parliament is allowed a margin in terms of the means employed to achieve an objective.[231] However, she noted that the Court should not be overly deferential to Parliament in light of other contextual criteria, such as the heightened vulnerability of children[232] and the "fundamental nature of physical integrity and bodily autonomy."[233] Since "the *Charter* infringement in [the case of section 43] is

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multiculturalism rights (s. 27) of the target groups. The majority held that the best approach was to weigh the various contextual factors and values under s. 1.

[231] *Canadian Foundation, supra* note 7 at para. 237.

[232] *Ibid.*

[233] *Ibid.* at para. 239.

discriminatory at a very direct and basic level,"[234] the availability of alternatives such as provincial child welfare regimes did not impact her conclusion. In light of the contextual factors raised by Justice Deschamps, all of which has precedential authority at the Supreme Court level, the conclusion that section 43 fails to satisfy the minimum impairment inquiry, and therefore cannot be justified pursuant to section 1, appears to be inescapable.

V. CONCLUSION

In the end, *Canadian Foundation* introduced significant limitations to the future application of section 43. Parents are not justified in using corporal punishment on children younger than two years of age, or older than 12 years of age. Corrective force cannot be applied in anger or frustration. The use of weapons, such as belts or spoons, and blows to the head are no longer considered reasonable in contemporary society. Any use of force that causes harm or the reasonable prospect of harm will not be justified. Teachers cannot use corporal punishment against students, but are justified in using corrective force to remove children from classrooms or secure compliance with instructions. The conduct of the child is not to be considered in assessing the reasonableness of the corrective force.

In this section, I have examined the *Canadian Foundation* decision and I have argued that the constitutional methodology employed by the majority was not only unconvincing, but incorrect. Both the established principle of

[234] *Ibid.* at para. 240.

fundamental justice of overbreadth and the best interests of the child principle could have sustained a finding that section 43 infringed section 7 of the *Charter*. Furthermore, the equality rights analysis should have concluded that section 43 is contrary to the essential human dignity of children. I also argued that some of the findings of the Court in *Canadian Foundation* may have problematic precedential impact. In particular, the finding that the best interests of the child principle does not meet the threshold of a principle of fundamental justice may have a detrimental impact on future litigation in the area of children's rights. Similarly, the majority's refusal to use the perspective of a reasonable child in considering a child's equality claim could lay a foundation for denying future meritorious section 15 claims brought by children. Finally, I have found the statutory interpretation employed by the majority in considering section 43 to be problematic. The new limits imposed on the provision by the majority, while perhaps laudable that they attempt to provide additional protection to children, are arguably outside the purview of the Court. Legislative drafting is often best left to those vested with that responsibility, even when courts are acting with the best of intentions.

Canadian Foundation was received with great expectations, and the result was subject to strong criticism. There was disappointment with the final result of the case.[235] In many ways, it seemed as though the majority was unwilling to

[235] Christopher B. Fuselier was one of the few exceptions to this general disappointment. He applauds the result in the case, noting "Canadian Foundation offers a viable starting point to ensure that corporal punishment legislation meets the expectation of society" in "Corporal Punishment of Children: California's Attempt and Inevitable Failure to Ban Spanking in the

choose a side, and instead attempted to please all parties by endorsing a much narrower application of section 43.[236] Unfortunately, it had the opposite effect. Children's rights advocates were discouraged about the continued justification of corporal punishment and the proponents of section 43 were frustrated by the increased degree of state interference into family life represented by the majority's decision. Furthermore, the new limits to section 43 were criticized for being too complex, and this bears out in the subsequent jurisprudence as examined in the next portion of this paper.[237]

It can be assumed that *Canadian Foundation* was accepted as a reference decision at the Supreme Court of Canada as a result of the inconsistent application of section 43 over the past century. The Supreme Court had considered the provision several years earlier in *Ogg-Moss*, but a critical need for clarity as to the proper ambit of the provision had arisen once again. Parliamentary inertia put the Supreme Court in a position to implement what they believed to be concrete and appropriate limits to the application of section 43. Unfortunately, the guidance the Supreme Court provided in *Canadian Foundation* began to unravel almost immediately following the release of the decision and section 43 continues to be problematic in terms of inconsistent application.

Home" (2007) 28 J. Juv. L. 82 at 99. Drew Mitchell notes the decision to be laudable in its attempt to balance the interests of parental autonomy and children's rights in "*R. v. Kaur:* Child Assault and Children's Rights after *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney Genera)*" (2005) 27 C.R. (6th) 230.

[236] Anand writes, "The Court's ruling in the "spanking" case could be viewed as strong circumstantial evidence supporting the position of academics who remark that the Supreme Court is sensitive to public opinion." Anand, s*upra* note 85 at 878.

[237] Both Katie Sykes and Tim Quigley write that the state of the law following *Canadian Foundation* is confusing and controversial. See Sykes, *supra* note 32 and Tim Quigley, "Correction of Children: The Supreme Court Divided" (2004) 16 C.R. (6th) 286.

PART TWO: THE SOCIAL SCIENCE OF PHYSICAL CORRECTION OF CHILDREN: *A Lack of Consensus*

I. INTRODUCTION

The Supreme Court of Canada used social science expertise to craft the scope of conduct falling under the term "reasonable correction" pursuant to section 43 in *Canadian Foundation.*[238] The conclusion of the majority of the Supreme Court relied, at least in part, on the conclusion that mild physical correction is not detrimental for children, and may even be beneficial. Current social science expertise demonstrates that the parameters created by the Court in *Canadian Foundation* have a solid grounding in the literature. Particular applications of physical correction have been proven to be harmful, such as the use of weapons or blows to the head. Those forms of correction were appropriately classified as being unreasonable by the court. Physical correction applied within the limits suggested by the Court has not been proven to be harmful to children. On the contrary, some experts suggest that the application of corrective force within these parameters may be beneficial for children.

In this section, I explore the current state of the social science literature as it relates to the use of physical correction on children. Specifically, issues relating to the research of physical correction of children, its benefits and detriments and

[238] While there are no specific sources of social science expertise cited in the decision, the Court does reference their use of social science literature. For example, see *Canadian Foundation, supra* note 7 at paragraph 37, where the Court wrote, "Based on the evidence currently before the Court, there are significant areas of agreement among the experts on both side of the issue."

the prevailing views on its use are discussed. There are a multitude of research limitations pertaining to the study of physical correction of children. Some of these limitations have ethical dimensions, while others pertain to the inability to collect proper data or adequately control for confounding variables. Despite these limitations, some beneficial outcomes of physical correction have been identified, such as an increase in childrens' immediate compliance. However, studies have also identified some detrimental outcomes, such as the development of antisocial personality traits and increases in the aggression and deviance of physically corrected chidlren. There is some agreement among the experts that limitations as to the frequency, severity and manner of application of physical correction will assist in mitigating, or completely negating, the potentially averse outcomes associated with this type of discipline.

For the purposes of this portion of the paper, "physical correction" will be defined as "the use of physical force, no matter how light, with the intention of causing the child to experience bodily pain so as to correct or punish the child's behavior."[239] The terms "corporal punishment" and "corrective force" are deliberately avoided so as to prevent confusion between the legal and social science standards. Obviously, the scope of conduct embraced by the term "physical correction" is much broader than that encompassed under the legal terms "corporal punishment" or "corrective force," since it includes the use of

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[239] Elizabeth T. Gershoff & Susan H. Bitensky, "The Case Against Corporal Punishment of Children: Converging Evidence from Social Science Research and International Human Rights Law and Implications" (2007) 13:4 Psychology, Public Policy, and Law 231 at 232.

weapons, blows to the head, and other applications of force that are more than transitory or trifling.

II. EFFECTS OF PHYSICAL CORRECTION ON CHILDREN

(a) Research Issues

Research on the use of physical correction on children encounters challenges both ethically and empirically. Ethically, researchers are proscribed from creating a scientifically controlled study in which one group of children is subject to physical correction and another group is not. Empirically, difficulties have been identified with respect to data collection via retrospective self-reporting by parents and children, inconsistent terminology, and weak assessment criteria leading to a lack of controlled experimentation.[240] Social scientists on both side of the debate have acknowledged a need for further, more controlled research into the use of physical correction on children.

Ethical issues related to the use of physical discipline on children by their parents are fairly obvious. It is unfeasible for a study to control for the use of physical correction by a parent against his/her child, as this would require dividing children into groups such as the "harsh physical discipline" category, the "mild physical discipline category" and the "no physical discipline category."[241]

[240] Alan E. Kazdin & Corina Benjet, "Spanking Children: Evidence and Issues" (2003)12:3 Clinical Child and Family Psychology Review 99.
[241] Some studies attempt to use the children of twins as a way around these ethical dilemmas, as it allows for some control of the genetic variables that are purportedly involved with corporal

Controls would be required as to the misbehavior calling for correction as well as the variety and ordering of the disciplinary techniques employed by parents. As a result of these restrictions, the vast majority of information adduced in physical correction research is gathered through retrospective self-reporting by both parents and children.[242]

However, self-reporting data is circumspect for several reasons. First, parents may unintentionally minimize the frequency and/or severity of their use of physical correction on their children,[243] which could have an impact on the conclusions of a study with respect to child outcomes. Second, physical correction is most common among children younger than five years of age, which creates problems in terms of their immediate ability to verbalize their experience as well as on their later memories of the past events.[244] The retrospective component to some of these reports can create difficulties for accurate findings.[245]

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punishment. For example, see Brian M. D'Onofrio, Eric N. Turkheimer, Lindon J. Eaves, Linda A. Corey, Kare Berg, Marit H. Solaas, & Robert E. Emery "The role of the children of twins design in elucidating causal relations between parent characteristics and child outcomes" (2003) 44:8 Journal of Child Psychology and Psychiatry 1130.

[242] Elizabeth Thompson Gershoff, "Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review" (2002) 128:4 Psychological Bulletin 539 at 540. However, Gershoff notes two retrospective self-reporting studies of "high validity," one in which parents were phoned nightly by researchers and asked to report on their use of physical discipline, and the other in which parents kept detailed discipline diaries on a daily basis.

[243] George W. Holden, "Perspectives on the Effects of Corporal Punishment: Comment on Gershoff" (2002) 128: 4 Psychological Bulletin 590 at 590.

[244] Gershoff, *supra* note 242 at 540.

[245] Jochen Hardt & Michael Rutter "Validity of adult retrospective reports of adverse childhood experiences: Review of the evidence" (2004) 45:2 Journal of Child Psychology and Psychiatry 260.

Many studies fail to differentiate between abusive physical discipline and non-abusive physical discipline. This can lead to inaccurate conclusions as to the outcomes associated with physical correction.[246] It is generally agreed that defining all forms of physical correction discipline as "corporal punishment" will result in incorrect results since the scope of behaviour encompassed by that term is overly inclusive, ranging from mild physical restraint to physical abuse.[247]

Parental use of physical correction can occur across a wide spectrum in terms of frequency, severity and manner of administration.[248] Few studies inquire about these factors. This is problematic, since several studies have shown that simple differences in the administration of physical discipline can result in a startling range of outcomes. For example, physical correction applied by an angry parent will have different results than a reasoned, sober application of force.[249] The instrumental use of physical correction and the expressive use of physical correction will have different results with respect to the expectations and reactions of both the parent and the child.[250] Furthermore, it has been suggested that the

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[246] Robert E. Larzelere & Brett R. Kuhn, "Comparing Child Outcomes of Physical Punishment and Alternative Disciplinary Tactics: A Meta-Analysis" (2005) 8:1 Clinical Child and Family Psychology Review 1 at 2; Holden, *supra* note 243.

[247] Ronald L. Simons, Christine Johnson & Rand D. Conger, "Harsh Corporal Punishment versus Quality of Parental Involvement as an Explanation of Adolescent Maladjustment" (1994) 56:3 Journal of Marriage and Family 591 at 591.

[248] Murray A. Straus & Vera E. Mouradian "Impulsive corporal punishment by mothers and antisocial behavior and impulsiveness of children" (1998)16:3 Behavioral Sciences and the Law 353.

[249] In a meta-analysis of physical correction studies comparing over 88 studies, only five studies asked parents about the frequency or severity of their use of physical correction in Gershoff, *supra* note 242 at 552.

[250] Instrumental use of physical correction is physical correction that is "planned, controlled, and not accompanied by strong parental emotion." Impulsive physical correction is "spur-of-the-moment and accompanied by feelings of anger and possibly by feelings of being out of control." Gershoff, *ibid.*at 553.

effect of physical correction when applied in conjunction with other potentially harmful disciplinary techniques, such as yelling, scolding, or threatening, could be exponentially damaging to a child, but this requires further research.[251] Lack of knowledge as to the impact of these other disciplinary techniques prevents accurate conclusions as to the actual impact of physical correction on its own.[252]

The context of physical correction is also ignored in many studies. Physical correction of children does not occur within a vacuum and it is important that studies account for some of the broad circumstances that can impact their findings. In fact, some studies that fail to account for the social context underlying parental use of correction are criticized for being overly simplistic.[253] The role of the parent-child relationship,[254] the family context, the socio-economic context and the cultural context [255] must be taken into account for more accurate results.

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[251] *Ibid.*

[252] Larzelere & Kuhn, *supra* note 246 at 2-3. In "Necessary Distinctions" (1997) 8:3 Psychological Inquiry 176 at 176, Diana Baumrind points out that parents who use frequent physical correction in disciplining their children tend to be verbally abusive as well, resulting in magnification of the impact of physical correction with respect to a child's aggression, delinquency, and socially aversive behavior.

[253] Baumrind, *ibid.*

[254] It is shown in Nancy Darling & Laurence Steinberg, "Parenting style as context: An integrative model" (1993) 113:3 Psychological Bulletin 487 that physical discipline applied by a warm, loving parent to a child with whom that parent enjoys a trusting, close relationship will have a significantly different outcome than physical discipline applied by a cold and rejecting parent to whom the child feels estranged.

[255] In Vonnie C. McLoyd & Julia Smith "Physical discipline and behavior problems in African American, European American, and Hispanic children: Emotional support as a moderator" (2002) 54:1 Journal of Marriage and the Family 40, the research shows that the effects of physical correction varies depending upon the culture in which the disciplinary practice is occurring

Another factor that requires more consideration in physical correction studies is the child being studied. Many studies on the physical correction of children fail to consider the temperament and behavior of the child under investigation.[256] There are questions as to whether detrimental outcomes associated with physical correction are the result of the physical correction itself, or the natural deviance of the particular child.[257] Dr. Robert E. Larzelere argues that physical correction research generally includes a selection bias in that children with behavioral issues are more likely to be selected for behavioral intervention, including physical discipline. Therefore, post-intervention outcomes could be the result of pre-intervention group differences (i.e. the presenting behavioral problems) as opposed to the intervention itself.[258] Several varieties of corrective intervention are associated with detrimental outcomes, including taking a child to a psychologist, nonphysical punishment, giving a child Ritalin, and scolding.[259] This tends to suggest that more research is required to determine whether it is the child who drives a particular outcome, or the treatment of the child.

[256] Holden, *supra* note 243 at 590. According to, Gershoff & Bitensky, *supra* note 239 at 235, the "Child Effect" hypothesis postulates that aggressive children are more likely to be the subjects of physical discipline regardless of the adult administering the correction. They cite studies that have shown that both familiar and unfamiliar adults treat aggressive children more harshly.
[257] Robert E. Larzelere, "Children and Violence in the Family: Scientific Contributions (A Submission to the UN Global Study on Children and Violence)" (March 30, 2005), online: <http://ches.okstate.edu/facultystaff/Larzelere/acp.sub.32005.pdf>.
[258] Robert E. Larzelere, Brett R. Kuhn & Byron Johnson, "The Intervention Selection Bias: An Underrecognized Confound in Intervention Research" (2004) 130:2 Psychological Bulletin 289 at 289.
[259] Larzelere, *supra* note 257.

Researchers on both sides of the physical correction debate have identified a need for more information to come to accurate conclusions as to the benefits and detriments of physical correction. Specifically, it has been suggested that future research should: (1) Standardize the definition of physical correction; (2) Standardize the measurement of physical correction; (3) Determine the causal direction; (4) Measure child moderating effect of multiple contexts; and (5) Study diverse cultural groups and populations.[260]

(b) Physical Correction: Benefits, Detriments and Prevailing Views

Some positive outcomes have been associated with the use of physical correction on children within certain parameters. The majority of studies acknowledge that physical correction increases a child's immediate compliance, particularly with young children.[261] Experts also suggest that spanking provides a psychological benefit for children by exchanging short-term physical pain for long-term guilt or anxiety.[262] There may also be a correlation between physical correction of children and a decrease in their antisocial and aggressive tendencies.[263]

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[260] For example, see Gershoff, *supra* note 2424 at 564-567 and Larzelere & Kuhn, *supra* note 246 at 28-33.

[261] Diana Baumrind, "The Discipline Controversy Revisted" (1996) 45:4 Family Relations 405 at 413.

[262] Joan E. Grusec & Jacqueline J. Goodnow, "Impact of parental discipline methods on the child's internalization of values: A reconceptualization of current points of view" (1994) 30:1 Developmental Psychology 4.

[263] Larzelere, *supra* note 257 quoting S.B. Friedman & S.K. Schonberg, "The short- and long-term consequences of corporal punishment" (1996) 98 Pediatrics 803, the author cites a study of African American samples that found the use of physical punishment decreases the aggression and antisocial behavior of children. He suggests that this study indicates that physical punishment, administered in an appropriate manner, could be used to decrease the aggression of children.

Physical correction of children has also been associated with several negative outcomes. Studies concerning the detrimental impact of the use of physical correction on children are plentiful; even entire books are dedicated to the theme.[264] One of the most commonly cited studies suggests that the use of physical correction on children increases their aggressive tendencies both in their youth and as adults.[265] Other studies found that the use of physical punishment of children results in decreases in their empathy[266]and increases in their deviance[267] and other antisocial behaviors.[268] Physical correction has been associated with having a negative psychological impact on children. One study found that toddlers who experience frequent physical punishment have increased levels of the stress hormone cortisol[269] and other studies have linked physical correction of

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[264] For example, see Matthew K. Mulvaney & Carolyn J. Mebert, "Parental Corporal Punishment Predicts Behavior Problems in Early Childhood" (2007) 21:3 Journal of Family Psychology 389; Murray A. Straus, *Beating the Devil out of them: Physical Punishment in American Families* (2nd Ed.), (New Brunswick, NJ: Transaction Publishers, 2001).

[265] Murray A. Straus, "Discipline and Deviance: Physical Punishment of Children and Violence and Other crime in Adulthood" (1991) 38:2 Social Problems 133; Gershoff, *supra* note 242; Eleanor M. Thomas, "Aggressive Behaviour Outcomes for Young Children: Change in Parenting Environment Predicts Change in Behaviour" (October 2004), online: < http://www.statcan.gc.ca/pub/89-599-m/89-599-m2004001-eng.pdf>; Murray A. Straus & Carrie L. Yodanis, "Corporal Punishment in Adolescence and Physical Assaults on Spouses in Later Life: What Accounts for the Link?"(1996) 58:4 Journal of Marriage and Family 825 at 839. See also Stacy K. Lynch *et al.*, "A Genetically Informed Study of the Association Between Harsh Punishment and Offspring Behavioral Problems" (2006) 20:2 Journal of Family Psychology 190 at 197.

[266] N.L. Lopez, J.L. Bonenberger & H.G. Schneider, "Parental disciplinary history, current levels of empathy, and moral reasoning in young adults" (2001) 3: 2 North American Journal of Psychology 193.

[267] Gershoff, *supra* note 242 at 541.

[268] Andrew Grogan-Kaylor, "The effect of corporal punishment on antisocial behavior in children" (2004) 28:3 Social Work Research 153 at 161. See also Clifton P. Flynn, "Exploring the Link between Corporal Punishment and Children's Cruelty to Animals" (1999) 61:4 Journal of Marriage and the family 971, which explores the link between increased frequency of physical correction of male children and their tendency to commit abusive acts toward animals in childhood. In contrast, in Larzelere & Kuhn, *supra* note 246 at 27, the authors conclude that non-abusive physical punishment is associated with lower levels of antisocial behavior than alternative forms of discipline.

[269] Daphne Blunt Bugental, Gabriela A. Martorell, & Veronica Barraza, "The hormonal costs of subtle forms of infant maltreatment" (2003) 43:1 Hormones and Behavior 237.

children to increased levels of depression, anxiety and general psychological maladjustment.[270]

Many experts agree that physical punishment of children applied within certain limits will minimize the potential detriments of the practice and maximize its benefits.[271] Obviously, the severity of the physical discipline should be controlled and at a sub-abusive level.[272] Many experts also suggest that any form of punishment, physical or otherwise, is most effective when accompanied by reason, communicated in a manner understood by the child.[273] Parental use of physical correction should be instrumental and not expressive.[274] Finally, a supportive and involved relationship between parent and child has been shown to

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[270] Gershoff, *supra* note 242 at 539; Straus & Yodanis, *supra* note 265 at 839; Heather A. Turner & David Finkelhor, "Physical punishment as a stressor among youth" (1996) 58:1 Journal of Marriage and the Family 155.

[271] Robert E. Larzelere, "Child Outcomes of Nonabusive and Customary Physical Punishment by Parents: An Updated Literature Review" (2000) 3:4 Clinical Child and Family Psychology Review 199; Gershoff, *supra* note 242.

[272] Robert E. Larzelere, "A review of the outcomes of parental use of nonabusive or customary physical punishment" (1996) 98:4 Pediatrics 824.

[273] Robert E. Larzelere, *et al.*, "Punishment Enhances Reasoning's Effectiveness as a Disciplinary Response to Toddlers" (1998) 60:2 Journal of Marriage and Family 388 at 390 suggests that the manner in which reasoning is communicated affects its efficacy. They cite studies demonstrating that reasoning is more effective with preschoolers if the importance of the message is emphasized and delivered in an intense fashion with judgmental components; Grusec & Goodnow, *supra* note 262 suggest that the sequencing of disciplinary tactics requires more research, since it may play a role in the impact of physical correction on children. Diana Baumrind, *supra* note 261 at 408 writes that the importance of using reason in administering discipline increases with a child's age, but is necessary even with pre-school aged children to increase compliance.

[274] Instrumental use of physical correction implies a usage of physical discipline that is both controlled and reasoned; expressive use of physical correction is an emotional and reactionary response to the behavior of the child with limited expectation of change. According to Larzelere and Kuhn *supra* note 246 at 26, instrumental use of physical correction was associated with less problem behavior than 10 of 13 alternative disciplinary techniques on children between the ages of two and six; Straus & Mouradian, *supra* note 248.

mitigate potentially negative outcomes associated with the use of physical correction against children.[275]

III. CONCLUSION

The limits created by the Supreme Court in *Canadian Foundation* for corrective force to be considered "reasonable" pursuant to section 43 are generally consistent with current social science literature. Studies conclude that only minimal, measured applications of force should be countenanced. While the limited use of force currently justified by section 43 may not be beneficial for children, it is unlikely to be harmful for them either. Ongoing research challenges regarding the use and effect of physical correction on children creates the probability that conclusive evidence of the efficacy of physical correction is unlikely to surface in the near future, if ever. Some experts have expressed the opinion that the mere possibility of harmful effects should be sufficient to completely ban the use of physical correction against children,[276] but others caution against premature action without a comprehensive understanding of the potential consequences.[277]

[275] Simons, Johnson & Conger, *supra* note 247 at 603.
[276] For example, see Susan H. Bitensky, "Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children" (1998) 31 U. Mich. J. L. Reform 353.
[277] Larzelere, *supra* note 256.

PART THREE: Post-*Canadian Foundation* Jurisprudence

I. INTRODUCTION

The *Canadian Foundation* decision of the Supreme Court was issued to resolve the "unclear and inconsistent" [278] jurisprudence surrounding section 43. The court's ruling was intended to serve as a building block to provide a uniform approach to the interpretation of section 43 by courts across Canada.[279] Six years post-release, the obvious question is whether *Canadian Foundation* has been interpreted and applied by Canadian courts in the consistent manner anticipated by the majority. The answer is that, for the most part, the Supreme Court judgment has enjoyed considerable success in terms of establishing increased uniformity in the application of section 43 in cases across Canada. *Canadian Foundation* became the convention for judgments considering section 43 immediately following its release and almost every reported decision concerning section 43 contains explicit consideration of the majority decision. As a result, section 43 is more consistently applied as compared with the pre-*Canadian Foundation* era of jurisprudence.

In the majority of child-assault cases, section 43 is strictly applied within the new parameters established by the Supreme Court. Courts across Canada have found parents and teachers guilty of assault (section 266), assault with a weapon (section 267(a)) or assault causing bodily harm (section 267(b)) due to one or more of the following factors:

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[278] *Canadian Foundation, supra* note 7 at para 39. This was a bit of an understatement, as noted by Justice Arbour in her review of the pre-2004 jurisprudence at paras. 152- 170.
[279] *Ibid.* at para. 39.

- An object was used to hit the child;[280]
- The child was hit in the head;[281]
- The parent was angry or frustrated when administering corrective force on the child;[282]
- The child was under the age of two or over the age of twelve;[283]
- The force used was not educative or corrective in nature;[284]
- The force was unreasonable due to excess or lasting injury/harm;[285] and
- The child was physically handled by a teacher beyond the limits prescribed by the Supreme Court.[286]

Justice Arbour's dissent in *Canadian Foundation* included a review of the cases that were decided between the Supreme Court's release of *Ogg-Moss* and *Canadian Foundation.* She demonstrated that acquittals have resulted in cases

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[280] *R. v. Earl* (2006), 240 N.S.R. (2d) 197 (S.C.); *R. v. Beck*, [2008] N.J. No. 110 (Nfld. Prov. Ct.); *R. v. H.L.*, [2009] O.J. No. 3572 (S.C.J.); *R. v. Smith* (2006), 70 W.C.B. (2d) 648 (Sask. Prov. Ct.); *R. v. U. (M.),* 2005 CarswellOnt 8708 (S.C.J.); *R. v. Rennato* (2007), 73 W.C.B. (2d) 320 (Ont. C.J.); *R. c. S.J.-B.,* [2004] J.Q. no. 15788 (C.Q. crim. & pen.); *R. c. G.O.,* [2005] J.Q. no. 7328 (C.Q. crim. & pen.).

[281] *R. v. G.(C.),* [2009] A.W.L.D. 2669 (Alta. Prov. Ct.).

[282] *R. v. Power*, [2008] N.J. No. 266 (Nfld. Prov. Ct.); *R. v. Hodder,* [2010] N.J. No. 35 (Nfld. Prov. Ct.); *R. v. Tourand* (2007), 298 Sask. R. 303 (Prov. Ct.); *R. v. Sinclair* (2008), 56 C.R. (6th) 29 (Man. C.A.); *R. v. McLeod,* 2008 ONCJ 162 (C.J.); *R. v. M. (D.L.),* [2009] B.C.W.L.D. 5832 (Prov. Ct.); *R. v. W. (B.W.),* [2010] A.W.L.D. 42 (Prov. Ct.); *R. v. R.(J.)*, 2006 CarswellOnt 5524 (S.C.J.); *R. v. Rashid*, 2007 CarswellOnt 9469 (C.J.); *R. v. Rennato, supra* note 280; *R. v. R. (T.J.)* (2006), 66 Alta. L.R. (4th) 359 (Prov. Ct.); *R. v. D.P.*, [2004] N.J. No. 38 (Nfld. Prov. Ct.); *R. v. Kinch*, 2005 CarswellOnt 6673 (C.J.) [*Kinch*]; *R. v. Olink,* [2009] A.W.L.D. 1925 (Prov. Ct.); *R. c. G.O., supra* note 282; *R. c. Y.,* [2006] J.Q. no. 10184 (C.M.); *R. v. Brown*, [2005] Nu.J. No. 10 (Nun. C.J.).

[283] *R. v. L.(J.A.),* [2009] B.C.W.L.D. 4351 (Prov. Ct.); *R. v. W. (B.W.), ibid.*.

[284] *R. v. U.(C.M.T.),* [2007] B.C.W.L.D. 3393 (Prov. Ct.); *R. v. McLeod, supra* note 282; *R. v. Sangwais* (2004), 252 Sask. R. 231 (Prov. Ct.); *R. v. Rashid*, *supra* note 282; *R. v. Smith, supra* note 280.

[285] *R. v. A.B.*, [2008] O.J. No. 4421 (S.C.J.); *R. v. U.(C.M.T.), ibid.*; *R. v. Sangwais*, *ibid.*; *R. v. R.(J.)*, *supra* note 282; *R. v. R. (T.J.)*, *supra* note 282; *R. v. D.P.*, *supra* note 282; *R. v. Ma,* 2005 CarswellOnt 6905 (C.A.).

[286] *R. c. G.B.*, [2004] J.Q. no. 4568 (C.Q. crim. & pen.); *R. c. Therien*, [2008] J.Q. no. 5929 (C.M.); *R. c. Deschatelets,* [2008] J.Q. no. 10501 (C.Q. crim. & pen.). In *R. c. Dubois*, [2007] J.Q. no. 4217 (C.Q. crim. & pen.), the court found that twisting a student's arm was unreasonable since the teacher was angry at the time, but the same action may be reasonable if done by a calm teacher for the appropriate purpose.

involving the use of force on a teenager, a child under the age of two years, or the head or face of a child. When compared to cases in the post-*Canadian Foundation* era, it can be decidedly stated that these types of cases are now much less likely to result in an acquittal. There has been a marked improvement in the consistency of the application of section 43.

However, not all lower courts have correctly applied *Canadian Foundation.* There have been several cases in which parents were inappropriately acquitted when trial judges held that section 43 justified the following uses of force against children: teachers applying physical correction beyond corrective restraint,[287] the application of force by a non-parent, non-teacher adult who was not standing in the place of a parent,[288] the use of a weapon in disciplining a child,[289] blows to a child's head,[290] and corrective force applied by a parent in anger.[291] Some lower court decisions fail to properly address the limiting scope given to section 43 by *Canadian Foundation;* others engage in a dubious exercise of distinguishing cases from the Supreme Court judgment in order to come to their particular results. Despite the Supreme Court of Canada's valiant efforts at molding section 43 into a constitutionally permissible, workable provision, problems with the application of the justification persist. Most notably, there continues to be uncertainty regarding the proper scope of section 43 including,

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[287] *R. v. Foote*, 2005 CarswellOnt 6470 (C.J.) [*Foote*].
[288] *R. v. Morrow* (2009), 12 Alta. L.R. (5th) 382 (Prov. Ct.) [*Morrow*].
[289] *R. v. Plummer,* 2006 CarswellOnt 4483 (C.J.) [*Plummer*].
[290] *R. v. Kaur* (2004), 27 C.R. (6th) 224 (Ont. C.J.) [*Kaur*]; *R. c. D.P.*, *supra* note 284.
[291] *R. v. Demelo,* 2009 ONCJ 267 (C.J.) [*Demelo*].

among other things, who may access the justification and whether any type of corrective force can be used on teenagers.

II. ISSUE 1: Who May Access Section 43?

The category of persons allowed to use section 43 has been inconsistently applied in lower courts, even after it was considered at the Supreme Court in *R. v. Ogg-Moss* (1984).[292] Section 43 states that the use of reasonable corrective force against a child is justified when the force is administered by schoolteachers or parents, including those who stand in the place of parents. In *Ogg-Moss,* Chief Justice Dickson provided obiter comments as to how and when parental authority (including the authority to administer corrective force) could be achieved in an attempt to clearly delineate this area of the law. *Ogg-Moss* established two ways of assuming parental authority: (1) A person assumes parental duties, in the absence or default of the natural parent, and stands *in loco parentis* to the child;[293] or (2) A person is delegated parental rights by the natural parent.[294] The first category requires that the person assume all parental duties, including those of maintenance and support of the child.[295] The second category, delegation, cannot be inferred solely from the fact that a child was placed into another adult's care; for a person to have delegated parental authority over a child there must be a more

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[292] *Ogg-Moss, supra* note 24.

[293] In *R. v. Ogg-Moss, ibid.* at 189, Chief Justice Dickson quoted Turgeon J.A. in *Shtitz v. C.N.R.,* [1927] 1 D.L.R. 951 at 959 (Sask. C.A.) to define the term "*in loco parentis"* as "A person *in loco parentis* to a child is one who has acted so as to evidence his intention of placing himself towards the child in the situation which is ordinarily occupied by the father for the provision of the child's pecuniary wants."

[294] *Ibid.* at para. 38.

[295] *Ibid.* at paras. 40-42.

involved release of authority, such as voluntary admission into a live-in care facility at an early age with parental consent.[296]

Canadian Foundation failed to adequately address the issue of who may access section 43. In the Chief Justice's words, "The phrase "person standing in the place of a parent" has been held by the courts to indicate an individual who has assumed "*all* the obligations of parenthood"… These terms present no difficulty."[297] It is possible that by making this statement, the Chief Justice intended the definition of "standing in place of a parent" to be limited solely to individuals in *loco parentis. Canadian Foundation*'s silence on the "parent by delegated authority" category created in *Ogg-Moss* could certainly lend itself to the conclusion that this category is no longer judicially recognized. However, this would not be a desirable result since it would remove statutory protection for non-parent caregivers who apply reasonable force to a child with the consent and knowledge of the child's parent. The inability for parents to delegate correctional authority could serve to make family life unworkable. For example, a grandparent who routinely cares for a child, but has not assumed all the obligations of parenthood, would be unable to justifiably restrain or control the child pursuant to section 43.

Post-*Canadian Foundation* jurisprudence surrounding the issue of who is eligible to use section 43 swings across a broad spectrum. In some cases, people

[296] *Ibid.* at para. 43.
[297] *Canadian Foundation, supra* note 7 at para. 21.

as remote as bus drivers have been granted the authority to use physical correction on children in the same manner as a parent.[298] In another case, a biological father was denied the potential benefit of section 43 based on the fact that he did not have an ongoing role in his child's life.[299] This demonstrates the critical need for a clear and unequivocal statement as to who may access section 43 when administering physical force against a child and, perhaps more importantly, who is not entitled to the justification offered by the provision.

(a) Bus Drivers and Delegated Parental Authority

School bus drivers have posed significant difficulty for courts with respect to the application of section 43 even after *Canadian Foundation* and *Ogg-Moss*. In *R. v. Kinch* (2005) [*Kinch*],[300] a school bus driver was found guilty of assaulting an eight year old passenger after throwing the boy into a seat, causing the child to have a bruising to his back. The court considered, but subsequently rejected, the application of section 43 to justify the actions of the accused person. Anderson J. held that section 43 could not justify the assault since the driver's actions were in anger and without forethought.[301] While the court acknowledged that section 43 is only available to school teachers, parents and persons standing in place of a parent, there was no discussion as to whether the offender qualified as belonging in any of those categories. The result of the case was correct in that

[298] *Kinch*, *supra* note 282; *Morrow, supra* note 288.
[299] *R. v. M. (D.L.), supra* note 282.
[300] *Kinch, supra* note 282.
[301] *Ibid.* at para. 63.

the offender was denied the justification offered by section 43, however it was inappropriate that the court even considered the provision in the circumstances.

Another school bus driver received consideration under section 43 in the Alberta Provincial Court decision of *R. v. Morrow* (2009) [*Morrow*].[302] In *Morrow,* Judge LeGrandeur acquitted a school bus driver of assaulting a special needs child by taping the child's wrists together and gagging the child by taping the child's sock into his own mouth, something the court characterized as a "minor taping incident."[303] Section 43 was used to justify the actions of the accused. The court held that the bus driver had a temporary delegation of parental authority[304] based on the fact that he was "partly responsible for the care and control of the [child]"[305]and also because he had contacted the child's foster parent regarding the child's misbehavior, at which time the foster parent advised him that "if worse came to worse, [the child] was to be put off the bus and ultimately made to walk home."[306] According to LeGrandeur J., the bus driver was justified in his actions because the child spat at the bus driver, assaulted other children, and was generally disruptive on the bus.

Morrow is problematic for many reasons. First, the fact that the driver was found to have delegated parental authority without evidence of the foster

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[302] *Morrow, supra* note 288.
[303] *Ibid.* at para. 38.
[304] *Ibid.* at para. 39.
[305] *Ibid.* at para. 37.
[306] *Ibid.* at para. 40. Incredibly, the court finds that being made to walk home would have been "a much more serious correction than that imposed by the accused in this case."

mother's intention to delegate seems contrary to the intention of the Supreme Court judgment in *Ogg-Moss*. Second, taping a child's sock into his mouth is clearly outside the bounds of reasonable correction as it is defined in *Canadian Foundation.* The Supreme Court clearly stated that corrective force applied to a child's head is unreasonable, as is the use of objects (such as a sock) in administering corrective discipline.[307] It is also arguable that the treatment was degrading and possibly harmful since it could have obstructed the child's airway or caused other physical or emotional damage to the child. Third, it appears that the child may not have been capable of learning from correction, since the child's foster mother testified that the child had difficulty recognizing "cause and effect."[308] Finally, LeGrandeur J. considered the behaviour of the child in determining whether the response of the accused driver was appropriate, which was specifically prohibited in *Canadian Foundation.*

The court in *Morrow* also acquitted the driver of assault based on the common law concept of assault, which apparently requires hostility or animosity on behalf of the accused person at the time of the commission of the alleged offence.[309] LeGrandeur J. engaged in a lengthy discussion as to the common law requirement, although it is unclear as to whether the court meant for the hostility/animosity element to be applied to all assault accusations or solely assaults on children that arise in corrective or quasi-corrective circumstances. In either case, it is incorrect in law. The offence of assault does not require proof of

[307] *Canadian Foundation, supra* note 7 at para. 40.
[308] *Morrow*, *supra* note 288 at para. 10.
[309] *Ibid.* at para. 64.

hostility as part of the *mens rea*. In fact, the only *mens rea* that must be proven is an intention to touch.[310] The result appears to have been driven by the court's sympathies for the bus driver. Indeed, LeGrandeur J. observed that, "It seems to me that it would be an injustice to characterize the appellant's conduct as a criminal offence in these circumstances."[311]

A bus driver is not a parent or a schoolteacher, so the only avenue by which a bus driver could access section 43 would be through a delegation of parental authority as discussed by Chief Justice Dickson in *Ogg-Moss.* Unfortunately, *Ogg-Moss* failed to clearly define this category. Outstanding issues in the area were identified almost immediately and continue to accumulate, as evidenced by *Kinch* and *Morrow*. In an annotation to the *Ogg-Moss* decision, Sheila Noonan notes, "Issues such as the juristic basis of the parent's ability to delegate, how the delegation might transpire, and to whom a parent might delegate the power of lawful corporal punishment remain unexplored." [312] She suggested that the Court instead adopt the "status theory" of parentage, which would limit the application of section 43 to parents and those in *loco parentis* without the possibility of delegation of parental authority.[313]

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[310] Assault is a general intent offence. Section 265(1)(a) of the *Criminal Code* reads: A person commits an assault when without the consent of another person, he applies force intentionally to that other person, directly or indirectly. See *Criminal Code, supra* note 5 at s. 265(1)(a).
[311] *Morrow, supra* note 288 at para. 37.
[312] See Sheila Noonan, Annotation to *R. v. Ogg-Moss,* (1984), 41 C.R. (3d) 297.
[313] Noonan, *ibid.*

Parental authority by delegation to a school bus driver does not appear to be in accordance with the Supreme Court's holdings in *Canadian Foundation* , since it cannot be convincingly advanced that a school bus driver assumes <u>*all*</u> obligations of parenthood as required by Chief Justice McLachlin at paragraph 21 of *Canadian Foundation.* But even if the "parent by delegated authority" category remains, which has been called into doubt after its lack of recognition in *Canadian Foundation,* neither *Kinch* nor *Morrow* should have fallen into that category. Parental authority must be expressly delegated and "cannot simply be inferred from the fact of placing a child in the care of another."[314] There is no evidence in either of these cases that the parents had expressly provided the bus drivers with parental rights or responsibilities. In the case of *Morrow,* the evidence was that the child's foster mother had directed the driver to speak with the child sternly, or at the worst to leave the child on the street. She did not advise the driver (or give him authority) to bind and gag the child to return him to the home.[315]

(b) Biological Parents Without Authority

The application of section 43 to biological parents was not addressed in *Canadian Foundation* or *Ogg-Moss,* but formed a central theme in the case of *R. v. M. (D.L.)* (2009).[316] In that case, the British Columbia Provincial Court found a biological father guilty of assaulting his nine year old daughter after he slapped her in the face while she threw a tantrum. Frome J. identified several reasons for

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[314] *Ogg-Moss*, *supra* note 24 at 191.
[315] *Morrow*, *supra* note 288 at para. 15.
[316] *R. v. M. (D.L.)*, *supra* note 282.

why section 43 was unavailable to the father: (1) He hit the child in the face, (2) The force was applied in anger, (3) There was no corrective nature to the application of force, (4) The application of force raised a reasonable prospect of harm, and (4) the father did not satisfy the criteria for "parent" or "standing in the place of parent" for the purposes of section 43. The first three reasons formed an appropriate application of the Supreme Court's holding in *Canadian Foundation*. The final criterion is the most interesting since the accused person was actually the biological father of the child. The court wrote that "Biology alone is not sufficient to create a parent for the purposes of Section 43."[317] Since the father seldom saw the child, he was unable to establish that he had assumed all the obligations of parenthood as required by the Supreme Court in *Canadian Foundation*.[318]

The ruling in *M.(D.L.)* restricted the application of section 43 further than a plain reading of the provision, or prior Supreme Court authority, allows. Section 43 specifically provides a justification for "Every…parent"[319] to use reasonable corrective force without qualifying the particular duties that parent incurs with respect to the child. While both *Ogg-Moss* and *Canadian Foundation* stipulated that a person standing in the place of a parent must assume *all* the obligations of parenthood in order to benefit from section 43,[320] neither decision held this to be a requirement for parents. *M.(D.L.)* is a novel decision in that it

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[317] *Ibid.* at para. 25.
[318] *Ibid.*
[319] *Criminal Code, supra* note 5 at section 43.
[320] *Canadian Foundation, supra* note 7 at para. 21 and *Ogg-Moss, supra* note 24 at 190.

was the first to reject the application of section 43 to the actions of a biological parent. This restrictive application of section 43 may be consistent with current social values as well as other areas of the law that differentiate between the rights and responsibilities of parents and guardians,[321] but it extends beyond current judicial and statutory authority. Without statutory amendment or higher court authority, the ruling in *M.(D.L.)* is incorrect and unsupported by the law.

III. <u>ISSUE 2: Corrective Force Applied to Teenagers</u>

Physical correction of teenagers by their parents and teachers was considered in *Canadian Foundation.* The majority held that corporal punishment of teenagers by their parents is harmful because it induces aggressive or antisocial behavior and, therefore, it is outside the sphere of protection offered by section 43. However, the court recognized that parents may need to restrain or remove their teenaged children from particular situations. Corrective force involving the restraint or removal of teenagers is authorized at paragraph 42 of the decision, which reads:

> Similarly, current expert consensus indicates that corporal punishment of teenagers creates a serious risk of psychological harm: employing it would thus be unreasonable. There may however be instances in which a parent or school teacher reasonably uses corrective force to restrain or remove an adolescent from a particular situation, falling short of corporal punishment.[322]

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[321] For example, the rights and responsibilities of a legal parent and a legal guardian are not synonymous in the area of family law. For example, see Alberta's *Family Law Act,* S.A. 2003, c. F-4.5, ss. 20-21.
[322] *Canadian Foundation, supra* note 7 at para. 46.

The use of corrective force against teenagers coming within the protection of section 43 has received limited consideration by the courts. In *R. v. Swan* (2008) [*Swan*], the Ontario Superior Court of Justice correctly held that *Canadian Foundation* only prohibits the use of corporal punishment against teenagers, but that "correction is not limited to corporal punishment and may include corrective restraint."[323] In that case, the accused father had followed his daughter to a campground and grabbed her by the shirt to physically force her into his vehicle to return her back to his home. The daughter testified that her father had "shoved" her into the truck. The trial judge held that section 43 did not apply since the child was a teenager, but granted the father a conditional discharge based on all the facts of the case. On appeal, the Ontario Superior Court of Justice held,

> The trial judge was correct that the summary of Canadian Foundation in Martin's Criminal Code includes the comment by the Supreme Court of Canada that s. 43 does not apply to teenagers, but a review of the case shows those comments were made in the context of a review of corporal punishment. The majority of the court concluded that corporal punishment of teenagers, particularly with the use of objects or blows or slaps to the head, is prohibited because it does not have corrective value. It did not hold, as the trial judge seems to have concluded, that any non-consensual application of force by a parent against a teenager is precluded in all circumstances. To exclude all force against teenagers takes the comments of the court out of context. The statute does not include an age restriction. Canadian Foundation did not prohibit the application of s. 43 in circumstances of restraint or control of an unruly teen.[324]

Swan's holding that parents are entitled to use corrective force in the form of restraint against their teenaged children was correctly decided in light of the

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[323] *R. v. Swan* (2008), 58 C.R. (6th) 126 (Ont. S.C.J.) at para. 15 [*Swan*].
[324] *Ibid.* at para. 28.

language used in *Canadian Foundation.*[325]

Swan was considered, but not applied, by the British Columbia Provincial Court in *R. v. L.(J.A.)*(2009) [*L.(J.A.)*].[326] In *L. (J.A.),* the British Columbia Provincial Court convicted a father of assault causing bodily harm against his fifteen year old daughter. The father hit the child to the ground and held her down with his knee on her chest and a hand on her throat, choking her. He also struck her several times in the face, causing a cut lip, a bloody nose and abrasions to her neck. The court acknowledged that *Canadian Foundation* precludes justification of corporal punishment against teenagers.[327] *Swan* was raised as a possible justification for the father's actions by defence counsel. The Crown attempted to differentiate *L.(J.A.)* from *Swan* based on the excessive force used by the father in *L.(J.A.)* as compared to the more measured approach of the father in *Swan.*

The decision of *L.(J.A.)* appears to be correct in law with respect to its consideration of section 43. It implicitly affirmed the ruling in *Swan* by considering section 43 in the context of parental use of corrective force on a teenaged child. It presumably rejected the application of section 43 on the basis that the force was excessive. The court found that *Swan* stood for the proposition

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[325] In his annotation to the decision, Don Stuart supports the ruling of the Ontario Superior Court of Justice. However, he also opines that the court's reasoning was flawed because it considered the gravity of the precipitating events to the assault in assessing the availability of the section 43 defence. See.*R. v. Swan* (2008), 58 C.R. (6th) 126 (Ont. S.C.J.) at 126.
[326] *R. v. L.(J.A.), supra* note 283.
[327] *Ibid.* at para. 251.

that "Section 43 may apply to teenagers if the person applying force intended it to be of educative or corrective purposes," and also that "Parents are not prevented from restraining unruly teens where reasonable force is used."[328] Judge Brecknell held that section 43 could not apply because the father's actions were "clearly exceeding any reasonable attempts…to exert parental control."[329]

In *R. v. W.(B.W.)* (2009) [*W.(B.W.)*],[330] an accused father attempted to use section 43 to justify an assault on his fifteen year old daughter that involved his grabbing her by the shirt and hair and dragging her to his vehicle. The court concluded that section 43 was not available to the father since he was acting out of anger and his actions had a punitive element, but that section 43 can apply in some circumstances involving parents applying corrective force to their teenaged children. The court noted that the father did not attempt to remove his daughter through less assertive means such as verbal direction or with the assistance of her friends. Interestingly, it was the latter finding that appeared to drive the court's rejection of section 43 to the circumstances.

W.(B.W.) serves as an additional authority for the proposition that parents are justified in using corrective force against their teenaged children if the intention of that force is to restrain or secure compliance with instructions. The case does not reference *Swan,* but came to the same conclusions with respect to the application of section 43 to the use of corrective force against teenagers.

[328] *Ibid.* at para. 252.
[329] *Ibid.* at para. 336.
[330] *R. v. W. (B.W.), supra* note 282.

Judge Barley differentiated between corrective force and corporal punishment by noting that teachers can use the former and not the latter. The court found that corrective force can be used to remove a teenager from a dangerous situation as long as it is not applied in anger and verbal directions are used prior to the exertion of physical force. Corrective force and corporal punishment were distinguished by the court in the following way:

> . . . there seems to be a distinction between corporal punishment, meant to punish, and corrective force, used to remove a child from a particular situation or to secure compliance with instructions. Teachers may use the latter, but not the former. It would seem logical to extend the same distinction to parents. A parent may not use corporal punishment on a teenager. However, it might be appropriate if a parent were to use force to remove a teenager from an inappropriate situation. For instance, if the daughter refused to accompany her father and continued to drink, endangering herself, he would probably be entitled to take her sleeve and remove her from the scene.[331]

IV. ISSUE 3: Unwarranted Extensions of Section 43

The language used in *Canadian Foundation* to describe the actions justified by section 43 has created confusion in several aspects. It is clear that the majority decision in *Canadian Foundation* intended a distinction between "corrective force" and "corporal punishment" in the case of teenagers. However, nowhere in the Supreme Court judgment are the terms "corporal punishment," "corrective restraint," "corrective force," "discipline," and "minor corrective force of a transitory or trifling nature" defined. This has created issues in post-*Canadian Foundation* cases, as several decisions have deviated from the holding in *Canadian Foundation* on the basis that the conduct proscribed in *Canadian*

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[331] *Ibid.* at para. 16.

Foundation is defined differently than the conduct before the court. Problematic applications of the terms "corrective force" and "minor corrective force" in the context of blows to a child's head, force applied in anger, and the use of weapons have created a desperate need for clarification. There is now lower court authority for the propositions that a teacher may access section 43 even if the amount of force applied exceeds that of removal or restraint,[332] corporal punishment by way of a weapon is acceptable so long as the force applied is not excessive,[333] corrective blows to a child's head are justifiable so long as they are not characterized as "corporal punishment" or "discipline,"[334] and corrective force applied in anger is allowable if the anger is not directed at the child.[335]

(a) Corporal Punishment by Teachers is Justifiable by Section 43

Canadian Foundation created substantial limitations to the justifiable use of corrective force by teachers on their students. The majority decision held that teachers may access section 43 as a justification for removing children from classrooms or to secure compliance with instructions.[336] *Canadian Foundation* unequivocally states that "the use of corporal punishment by teachers is not acceptable"[337] and that teachers are only protected in using reasonable, corrective force to "restrain or remove a child in appropriate circumstances."[338]

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[332] *Foote, supra* note 284.
[333] *Plummer, supra* note 289..
[334] *Kaur, supra* note 290.
[335] *R. v. Demelo, supra* note 291.
[336] *Canadian Foundation, supra* note 7 at para. 38.
[337] *Ibid.*
[338] *Ibid.*

However, in *R. v. Foote* (2005) [*Foote*],[339] a teacher was acquitted of assault for threatening to kick an autistic grade two student in the leg based in part on section 43. In *Foote,* Westman J. found that an assault was committed against the child after the teacher threatened and mimicked a kick to the child's leg, barely stopping short of making contact. However, the court found that the assault was justified since it was corrective in nature, the child was capable of learning from the correction, there was no lasting injury, and the force was not applied in anger or frustration. In short, the court used the more liberal application of section 43 reserved for parents applying force to their children in the context of a teacher applying force to a student. Interestingly, the court engages in a fairly thorough analysis of paragraphs 21 to 37 of *Canadian Foundation,* but stops short of paragraph 38, which is the portion of the decision that deals with the application of section 43 to teachers applying force to their students. At the end of the decision, the court chastises the Crown for pursuing the case, stating

> But the powerful language I hear expressed in the WEMET report [in paragraph 60 of *Canadian Foundation*] from my perspective would appear to have suggested that maybe this matter should have not ended up before the criminal court. That maybe there should be another forum in which to deal with these matters in a civil setting as opposed to a criminal setting where the teacher could be challenged for her conduct. The parents would have an opportunity to be said, to have their say. It would be done in a community setting so that people would know that it was not a cover up. But to bring it here where the instrument is so blunt and the standard is so high for prosecution, one questions the value in circumstances similar to this.[340]

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[339] *Foote, supra* note 284.
[340] *Ibid.* at para. 101.

Foote was considered in the case of *R. v. Maddison* (2009) [*Maddison*].[341] In *Maddison,* an educational assistant was acquitted of assault after allegedly grabbing an eight year old student by the throat, pinching him, and then cuffing the child on the head in an attempt to get the child to do some work. It was also alleged that, on two separate occasions, the accused person had used a choke hold on the child. Tufts J. found that the application of force was corrective in nature with the intention of securing compliance or restraining the child, and that the force applied was transitory and trifling. The court found reasonable doubt that the choke-holds were around the child's neck and not the child's chest based on the testimony of the accused person. According to the court, a chest restraint was reasonable based on the child's behavioral problems. The court found that the throat-grabbing allegation and the head-cuffing allegation could not be justified under section 43 pursuant to *Canadian Foundation*, but that Crown did not prove the allegations beyond a reasonable doubt.

The result in *Maddison* initially appears to be objectionable in that a teaching assistant is acquitted of using a high degree of force against a student until the decision is read in its entirety. Tufts J. engaged in a thorough and thoughtful analysis of the evidence adduced at trial in *Maddison* to arrive at a verdict. Expert evidence was called as to the particular behavioural issues of the child as well as the types of restraint or force that would be necessary to secure compliance from the child or remove the child from particular situations. The evidence of the Crown was conflicting in important details and lacked specificity

[341] *R. v. Maddison*, 2009 NSPC 16 (Prov. Ct.).

in terms of dates and times. The evidence of the defence was detailed and consistent with exculpatory explanations. Ultimately, it appears as though the court came to the correct conclusions in law based on the analysis of section 43 and the application of the evidence to that analysis.

(b) Correction by Weapon Without Excessive Force is Justifiable by Section 43

The use of weapons as a method of correcting children has received questionable treatment in at least one Canadian lower court. *Canadian Foundation* unequivocally held that the use of weapons in punishing a child is unreasonable since it is emotionally and physically harmful to the child.[342] The court explicitly precluded the use of section 43 for parents who use belts and paddles as corrective tools against their children.[343] Even so, a mother was acquitted of assaulting her children with a belt after they acted unruly by the Ontario Court of Justice in *R. v. Plummer* (2006) [*Plummer*].[344]

In *Plummer,* the court found that the assaults were justified pursuant to section 43 notwithstanding the fact that a belt was used since the children were apparently uninjured and the force was applied with a corrective purpose. The court also took issue with the description of the term "belt," indicating that the lack of evidence as to "the thickness of the belt, whether it was a leather belt or a

[342] *Canadian Foundation*, *supra* note 7 at para. 37.
[343] *Ibid.*
[344] *Plummer, supra* note 289.

cloth belt, or basically what type of belt [it was]" left the court "ignorant,"[345] even though there was no doubt that a belt was used in the circumstances.[346] A deficient description of the belt seemed to leave Rosemay J. with some doubt, when he stated "…clearly what the children said [was] that ["]our mother used the belt as a last resort["], and again I don't know what that belt is. The court doesn't know and the court cannot assume anything in the absence of evidence as to the belt."[347] Rosemay J. acknowledged the ruling in *Canadian Foundation,* by noting that "when a parent uses a belt or a ruler to discipline a child it is an inappropriate form of discipline,"[348] but still found that the application of force in the circumstances was reasonable.

The court in *Plummer* concluded that the assaults by the mother on her children were justified as being reasonable and appropriate, in part based on the fact that the Crown failed to show that the force was excessive.[349] It could be argued that *Plummer* stands for the following propositions: (1) Lack of evidence as to the description of a belt will negate the Supreme Court's ruling in *Canadian Foundation* that the use of a belt on a child is an unreasonable application of force; and (2) The Crown must prove that corrective force applied to children is excessive even in circumstances involving the use of a weapon against a child.

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[345] *Ibid.* at para. 7.
[346] At paragraph 7 of *Plummer,* the court writes, "The court can only go on the evidence before it, which was that a belt was used." *Ibid.*
[347] *Ibid.* at para. 37.
[348] *Ibid.* at para. 34.
[349] *Ibid.* at para. 39.

Plummer has created a confusing, and potentially dangerous, line of authority in the area of correction of children by force.

(c) Minor, Non-Disciplinary Head Shots are Justifiable by Section 43

Parents who attempt to correct their children through blows to the head are prohibited from accessing section 43 based on the majority decision in *Canadian Foundation*,[350] yet there have been several cases of child assault involving head blows in which section 43 has been raised to justify the conduct. In at least one case, the application of section 43 resulted in an acquittal of the accused parent. In *R. v. Tourand* (2007),[351] an accused father was convicted of assaulting his son since he administered excessive force to the child's head when he was angry. After correctly applying *Canadian Foundation* to the facts of the case, the court wrote in *obiter* that "a slap to the face could only be considered reasonable if the slap were slight and/or trifling."[352] The court in *R. v. Kaur* (2004) [*Kaur*] [353] went even further, concluding that the accused mother was justified pursuant to section 43 for slapping her twelve year old daughter in the head. In both cases, the courts appeared to be motivated by the lack of severity of the assaults as opposed to strictly applying the limits to section 43 created in *Canadian Foundation.*[354]

[350] *Ibid.*
[351] *Supra* note 284.
[352] *Ibid*. at para. 15.
[353] *Kaur, supra* note 299.
[354] This is consistent with other lower court judgments that acquit accused parents on the basis that the assaults were minor. For example, see *Plummer*, *supra* note 291 and *Demelo, supra* note 291.

In *Kaur,* the court considered whether section 43 justifies blows to the head that are "properly labeled as "minor corrective force of a transitory and trifling nature,""[355] as opposed to blows to the head that could be defined as "corporal punishment." Using particularly circuitous reasoning, Sutherland J. held that minor slaps to the head are not properly characterized as corporal punishment or discipline, and since only blows to the head that are defined as "corporal punishment" or "discipline" are unreasonable pursuant to *Canadian Foundation,* the mother's actions were justifiable under section 43. In *Kaur,* the court specifically identified the conduct of the accused mother as "minor corrective force of a transitory and trifling nature" and not "corporal punishment." The explanation provided as to what distinguishes one from the other was both meager and obscure. Basically, Sutherland J. used a series of quotes from *Canadian Foundation* as authority for the proposition that "corporal punishment," "discipline," and "minor corrective force" are all separate species of assault, with the former two being more serious than the latter.[356] Therefore, according to *Kaur,* while slaps to the head defined as "discipline" or "corporal punishment" are prohibited by *Canadian Foundation,* lesser head blows characterized as "minor corrective force of a transitory and trifling nature" are permissible.[357]

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[355] *Kaur, supra* note 290 at para. 25.
[356] The court in *Kaur, ibid.* at para. 31 relies on sentences from paragraphs 40 and 62 of *Canadian Foundation, supra* note 7 as standing for the proposition that the terms "corporal punishment," "discipline," and "assault" are distinguishable from each other. The applicable portion of paragraph 40 of *Canadian Foundation* reads, "... Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment." And the sentence from paragraph 62 of *Canadian Foundation* relied upon in *Kaur* reads, "... The reality is that without s.43, Canada's broad assault law would criminalize force falling far short of what we think of as corporal punishment, like placing an unwilling child in a chair for a five-minute "time-out"."
[357] *Ibid.* at para. 33.

Terminology plays a very significant role in the *Kaur* decision. The court was able to capitalize on the lack of precision in the language used in *Canadian Foundation* to create a completely new form of corrective force that may be justified under section 43. Sutherland J. acknowledged that *Canadian Foundation* established that disciplinary blows to a child's head are both harmful and unreasonable[358] as is corporal punishment involving slaps or blows to a child's head.[359] The court even quoted the applicable passages from *Canadian Foundation* in the judgment.[360] While it is arguable that the Supreme Court intended the terms "discipline" and "corrective force" to be used interchangeably,[361] neither term is defined at any point in the decision, which left it open to Sutherland J. and other lower courts to come to their conclusions.

Kaur is a problematic judgment. If *Kaur* is accepted by other trial judges, which it has been,[362] it would mean that any parent can be justified for hitting their child in the head as long as they can argue that the force applied was "minor

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[358] *Canadian Foundation*, *supra* note 7 at para. 40.
[359] *Ibid.* at para. 37.
[360] *Kaur, supra* note 290 at paras. 23-24.
[361] For example, paragraph 40 of *Canadian Foundation, supra* note 7 discussed the type of conduct to be justified under section 43. The paragraph begins, ""When these considerations are taken together, a solid core of meaning emerges for "reasonable under the circumstances", sufficient to establish a zone in which discipline risks criminal sanction. Generally, s. 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature." (emphasis added). The term "discipline" is used in the first sentence, the term "corrective force" in the second without any differentiation between the two terms. One would logically conclude that the Court is engaging in a discussion of the same type of conduct, but using different terms for that conduct.
[362] The court in *Demelo*, *supra* note 291 affirmed the holding. The decision was considered in *R. v. Maddison, supra* note 341, *Swan, supra* note 323 and *R. v. U.(C.M.T.), supra* note 284. It is cited in *R. v. Smith, supra* note 280.

and of a transitory and trifling nature" and not "corporal punishment."[363] Drew Mitchell points out that "transitory or trifling" correction with an object, such as a belt or a stick, could also be justified using the same reasoning.[364] If this were the case, it is possible that the court in *R. v. Smith* (2006)[365] may have acquitted the accused father for 'strapping' his difficult thirteen year old son with a belt using 'half-strength', as the court appeared to be quite sympathetic to the plight of the father with respect to the son's misbehaviour. Instead, the court convicted the father of assault with a weapon. It is unfair, and unjust, that such disparate outcomes should arise after the Supreme Court's attempt to clearly delineate the proper scope of section 43.

The court in *Kaur* could have legitimately arrived at the result it did through other means. It appears that the acquittal in *Kaur* was based on the lack of severity of the incident, and therefore it would have been more appropriate route for the court to have acquitted the father on the basis of the common law defence of *de minimis non curat lex.*[366] It was incorrect for the court to hold that section 43 justified the actions of the mother through an illogical manipulation of the wording in *Canadian Foundation*.

[363] See Mitchell, *supra* note 235.
[364] *Ibid.*
[365] *R. v. Smith, supra* note 280.
[366] *De minimis* is discussed in Part Four, at section II(c)(ii) of this thesis.

(d) Force Applied in Anger (at Another Person) is Justifiable by Section 43

Physical discipline of children must be applied with a corrective purpose for section 43 to apply. *Canadian Foundation* specifically precluded the use of force that is applied as a result of the caregiver's frustration, loss of temper or abusive personality from being justified pursuant to section 43 since those applications of force are not corrective.[367] The Supreme Court failed to address whether the anger must be directed at the child and, as in the case of the loose terminology employed in the decision, at least one lower court seized upon this ambiguity in arriving at an acquittal of a father accused of assaulting his son.

The Ontario Court of Justice has applied this limit to mean that a parent must not be angry <u>at the child</u> when administering physical discipline, but that it is acceptable for the parent to be angry at another individual when he/she is assaulting his/her child.[368] In *R. v. Demelo* (2009) [*Demelo*],[369] a father was acquitted of assault after pushing his son in the forehead and accidentally kneeing the child after the child called the father rude names. Brown J. quoted from *Canadian Foundation,* noting the Supreme Court's holding that both blows to the head and force applied in anger are unreasonable.[370] However, the court in *Demelo* found the father's actions to be justified pursuant to section 43 notwithstanding the fact that the assault included a blow to the head applied by an

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[367] *Canadian Foundation, supra* note 7 at para. 40.
[368] *Demelo, supra* note 291 at paras. 57-60.
[369] *Ibid.*
[370] *Ibid.* at para. 55.

angry father. The court found that the father's anger was "primarily" directed at his mother-in-law and not at his son.[371] Furthermore, the court quotes and affirms *R. v. Kaur* as authority for the proposition that only slaps to the head that can be characterized as "corporal punishment" or "discipline" are prohibited by *Canadian Foundation,* and not every application of force to a child's head.[372] Brown J. held that "A slight push to the cheek or forehead, as I have found occurred in this case, is not sufficient to disentitle Mr. Demelo to the s. 43 defence."[373] At the conclusion of the decision, there is also an indication that the amount of force applied was too minimal to mandate that the court convict the accused person when the court writes, "I cannot find that the Crown has proven beyond a reasonable doubt that the defendant's behaviour on this date rose to the level where I can find him guilty of any of the criminal charges that he faces."[374] This type of comment is reminiscent of the court in *Plummer*, which required that force applied to a child must be excessive to be outside the ambit of section 43.[375]

V. <u>CONCLUSION</u>

While it is certainly the case that section 43 of the *Criminal Code* has been applied with more consistency following the release of *Canadian Foundation,* new issues have arisen and old issues persist. Not only does section 43 continue to be misapplied and misconstrued by lower courts, but new areas of ambiguity as to the ambit of section 43 have been created based on the imprecise language used

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[371] *Ibid.* at paras. 60 & 68.
[372] *Ibid.* at para. 65.
[373] *Ibid.* at para. 67.
[374] *Ibid.* at para. 70.
[375] *Plummer, supra* note 289 at para. 39.

in *Canadian Foundation.* These outstanding issues have created a deep-rooted need for Parliamentary intervention.

PART FOUR: The Future of Section 43

I. INTRODUCTION

Canadian Foundation's conclusion that section 43 is constitutionally valid coupled with Parliament's failure to repeal the provision have led to negative reactions from international bodies as well as domestic groups. The United Nations Committee on the Rights of Child has expressed concern that Canada has yet to expressly prohibit all forms of corporal punishment against children, specifically noting the continued existence of section 43.[376] Within Canada, the Repeal 43 Committee[377] and other children's rights groups continue to agitate for change in the laws regarding the use of corporal punishment against children.

The necessity of having section 43 as a defence for reasonable chastisement has been called into question. It has been suggested that the other existing defences, such as *de minimis non curat lex*, necessity, duress, self defence and deemed consent are sufficient to cover the behaviour that comes within the newly narrowed scope of section 43. Furthermore, the use of discretion by Crown prosecutors through detailed policy guides could further reduce the need for section 43, possibly by redirecting offenders into the civil child welfare system or

[376] Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties Under Article 40 of the Convention,* CRC/C/15/Add. 215, 34th Sess., (2003) at para. 32.
[377] The Repeal 43 Committee is a national, voluntary committee of lawyers, pediatricians, social workers and educators formed in 1994 to advocate repeal of section 43 of the Criminal Code. They receive financial assistance from the Laidlaw Foundation: Repeal 43 Committee, "About Us", http://www.repeal43.org/about.html accessed November 29, 2009.

through a specialized alternative measures program as opposed to proceeding under the criminal law.

However, there are issues with completely removing section 43 from the *Criminal Code.* Many situations arise in the parent-child context that are not covered by any of the codified defences or the existing common law defences. Moreover, the two common law defences that would be the most applicable to parent-child interactions (*de minimis non curat lex* and deemed consent) have yet to receive formal recognition by a majority of the Supreme Court of Canada or the majority of the provincial appellate courts in Canada. In addition, the exercise of prosecutorial discretion is uncertain in its application and difficult to review.

Amendment of section 43 has also been raised as a possible alternative to the current statutory provision. Indeed, a variety of bills seeking to amend section 43 have been tabled in the Senate.[378] Nevertheless, legislative reform has not yet been achieved.

In this portion of the paper, I examine the current proposals for repeal and amendment of section 43 of the *Criminal Code*. I discuss the potential ramifications of each course of action. Ultimately, I conclude that Parliament would be best served by amending section 43 so that the text of the provision reflects the decision of the Supreme Court in *Canadian Foundation,* incorporating

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[378] See, for example, Bill S-21, *An Act to Amend the Criminal Code (protection of children)*,1st Sess., 38th Parl., 2004 [Bill S-21].

leading social science evidence, and provides certainty in the ake of exiting legal ambiguities surrounding the physical correction of children.

II. REPEAL SECTION 43

Repealing section 43 enjoys the support of a multitude of parties.[379] Leaders in the field of criminal law,[380] children's law,[381] and child psychology[382] have clearly indicated their support for the complete removal of section 43 from the *Criminal Code*. In fact, committees have been formed with the sole purpose of advocating the repeal of section 43.[383]

Sweden has gained a distinguished reputation for being the first country to completely ban corporal punishment of children by their parents in 1979, often

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[379] There are also many opponents to repealing section 43. The Chair of the National Criminal Justice Section of the Canadian Bar Association has written a letter to the Senate voicing its concern over the potential repeal of section 43 in Greg DelBigio, "Letter to Senator Joan Fraser" (4 June 2008), online: Canadian Bar Association <http://www.cba.org/CBA/submissions/pdf/08-31-eng.pdf>. Some other opponents of repeal include: REAL Women of Canada, "July/August 2007 Newsletter," online: REAL Women of Canada <http://www.realwomenca.com/page/newslja0704.html>), Canadian Teacher's Federation, "Section 43 of the Criminal Code of Canada," online: Canadian Teacher's Federation <http://www.ctf-fce.ca/documents/Priorities/EN/advocacy/section43/index.asp>).

[380] Don Stuart, one of Canada's leading criminal law experts, writes, "In my view the better approach [than enacting an amended version of section 43] would be to repeal section 43 and have Canada catch up to the worldwide trend to abolish the right to physically discipline children" in annotation to *R. v. Swan* (2008), *supra* note 325 at 126. See also Mark Carter, "Corporal punishment and prosecutorial discretion in Canada" (2004) 12 The International Journal of Children's Rights 41.

[381] Anne McGillivray, "Nowhere to stand: Correction by force in the Supreme Court of Canada," in S. Anand, ed., *Children and the Law: Essays in Honor of Professor Nicholas Bala* (2009), [forthcoming 2010].

[382] See Joan E. Durrant *et al.*,, "Protection of Children from Physical Maltreatment in Canada: An Evaluation of the Supreme Court's Definition of Reasonable Force" (2009) 18:1 Journal of Aggression, Maltreatment & Trauma 64.

[383] See the Repeal 43 Committte, *supra* note 377.

being cited as the leader in this area.[384] Corporal punishment was abolished in Sweden in several steps: corporal punishment was explicitly banned in child care institutions in 1960, a justification permitting parents to use corporal punishment was removed from the civil code in 1966, and in 1979 a new paragraph was added to the civil code prohibiting parents from using physical punishment on their children.[385] A public education campaign involving extensive pamphlet distribution and advertising on milk cartons accompanied the ban, leading to 99% of the Swedish population being informed about the law.[386] The Swedish ban has been applauded as being "highly successful" in terms of decreasing public support for corporal punishment and increasing the identification of children at risk and interventions such as criminal prosecution and children's services.[387] Sweden's ban on corporal punishment has also been linked to decreases in the rates of youth involvement in crime, alcohol and drug abuse and suicide.[388]

However, studies on the outcomes of Sweden's ban are not all positive. In a review of literature examining the effects of Sweden's prohibition of the use of physical force on children, Robert Larzelere and Byron Johnson report that there has been little change in the rates of child physical abuse.[389] Another study

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[384] Joan E. Durrant, "Legal Reform and Attitudes Toward Physical Punishment in Sweden" (2003) 11:2 International Journal of Children's Rights 147.
[385] Joan E. Durrant, *A Generation Without Smacking: The impact of Sweden's ban on physical punishment,* (Save The Children: London, 2000) at 7.
[386] *Ibid.* at 7-8.
[387] Joan E. Durrant, "Evaluating the Success of Sweden's Corporal Punishment Ban" (1999) 23:5 Child Abuse & Neglect 435.
[388] Joan E. Durrant, "Trends in Youth Crime and Well-Being Since the Abolition of Corporal Punishment in Sweden" (2000) 31:4 Youth Society 437.
[389] Robert E. Larzelere & Byron Johnson, "Evaluations of the Effects of Sweden's Spanking Ban on Physical Child Abuse Rates: A Literature Review" (1999) 85 Psychological Reports 381.

concluded that the ban on corporal punishment in Sweden has not had an effect on public attitudes toward its use, but instead that the changing attitudes of the public were the instigating force behind the ban.[390] If this second study is correct in stating that changing attitudes begins with the public and is followed by a change in the law, it would mean that Canada may not be in an appropriate position to implement a ban on the use of corrective force against children since the majority of Canadians are opposed to that course of action.[391]

(a) Prosecutorial Discretion

The use of prosecutorial discretion as a replacement for section 43 was put forward by the CFCYL in *Canadian Foundation.*[392] They suggested that prosecutorial discretion could serve as an effective screening mechanism to ensure that only appropriate cases of child corporal punishment would be brought before the courts.[393] This argument received short shrift from the Chief Justice, who responded by writing, "The Foundation argues that these harms could be

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[390] Julian V. Roberts, "Changing Public Attitudes Towards Corporal Punishment: The Effects of Statutory Reform in Sweden" (2000) 24:8 Child Abuse & Neglect 1027. Roberts concludes that changing public attitudes are more likely to instigate a change in the law, as opposed to changing laws having an impact on the attitudes of the public.

[391] A survey by Canadian Press and Leger Marketing, *supra* note 2, found that 70.0% of Canadians were opposed to a law prohibiting parents from spanking their children.

[392] For more on prosecutorial discretion, see David Vanek, "Prosecutorial Discretion" (1988) 30 Crim. L.Q. 219, Bruce P. Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions Between Punitive and Restorative Paradigms of Justice" (1998) 3 Cdn. Crim. L.R. 68 and Wayne Gorman, "Prosecutorial Discretion in a Charter-Dominated Trial Process" (2001) 44 Crim. L.Q. 15.

[393] CFCYL Factum, *supra* note 68 at para. 107. This view is also advocated in Sheila Noonan's annotation to *Ogg-Moss, supra* note 312 at 299 and further support can be found in Carter, *supra* note 380. However, guidelines for the exercise of prosecutorial discretion are implemented at a provincial level, since the Federal Crown has delegated prosecutorial power of *Criminal Code* offences to Provincial Crowns pursuant to the *Constitution Act*, *1867* (U.K.), 30 & 31 Vict., c. 3. This leaves open the possibility that, should section 43 be repealed, parents will be treated differently depending on their province of residence.

effectively avoided by the exercise of prosecutorial discretion. However, as the Foundation asserts in its argument on vagueness, our goal should be the rule of law, not the rule of individual discretion."[394] Justice Arbour echoed the concerns of the Chief Justice, noting,

> The Chief Justice is rightly unwilling to rely exclusively on prosecutorial discretion to weed out cases undeserving of prosecution and punishment. The good judgment of prosecutors in eliminating trivial cases is necessary but not sufficient to the workings of the criminal law. There must be legal protection against convictions for conduct undeserving of punishment.[395]

It is a well recognized principle that courts will interfere with the exercise of prosecutorial discretion only in the rarest of circumstances.[396] Even in the context of section 43, Dickson C.J.C. commented that it is not the place of the courts to question the discretion of the prosecution. In *Ogg-Moss* he wrote,

> Since s. 43 does not justify the intentional application of force in a situation like the present, it follows that this use of force constitutes an assault within the meaning of s. 245(1). I make no comment on the gravity of the assault nor on the appropriateness of laying criminal charges. These questions are not before us; as in the case of any other intentional application of force they are matters for prosecutorial judgment in the discretion of the sentencing court.[397]

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[394] *Canadian Foundation, supra* note 7 at para. 63.
[395] *Ibid.* at para. 200. In *R. v. Keegstra* (1988), 65 C.R. (3d) 289 at para. 9 (Alta. C.A.), rev'd on other grounds [1990] 3 S.C.R. 697, Justice Kerans of the Alberta Court of Appeal stated that prosecutorial discretion is "an inappropriate and an inadequate protection of a *Charter* right."
[396] In *Smythe v. The Queen,* [1971] S.C.R. 680 at 686 (S.C.C.), the court wrote, "Obviously, the manner in which the Attorney General of the day exercises his statutory discretion may be questioned or censured by the legislative body to which he is answerable, but that again is foreign to the determination of the question now under consideration. Enforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power." This was affirmed in *R. v. T.(V.)*, [1992] 1 S.C.R. 749 at para. 12 (S.C.C.), when the court held, "There is no doubt that the Crown acting through the Attorney General, and in turn through his or her prosecutors, has a wide amount of discretion in the carriage of criminal cases." See also *Krieger v. Law Society (Alberta)*, [2002] 3 S.C.R. 372 and *R. v. Power, supra* note 117.
[397] *Ogg-Moss*, *supra* note 24 at 195-196.

This inability, or unwillingness, of courts to review the use of prosecutorial discretion makes it a poor substitute for a codified defence or justification.

(b) Common law defences

Common law defences continue to apply in Canadian criminal law by virtue of section 8(3) of the *Criminal Code*,[398] and may offer alternatives to the continued use of section 43. In her dissenting judgment in *Canadian Foundation*, Justice Arbour suggested that the common law defences of necessity and *de minimis non curat lex* could serve as substitutes for section 43.[399] The defence of deemed consent has been put forward as another possible alternative to section 43 in post-*Canadian Foundation* literature.[400]

i. Necessity

The common law defence of necessity has been proposed as a potential alternative to section 43 in particular situations.[401] Necessity is a residual defence that can excuse criminal behaviour in situations of moral involuntariness. Unlike section 43, necessity is an excuse and not a justification,[402] meaning that the

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[398] *Criminal Code, supra* note 5 at section 8(3) reads:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

[399] *Canadian Foundation*, *supra* note 7 at paras. 196 and 200 respectively.

[400] See Stewart, *infra* note 458 and McGillivray, *supra* note 381.

[401] McGillivray, *supra* note 42 at 240.

[402] *R. v. Perka*, [1984] 2 S.C.R. 232 at 248.

behavior being excused remains unlawful, but will not be punished in the usual course based on the circumstances of the excuse.[403]

The defence of necessity has received a fair amount of consideration from the Supreme Court of Canada. Canada's highest court engaged in a discussion of the necessity defence in *R. v. Morgentaler* (1975),[404] but failed in definitively acknowledging its existence or lack thereof. The existence of the defence of necessity was expressly recognized by the Supreme Court of Canada in *R. v. Perka* (1984) [*Perka*].[405] In *Perka,* Chief Justice Dickson identified three elements to be satisfied for the defence of necessity to apply: (1) the circumstances must be urgent and of imminent peril,[406] (2) there must be no reasonable legal alternative to disobeying the law,[407] and (3) the harm inflicted must be less than the harm avoided.[408]

In *R. v. Latimer* (2001) [*Latimer*],[409] the Supreme Court held that the first two elements of the defence of necessity must be evaluated on a "modified objective" standard, taking into account the "situation and characteristics" of the particular accused person.[410] In *Latimer,* which involved a father accused of murdering his disabled daughter to spare her ongoing pain, the Court emphasized that the first step of the necessity test requires that the circumstances must be on

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[403] Colvin & Anand, *supra* note 46 at 286.
[404] 20 C.C.C. (2d) 449 (S.C.C.)
[405] *Supra* note 402.
[406] *Ibid.* at 251.
[407] *Ibid.* at 252.
[408] *Ibid.*
[409] [2001] 1 S.C.R. 3 (S.C.C.)
[410] *Ibid.* at para. 32.

the verge of transpiring and not merely foreseeable or likely.[411] With respect to the proportionality element of the necessity test, the Court in *Latimer* held that it is to be evaluated on a purely objective standard and that the two harms must be of comparable gravity at a minimum.[412]

Circumstances in which the defence of necessity could be used to excuse a parent of applying physical force to a child would be narrow. In *Canadian Foundation,* Justice Arbour discussed the defence of necessity in the context of child correction, noting that it could exculpate the use of force applied to protect children from themselves or others.[413] The examples provided by Arbour J. as being appropriate circumstances for the necessity defence to apply are that of holding a child back to prevent him from entering a traffic intersection or restraining a child so that a doctor can administer a needle to him.[414]

Nevertheless, relying on the necessity defence as a replacement for section 43 is still problematic. The necessity defence is open-ended with a highly

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[411] *Ibid.* at para. 29.
[412] *Ibid.* at para. 31. The elements of the defence of necessity may be refashioned by the courts as a result of *R. v. Ruzic,* [2001] 1 S.C.R. 687. In *Ruzic,* the Supreme Court struck down the immediacy and presence requirements of the statutory defence of duress, holding that a minimum constitutional standard is required for criminal defences in terms of moral involuntariness. At paragraph 47 the court held that "It is a principle of fundamental justice that only voluntary conduct—behaviour that is the product of a free will and controlled body, unhindered by external constraints—should attract the penalty and stigma of criminal liability." Nevertheless, it remains unclear whether and how this principle of fundamental justice may alter the components of the defence of necessity. For a more in-depth discussion of this topic see Colvin & Anand, *supra* note 46 and Stephen Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 Can. Crim. L.R. 147.
[413] *Canadian Foundation, supra* note 7 at para.198.
[414] *Ibid.* at para 199.d

individualized application.[415] This defence involves a complex analysis of the state of mind of an accused person at the time of an offence, as well as a complicated balancing of harms. Since necessity claims can only be evaluated on a case-by-case basis, they cannot provide a concrete scope of protection to individuals.[416] Parents require certainty as to the manner and circumstances in which they can apply force to their children, which cannot be provided with the use of the defence of necessity.

ii. De Minimis Non Curat Lex

The common law defence of *de minimis non curat lex* [*de minimis*] has been suggested as an appropriate defence to excuse minor applications of corrective force to children.[417] *De minimis non curat lex* roughly translates to "the law will not concern itself with trifles."[418] Origins of *de minimis* can be traced back to the English case of *The Reward* (1818), in which Lord Stowell wrote,

> The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex.*—where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice would weigh little or nothing on the public interest, it might properly be overlooked.[419]

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[415] Colvin & Anand, *supra* note 46 at 356.
[416] *Ibid.*
[417] See Justice Arbour's dissent in *Canadian Foundation, supra* note 7 at para 200.
[418] For more on *de minimis non curat lex* see Stuart, *supra* note 47 at pp. 624-629.
[419] *Reward (The)* (1818), 165 E.R. 1482, 2 Dods. 265 at 1485 (Eng. Adm. Ct.).

The concept of *de minimis* developed in a civil context, but has been considered by criminal courts across Canada.[420] In a criminal context, *de minimis* would offer a defence to a technical commission of an offence on the basis that the offence committed was minimal and undeserving of criminal sanction.[421] In other words, "the conduct fell within the words of an offence description but was too trivial to fall within the range of wrongs which the description was designed to cover."[422]

The existence of the *de minimis* defence in Canadian jurisprudence is tenuous. Its use has yet to be definitively affirmed or denied by a majority of the Supreme Court of Canada. The potential application of *de minimis* was briefly acknowledged by the majority in *Canadian Foundation,*[423] *R. v. Hinchey*

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[420] For cases involving the court's acceptance of the *de minimis* defence resulting in an acquittal of the accused person, see for example: *R. v. Peleshaty,* [1950] 1 W.W.R. 108 (Man. C.A.); *R. v. Lepage* (1989), 74 C.R. (3d) 368 (Sask. Q.B.); *R. v. Lepage,* [1994] O.J. No. 2313 (Ont. C.J.); *R. v. Matsuba* (1993), 137 A.R. 34 (Alta. Prov. Ct.); *R. v. Marusiak* (2003) 324 A.R. 159 (Alta. Q.B.); *R. v. Ling* (1954), 19 C.R. 173 (Alta T.D.); *R. v. Stimpson* (1974), 17 C.C.C. (2d) 181 (Man. Prov. Ct.); and *R. v. Merasty,* [2002] S.J. No. 584 (Sask. Prov. Ct.). For cases that consider the use of *de minimis* without applying it, see for example: *R. v. Kubassek* (2004), 25 C.R. (6th) 340 (Ont. C.A.); *R. v. Carson,* [2004] O.J. No. 1530 (Ont. C.A.); *R. v. Hnatiuk,* [2000] A.J. No. 545 (Alta. Q.B.); *R. v. Overvold,* [1972] 6 W.W.R. 473 (N.W.T. Mg. Ct.); *R. v. Kormos* (1998), 14 C.R. (5th) 312 (Ont. Prov. Ct.); *R. v. Schroeder*, [2006] O.J. No. 4310 (Ont. S.C.J.); *R. v. Robart*, [1997] N.S.J. No. 149 (N.S. C.A.); and *R. v. Chapman*, [2008] O.J. No. 4391 (Ont. C.J.). For cases rejecting the existence of a *de minimis* defence in the criminal law, see for example: *R. v. Li,* (1984), 16 C.C.C. (3d) 382 (Ont. H.C.); *R. v. Appleby* (1990), 78 C.R. (3d) 282 (Ont. Prov. Ct.); *R. v. Macdonald* (1987), 70 Nfld. & P.E.I.R. 64 (Nfld. S.C.); and *R. v. Gale*, [2010] N.J. No. 5 (Nfld. Prov. Ct.).

[421] In Justice Arbour's words, "…the defence of *de minimis* does not mean that the act is justified; it remains unlawful, but on account of its triviality it goes unpunished." *Canadian Foundation, supra* note 7 at para. 203 citing S.A. Strauss, "Book Review of *South African Criminal Law and Procedure"* by E.M. Burchell, J.S. Wylie & P.M.A. Hunt" (1970) 87 So. Afr. L.J. 470 at 483.

[422] Colvin & Anand, *supra* note 46 at 171.

[423] In *Canadian Foundation, supra* note 7 at para. 44, Chief Justice McLachlin notes that the application of *de minimis* is equally or more vague than the term "reasonable" as it appears in section 43. Sanjeev Anand criticizes this approach, citing it as a "missed opportunity" for the Supreme Court of Canada to firmly establish the proper application and approach to the *de minimis* defence, *supra* note 85 at 878.

(1996)[424] and *R. v. Cuerrier* (1998).[425] However, dissenting and minority judgments at the Supreme Court level have offered support for the existence of the *de minimis* defence. In *Canadian Foundation,* Justice Arbour writes at length about the defence of *de minimis*,[426] ultimately affirming its existence in Canadian law, at least in her view, by stating,

> The judicial system is not plagued by a multitude of insignificant prosecutions for conduct that merely meets the technical requirements of "a crime" (e.g. theft of a penny) because prosecutorial discretion is effective and because the common law defence of *de minimis non curat lex* (the law does not care for small or trifling matters) is available to judges.[427]

And later,

> I am of the view that an appropriate expansion in the use of the *de minimis* defence—not unlike the development of the doctinre of abuse of process—would assist in ensuring that mere technical violations of the assault provisions of the *Code* that ought not to attract criminal sanctions are stayed.[428]

Ontario courts have unequivocally affirmed the existence of the *de minimis* defence and have provided consideration of its application in the context of domestic violence and violence against children. In *R. v. Carson* (2004) [*Carson*],[429] the Ontario Court of Appeal affirmed the use of *de minimis*"…only so far as to preclude the criminalization of conduct for which there is no reasoned

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[424] In *R. v. Hinchey*, [1996] 3 S.C.R. 1128 at para. 69, Justice L'Heureux-Dube writes, "Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex,* that "the law does not concern itself with trifles"."
[425] *R. v. Cuerrier,* [1998] 2 S.C.R. 371 at para. 21.
[426] *Canadian Foundation, supra* note 7 at paras. 200-209.
[427] *Ibid.* at para. 200.
[428] *Ibid.* at para. 207.
[429] *Supra* note 420.

apprehension of harm to any legitimate personal or societal interest."[430] The accused in *Carson* was not entitled to use the *de minimis* defence since the charges arose out of a domestic violence situation.[431] *Carson* was later applied by the Ontario Superior Court of Justice in *R. v. Persaud* (2007) as standing for the proposition that since minor assaults in a domestic violence situation, which would include assault of children by their parents, cannot be considered trivial due to the social harm, minor assaults against children by teachers similarly cannot be considered trivial and, as such, *de minimis* cannot be used as a defence for child assaults by teachers that go beyond the ambit of section 43.[432]

The approach to *de minimis* outlined in *Carson* and applied by *Persaud* makes sense. Courts across Canada have become increasingly concerned with family violence, which means that assaults by parents against their children will likely not be considered trivial. Furthermore, the *Criminal Code* specifies that offences committed against children, or by persons who hold a position of trust or authority are aggravating circumstances on sentencing.[433] It would be inappropriate, and perhaps even irresponsible, for the judiciary to begin allowing for the use of the *de minimis* defence in situations involving the use of force

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[430] *Ibid.* at para. 24.
[431] There are also cases in which the *de minimis* defence was invoked by the courts to acquit an accused in cases of domestic violence, some of which consider *R. v. Carson, supra* note 420. See *R. v. McLeod,* [2006] A.J. No. 644 (Alta. Prov. Ct.), *R. v. Dejong*, [2005] B.C.J. No. 2546 (B.C. Prov. Ct.), and *R. v. H. (J.K.),* [2008] B.C.J. No. 162 (B.C. Prov. Ct.). Several other cases have refused the application of a *de minimis* defence due to the fact that the offence involved domestic violence. See *R. v. Downey,* [2002] N.S.J. No. 442 (N.S. S.C.); *R. v. B. (A.S.)*, [2006] B.C.J. No. 3447 (B.C. Prov. Ct.), and *R. v. S. (M.M.)*, [2010] B.C.W.L.D. 887 (B.C. Prov. Ct.).
[432] 2007 CarswellOnt 2792 at paras. 49-50 (Ont. S.C.J.). The *de minimis* defence was also rejected in the following cases involving allegations of teachers or parents assaulting children: *R. v. Rennato, supra* note 280; *R. v. Galliani*, [2004] O.J. No. 2978 (Ont. S.C.J.); and *R. v. White*, [1997] O.J. No. 146 (Ont. C.J.).
[433] *Criminal Code*, supra note 5 at , s. 718.01 and ss. 713.2(ii.1)-(iii).

between individuals when a marked power imbalance exists between the parties. As stated by the Ontario Court of Appeal in *Carson,* "The harm to society occasioned by domestic violence, even of a minor nature, cannot be understated."[434]

The use and existence of the *de minimis* defence is divisive. Those in favour of the *de minimis* defence applaud its ability to increase the flexibility of trial judges to acquit those accused of crimes committed in the most minor instances, as well as protect accused persons from unjustified prosecution.[435] Those opposed to the *de minimis* defence point to its vagueness and the potential for usurping the discretion of the police and the prosecutor.[436] As noted by the British Columbia Provincial Court in *R. v. S. (M.M.)* (2010), "To dismiss on the basis that a charge is trivial arguably interferes with prosecutorial discretion and oversteps the role of the court."[437]

Finally, repealing section 43 on the basis of the presumed existence of the *de minimis* defence would fail to advance the goal of consistency across Canada. The current state of section 43, as discussed in Part III of this paper, is that it is generally applied within the parameters intended by the Supreme Court in *Canadian Foundation.* It has been suggested that these parameters have

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[434] *Carson, supra* note 420 at para. 25.
[435] Stuart, *supra* note 47 at 628; Anand, *supra* note 85 at 878.
[436] In *R. v. Gale, supra* note 420 at para. 39, the court writes, "My view is that we should recognize the inherent impossibilities in applying this doctrine in a reasonable and fair manner and thus unequivocally declare that it does not exist as a defence or excuse in Canadian criminal law."
[437] *Supra* note 431 at para 28.

essentially created a *de minimis* defence to parental use of minor corrective force against children.[438] *De minimis,* on the other hand, is still in the developmental stages across Canada. It is applied inconsistently, if at all, depending on the type of offence and the degree of severity. As such, *de minimis* is not currently a viable alternative to the continued use of section 43.

iii. Deemed Consent

The defence of deemed consent (also called "implied consent" or the "privilege of touch" by some authors) has been put forward as a potential shield for parents who are accused of assaulting their children in situations involving the appropriate application of force to manage their day-to-day care. According to Anne McGillivray,

> As their children's fiduciaries, parents enjoy privileges necessary to carrying out their duties. One is the privilege of touch. Neither s. 43 nor its 'act of nurture' common-law shadow is required to justify why parents can do for children what others cannot. Where a parent's conduct risks or causes harm to the child, *parens patriae* jurisdication is invoked and the privilege may be lost. Assault…is such a harm.[439]

The defence of deemed consent essentially arises from a common law doctrine providing a specialized set of rights to parents such that they can adequately fulfill their legal and moral obligations toward their children.[440]

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[438] Anand, *supra* note 85 at 878.

[439] McGillivray, *supra* note 381. See also Samuel M. Davis & Mortimer D. Schwartz, *Children's Rights and the Law*, (Toronto: Lexington Books, 1987) at 18, who cite Samuel von Pufendorf in the late 17th century as putting forward the theory that the system of rights and duties is built on the presumed consent of the child.

[440] For more on the legal rights and obligations between parents and their children, see Michael David Jordan, "Parents Rights and Children's Interests" (1997) Can. J.L. & Juris. 363 and David Archard, *Children: Rights and Childhood,* 2nd Ed. (London: Routledge, 2004). See also J. Raz

According to Sir William Blackstone (1723-1780) in his treatise, *Commentaries on the Laws of England,*[441] parents were granted the right to use corporal punishment on their children in order to carry out their three primary duties to the children, which were maintenance, protection and education.[442] Children owed their parents a reciprocal duty of "subjection and obedience during [their] minority."[443]

Variations on the defence of consent have received a great deal of consideration over the years. The defence of implied consent is available to those who are accused of an assault that has taken place during a hockey game or another contact sport.[444] Consent may also be used to excuse assaults by accused persons who engage in fist-fights, but it will be vitiated if the accused person both intended and caused bodily harm to the complainant in the course of the consensual fight.[445] There is no defence of implied consent in the context of

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"Legal Rights" (1984) 4 Oxford J. Legal Stud. 1 at 14 (A legal right is an interest recognized by law that holds another subject to a legal duty).

[441] Sir William Blackstone, *Commentaries on the Laws of England,* 2nd Ed. Revised, Thomas M. Cooley, Ed. (Chicago: Callaghan and Company, 1876).

[442] *Ibid.* at 434-41. For discussion of the three parental duties as outlined by Blackstone, see Davis & Schwartz, *supra* note 439 at 19- 21.

[443] Blackstone, *supra* note 441 at 303.

[444] See *R. v. Cey* (1989), 48 C.C.C. (3d) 480 at para. 24 (Sask. C.A.), in which the Saskatchewan Court of Appeal held, "It is clear that in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted standards by which the game is played, may also come within the scope of the consent." See also *R. v. Leclerc* (1991), 7 C.R. (4th) 292 (Ont. C.A.).

[445] See *R. v. Jobidon* (1991), 7 C.R. (4th) 233 (S.C.C.) and *R. v. Paice* (2005), 29 C.R. (6th) 1 (S.C.C.).

sexual assault,[446] and a person cannot consent to death.[447] It is unclear whether a person can consent to spousal violence.[448]

Implied consent has recently received judicial consideration in the parent-child context. In *R. v. Emans* (2000) [*Emans*], the Ontario Court of Appeal acknowledged that "[t]he common law recognizes the right of a parent to apply force in a reasonable manner for the benefit of the child." [449] The court goes on to write,

> Here, as in s.43, the common law exception that allows a parent to touch a child in order to care for the child both protects the parent and removes a protection from the child. Because the exception interferes with the child's physical security and dignity, it is a narrow exception whose logic and rationale rests on the child's incapacity to care for himself or herself. It is appropriate that an infant's implied consent, itself a creature of public policy, be strictly limited to conduct which is consistent with the purpose and rationale underlying the policy basis for the consent. In order to avail himself of the defence of deemed consent, the force used by the appellant must have been for the purpose of caring for the child. Otherwise, the positive social value of deemed consent loses its rationale.[450]

Justice Weiler suggested that "[t]he deemed consent of a child to the intentional application of force by a parent is limited at common law to the customary norms

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[446] *R. v. Ewanchuk* (1999) 22 C.R. (5th) 1 (S.C.C.). See the codified version of the meaning of consent for the purposes of sexual assault in *Criminal Code, supra* note 5 at section 273.1. There is also no consent to sexual offences against a person under 14 years of age (s. 150.1) or abduction of a person under 16 years of age (s. 280).

[447] *Criminal Code, ibid.* at s. 14.

[448] In *R. v. Shand* (1997) 164 N.S.R. (2d) 252 (N.S. S.C), leave to appeal refused (1998), 166 N.S.R. (2d) 74 (N.S. C.A.), the court disallowed a defence of consent in a domestic violence situation, but left open the possibility for the defence to be used in less serious circumstances.

[449] [2000] O.J. No. 2984 at para. 26 (Ont. C.A.). *Emans* involved a father who was accused of assault causing bodily harm to his two month old child. The Ontario Court of Appeal rejected his claim that he was acting with the deemed consent of the victim.

[450] *Ibid.* at para. 33.

of parenting or what a reasonable parent would do in similar circumstances."[451] Furthermore, any force applied must not be excessive.[452]

Emans was later affirmed by the Ontario Court of Appeal in *R. v. Palombi* (2007) [*Palombi*].[453] In *Palombi,* Justice Rosenberg acknowledges that parents need to have the ability to apply minor force to their children in their day-to-day care. The concept of deemed consent is necessary in these circumstances since using the necessity defence to excuse these applications of force is "awkward."[454] The court also affirms the two requirements from *Emans* for the defence of deemed consent to apply, summarizing it by holding that "in the context of criminal charges, a parent will only be deprived of protection of implied or deemed consent where the force used clearly exceeds customary norms or is clearly excessive."[455]

In *R. v. Olink* (2008),[456] Judge Allen of the Alberta Provincial Court affirmed the application of the common law defence of deemed consent as put forward in *Emans* and *Palombi.* He added that "It can be applied in situations where a reasonable doubt exists that a parent is applying reasonable force for the

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[451] *Ibid.* at para. 40.
[452] *Ibid.* at para. 37.
[453] 222 C.C.C. (3d) 528 (Ont. C.A.). The British Columbia Supreme Court has also affirmed the existence of a defence of deemed consent in the day-to-day applications of force to infants in *R. v. Tom* (2007), 2007 BCSC 1407 at para. 102 (B.C. S.C.) using *Palombi* as an authority. In *Tom*, the accused father was convicted of two counts of assault relating to his striking his developmentally delayed infant in the face and head. The court found that the defence of deemed consent did not apply since the force applied would not be applied by a reasonable parent (at para. 103).
[454] *Palombi, ibid.* at para. 29.
[455] *Ibid.* at para. 33.
[456] *Supra* note 282.

benefit of the child where the child is unable to properly care for him or herself."[457] In *Olink,* the accused was convicted of assaulting a seven year old special needs child over whom she exercised parental control. The court rejected the defences of deemed consent, section 43 and necessity in coming to the guilty verdict.

There are several difficulties with entrusting the legal culpability of parents accused of assaulting their children to the defence of deemed consent. First, there is the obvious issue that children are not active participants in the process; at no point do they consent or reject the physical handling of their parents and (certainly at young ages) they are incapable of doing so.[458] Second, the Supreme Court has yet to acknowledge the existence of such a defence in the context of parent-child relationships. One would have expected Justice Arbour to have mentioned the potential application of this defence in *Canadian Foundation* given her examination of the common law defence of *de minimis.* Finally, it is foreseeable that an inappropriate expansion of the defence of deemed consent could lead to the argument that "corporal punishment is permitted at common law, beyond what is permitted under s. 43."[459]

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[457] *Ibid.* at para 165.
[458] Hamish Stewart, "Parents, Children, and the Law of Assault" (2009) 32 Dalhousie L.J. 1 at 4 at 27. See also Barbara Bennett Woodhouse "'Who Owns the Child?' *Meyer* and *Pierce* and the Child as Property" (1992) 33 Wm. & Mary L. Rev. 995 at 1038.
[459] Stewart, *ibid.* at 26. In "Parents, Children and the Law of Assault," *ibid.,* Hamish Stewart explores the argument that existing statutory and common law defences would sufficiently protect morally innocent parents from the criminal law. He concludes that while the common law defence of "deemed consent" may be a promising shield for parents, the most desirable outcome would be for Parliament to repeal section 43 and enact a statutory defence of "parental care," essentially creating a codified version of the defence of deemed consent. Stewart's recommendation is explored at Part 4 III (c).

III. REPLACE SECTION 43

An alternative to completely repealing section 43, or leaving it as is, would be to replace it with an amended version. Wording of the new provision must consider the potential constitutional issues associated with section 43 as well as the concerns that have arisen since the release of *Canadian Foundation.* A significant dilemma arises in determining precisely what conduct is to be countenanced. The Senate of Canada has suggested that section 43 should be repealed and replaced with a provision justifying the use of "reasonable force other than corporal punishment" for particular purposes. Another option would be following in New Zealand's footsteps by codifying the defence of deemed consent. My suggestion is to enact a codified version of the majority judgment in *Canadian Foundation* with some additions to resolve issues that have arisen as a result of some of the post-*Canadian Foundation* jurisprudence.

(a) Senate Reform Initiatives

There has been a great deal of discussion regarding section 43 in the Senate of Canada. Senator Céline Hervieux-Payette introduced Bill S-21[460] to the Senate on December 2, 2004, approximately ten months following the release of *Canadian Foundation*. Bill S-21 called for the complete repeal of section 43. The bill was debated on five occasions before receiving its second reading on March 10, 2005, at which time it passed the second reading and went on to the Legal and Constitutional Affairs Committee. The Committee held several

[460] Bill S-21, *supra* note 378.

hearings, but Bill S-21 ultimately died in January of 2006 when Parliament adjourned for elections. The successor to Bill S-21 was Bill S-207,[461] also calling for the repeal of section 43. After a very similar journey involving the bill passing first and second readings and going to the Human Rights Committee, Bill S-207 died when Parliament prorogued in September of 2007.

After the failure of several bills aimed at the complete repeal of section 43, Bill S-209[462] was introduced by Senator Hervieux-Payette on October 17, 2007. It sought to remove justification for the use of corporal punishment by creating a specialized defence to very particular applications of force by a parent or teacher to a child. Bill S-209 altered the title of section 43 to "Control of Child" and changed the wording of section 43 to the following:

> **43.** **(1)** Every schoolteacher, parent or person standing in the place of a parent is justified in using reasonable force other than corporal punishment toward a child who is under their care if the force is used only for the purpose of
>
> (***a***) preventing or minimizing harm to the child or another person;
>
> (***b***) preventing the child from engaging or continuing to engage in conduct that is of a criminal nature; or
>
> (***c***) preventing the child from engaging or continuing to engage in excessively offensive or disruptive behaviour.

[461] Bill S-207, *An Act to Amend the Criminal Code (protection of children)*,1st Sess., 39th Parl., 2006.
[462] Bill S-209, *An Act to Amend the Criminal Code (protection of children)*,2nd sess., 39th Parl., 2007.

(2) In subsection **(1),** “reasonable force” means an application of force that is transitory and minimal in the circumstances.

Bill S-209 passed its third reading on June 17, 2008, and was sent to Parliament to be voted on in the House of Commons. This never occurred due to the dissolution of Parliament pending elections in September of 2008. An amended version of Bill S-209 was revived again in January of 2009 and received its first reading in the Senate on January 27, 2009.[463] Bill S-209 continues to be the subject of ongoing discussion in the Senate.[464] The Bill passed its second reading on June 22, 2009 and was sent to the Senate Standing Committee on Legal and Constitutional Affairs. On March 9, 2010 Senator Hervieux-Payette introduced Bill S-204[465] to repeal and replace section 43 and it passed first reading. Neither Bill S-209 nor Bill S-204 has been sent to the House of Commons as of July, 2010.

The amendments to section 43 proposed by Bill S-209 are of questionable efficacy. Bill S-209 suffers from a lack of clarity in its breadth, both in terms of who may access the provision and what conduct is justified pursuant to the provision. Failure to define the terminology used in the proposed provision leaves judges, lawyers and members of the public uncertain as to its ambit. In particular, the amendment does not delineate who may access the justification any

[463] *Ibid.*
[464] Canada, Senate, *Debates of the Senate, Official Report (Hansard),* 39 (28 May 2009) at 927 (Sen. Hervieux-Payette); Canada, Senate, *Debates of the Senate, Official Report (Hansard),* 48 (18 June 2009) at 1256 (Hon. John D. Wallace).
[465] Bill S-204, *An Act to Amend the Criminal Code (protection of children),* 3rd Sess., 40th Parl., 2010.

more clearly than the current provision; it also neglects to define who falls under the definition of "child." Its failure to define the terms "corporal punishment," "harm," and "disruptive behaviour," leaves the provision open to broad interpretation by the courts, one of the criticisms of the current section 43 that the Supreme Court's ruling in *Canadian Foundation* sought to alleviate.[466]

Prior to the release of *Canadian Foundation,* it could be argued that the amended provision would serve the important purpose of clarifying the proper use and application of section 43. As the law currently stands, however, the proposed amendments offer little clarification, and perhaps even muddy the existing understanding of the scope and application of section 43.

(b) New Zealand

The example of New Zealand may offer guidance to the reform of section 43 in Canada. New Zealand amended their correction by force provision (which was very similar to section 43 of the *Criminal Code*) in May of 2007 by replacing it with a defence of "parental control":

> **59 (1)** Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the
> circumstances and is for the purpose of —
>
> **(a)** preventing or minimising harm to the child or another person; or

[466] In his annotation to *Swan, supra* note 325, Don Stuart writes that the proposed power of parents and teachers to apply force for behaviour that is excessively offensive or disruptive is "a power that is dangerously vague."

> **(b)** preventing the child from engaging or continuing to engage
> in conduct that amounts to a criminal offence; or
> **(c)** preventing the child from engaging or continuing to engage
> in offensive or disruptive behaviour; or
> **(d)** performing the normal daily tasks that are incidental to good
> care and parenting.
>
> **(2)** Nothing in subsection **(1)** or in any rule of common law justifies the
> use of force for the purpose of correction.
>
> **(3)** Subsection **(2)** prevails over subsection **(1).** [467]

Section 59 of the New Zealand *Crimes Act* is preferable to the proposed amendments in Canada's Bill S-209 for several reasons. First, section 59(1)(d), which allows a parent and persons in place of a parent to perform daily tasks "incidental to good care and parenting," would alleviate concerns that a parent could be successfully prosecuted for the day-to-day care of a child. Bill S-209 does not contain a comparable provision. Second, the removal of all other common law justifications in section 59(2) appears to provide increased protection to children by limiting the scope of defences available to parents accused of assaulting their children. However, when section 59(2) is closely examined, it should be noted that it merely removes the application of other common law "justifications" as opposed to other common law defences. In practice, the application of section 59(2) would be extremely limited, as the common law doctrine of necessity is an excuse-based defence and not a justification, and the deemed consent line of authority serves to negate the *actus*

[467] See *Crimes (Substituted Section 59) Amendment Act 2007*, (N.Z.), 2007/18, s. 5.

reus of assault but it does not act as a justification based defence. In fact, it is difficult to conceptualize precisely what the New Zealand Parliament was seeking to exclude in section 59(2).

Ultimately, the New Zealand amendments were not well-received. Much like the current debate in Canada, New Zealanders were divided on the issue of corporal punishment, but the amendments were pushed through nonetheless. The amended defence became so controversial that a citizen-initiated referendum was held in August of 2009 to determine whether "a smack as part of good parental correction [should] be a criminal offence in New Zealand."[468] The overwhelming response was "no."[469] The New Zealand government's refusal to act upon the referendum has sparked a new controversy of its own.[470] Interestingly, there is some literature suggesting that the amendment to section 59 has had the effect of influencing parents against using physical discipline against their children.[471]

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[468] Elections New Zealand, "2009 Referendum," online: Elections New Zealand <http://www.elections.org.nz/elections/referendum/2009-referendum.html>.

[469] The "Yes" campaign received just over 200 000 votes; the "No" campaign received well over 1.4 million votes. See Elections New Zealand "Final Result by Electorate for the Citizens Initiated Referendum 2009 on the question "Should a smack as part of good parental correction be a criminal offence in New Zealand?" (25 August 2009) online: Elections New Zealand <http://www.electionresults.govt.nz/2009_citizens_referendum/2009_referendum_results.html>.

[470] New Zealand Herald, "One arrest as thousands join 'March for Democracy'" (21 November 2009), online: New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10610750>. Debate as to the appropriate direction to take in this area continues in Australia due in part to the New Zealand controversy. See Bronwyn Naylor & Bernadette Saunders, "Whose Rights? Parents, Children and Discipline" (2009) 34:2 Alternative Law Journal 80.

[471] Epoch New Zealand, "Physical Discipline of Children and the Child Discipline Law" (November 2009) online: The Yes Vote < http://yesvote.org.nz/files/2009/11/epoch-november-2009.pdf>. See also Julie Lawrence & Anne B. Smith, "Aotearoa/New Zealand Families: Their Perspectives on Child Discipline and Recent Legislative Change" (2008) 12:2 Childrenz Issues 17, Beth Wood, "The Long Road to Reform" (2008) 12:2 Childrenz Issues 13, and Nicola Taylor & Anne Smith, "Repealing a Defence for the Physical Punishment of Children: Changing the Law in New Zealand" (2008) 12:2 Childrenz Issues 7.

The New Zealand experience is instructive in that it demonstrates the backlash that can follow the implementation of a law that lacks the support of a strong majority of the populace. Thus, Canadian lawmakers may be wise to refrain from changing the law or policy surrounding the correction of children by force until significant attitudinal change has occurred in large segments of the public.[472]

(c) Other Alternatives

Hamish Stewart suggests that a codified version of the common law defence of deemed consent would be the best replacement for section 43. He proposes the following provision:

> A parent, teacher, or person standing in place of a parent is justified in using force for the purpose of carrying out their duties in respect of the child, including proper purposes such as caring for and educating the child, and preventing harm, crime and disruptive behaviour; provided that the force used is reasonable in the circumstances, does not amount to degrading or dehumanizing treatment, and does not intentionally injure the child.[473]

Although the text of Stewart's proposed provision is more precise than the current wording of section 43 of the *Criminal Code,* problems associated with the interpretation of section 43 would undoubtedly also plague the interpretation of Stewart's legislation. For example, under both legislative regimes there would be

[472] See Canadian Press and Leger Marketing, *supra* note 2, which suggests 70.0% of Canadians are opposed to a law prohibiting parents from spanking their children.
[473] Stewart, *supra* note 458 at 30. Stewart suggests that his proposed provision more closely mirrors other codified defences to the offence of assault, such as self defence and the current section 43 (*ibid.* at 31.)

uncertainty as to the meaning of the phrase, "person standing in the place of a parent."

A codified version of the interpretation of section 43 offered by the Supreme Court in *Canadian Foundation,* with certain additions and modifications, would be a more fitting amendment to the current version of section 43. Certainly, a codified version of the parameters outlined in *Canadian Foundation* would withstand *Charter* scrutiny. Additional provisions should be added to also address the post-*Canadian Foundation* issues that have arisen over the past six years. The new provision could read:

> **43 (1)** A parent is justified in using corrective force toward a child who is under his care if the corrective force does not exceed what is reasonable under the circumstances.
>
> **(2)** A schoolteacher is justified in using corrective force toward a pupil under his care if that force is used to remove a child from a classroom or to secure compliance with instructions if that force is not corporal punishment and does not exceed what is reasonable in the circumstances.
>
> **(3)** Corrective force will not be considered reasonable when it is administered
> **(a)** in anger or frustration, or
> **(b)** with a weapon, including a belt or spoon, or
> **(c)** to the head of the child, or
> **(d)** in a harmful, degrading or inhuman manner, or
> **(e)** in a manner that causes bodily harm, or
> **(f)** without a corresponding explanation to the child, in language appropriate to his or her age and understanding, pertaining to the reason for the use of corrective force.
>
> **(4)** In this section,
>
> "Child" means a person who is under the age of majority.

"Parent" means a person who has assumed all the obligations of parenthood including, but not limited to, support and maintenance for the child, or a person who has the explicit consent of the child's parent to use reasonable corrective force against that child.

"Schoolteacher" means a person who gives formal instruction in a children's school.

"Pupil" means a child taking instruction.

43.1 For the purposes of section 43, reasonable corrective force for a child over twelve years of age or under two years of age is limited to minor applications of force that are transitory and trifling in nature, applied to restrain, control, or secure compliance with instructions.

43.2 **(1)** For the purposes of section 43, reasonable corrective force for a child who is between two years of age and twelve years of age includes some forms of corporal punishment as well as minor applications of force that are transitory and trifling in nature, applied to restrain, control, or secure compliance with instructions.

(2) Corporal punishment shall not be considered reasonable corrective force if it is used in the absence of an educative purpose.

(3) Corporal punishment shall not be considered reasonable corrective force if it is used against any child who is incapable of benefiting from the correction.

(4) For the purposes of sections 43 and 43.2, "corporal punishment" is defined as a punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.

43.3 For the purposes of any proceedings under this Act, a child cannot consent to force being applied to him or her by a schoolteacher or a parent unless that consent is explicit.

43.4 For the purposes of any proceedings under this Act, no principle of common law can be used to make lawful any degree of force applied without consent to a child.

Section 43 (as amended) provides the foundation for the entire legislative scheme for the suggested justification. Section 43(1) essentially mirrors the phraseology of the current section 43 with a few key changes, including removal of the term "person standing in the place of a parent" and a separate justification for schoolteachers at section 43(2) that is tailored to their specific circumstances. In section 43(3), the boundaries of reasonable corrective force are stipulated in an effort to provide certainty to parents and law enforcement officials, as well as remain squarely within the constitutional parameters outlined in *Canadian Foundation*. Finally, section 43(4) provides definitions of the key persons involved in the use of corrective force gleaned primarily from the guidance of Chief Justice Dickson in *R. v. Ogg-Moss*.[474] It is expected that this would allow for increased precision and certainty in the application of the justification.

The problematic category of "person standing in the place of a parent" is eliminated in section 43(1) of the amended provision in favor of the inclusive term "parent." The term "parent" is to be interpreted according to section 43(4). This amended definition for "parent" prevents a biological parent with limited involvement in a child's life from being justified in applying corrective force since that person has not assumed all of the obligations of parenthood, which was the issue in *R. v. M.(D.L.)*(2009).[475] Furthermore, to avoid any ongoing confusion with the "parent by delegation" category described in *Ogg-Moss*, section 43(4)

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[474] *Ogg-Moss, supra* note 24. For the definition of "child" see 186; for "parent" see 190; for "schoolteacher" see 193; for "pupil" see 192. The definition of "parent" was affirmed by the Supreme Court in *Canadian Foundation, supra* note 7 at para. 21.
[475] *Supra* note 284.

requires that a person must have the explicit consent of a child's parent to be justified in applying reasonable corrective force to that child.[476] With this type of express consent requirement, the issue of whether a bus driver can stand in the place of a parent, such as in *R. v. Morrow* (2009), would not arise. However, a parent could still allow a non-parent caregiver, such as a grandparent or a baby-sitter, the ability to use reasonable physical correction against his or her child since section 43.4 removes the application of the common law as a potential recourse for non-parent caregivers accused of assaulting a child.

Schoolteachers and pupils are considered separately from parents and their children in the amended section 43(2). The definition of both "schoolteacher" and "pupil" is provided at section 43(4). The type of reasonable correction that may be exercised by teachers pursuant to the proposed section 43(2) is derived from the Supreme Court's guidance in *Canadian Foundation*.[477] A clear statutory definition of the type of conduct permissible on behalf of schoolteachers will prevent courts from relying on the problematic *obiter* in *R. v. Foote* (2005), in which the court noted that a schoolteacher's kicking of a pupil would be justified pursuant to the old section 43 since it was corrective.[478]

Section 43(3) establishes the limits of reasonable correction in accordance with the Supreme Court's ruling in *Canadian Foundation* and social science evidence. The wording of the amended provision requires that all forms of

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[476] The definition of "child" is derived from *Ogg-Moss, supra* note 24 at 192-193.
[477] *Canadian Foundation, supra* note 7 at para. 38.
[478] *Supra* note 284.

corrective force, including corporal punishment, comply with the limits stipulated in the provision. Sections 43(a), (b), (c), (d), and (e) are the boundaries for reasonable correction suggested by the Supreme Court in *Canadian Foundation.*[479] Chief Justice McLachlin ruled that physical correction administered contrary to those limits could not be considered reasonable. Without these limits, the current version of section 43 may have been deemed unconstitutionally vague or overbroad contrary to section 7 of the *Charter*. Thus, the express addition of these limits to the amended provision ensures its constitutionality. The addition of section 43(3)(f) accords with a growing consensus among social scientists as to the best practice for parents when they administer physical correction to their children in an age-appropriate manner.[480] While reasoning is one of the most highly endorsed disciplinary methods, many observers have noted that physical correction may be necessary to enhance the effectiveness of reasoning and other less-aversive disciplinary tactics, particularly with defiant children.[481]

Teenagers and children under two years of age are exempted from the application of corporal punishment pursuant to section 43.1 of the amended provision. The Supreme Court ruled that corporal punishment of children under the age of two years is harmful and is without corrective value, and that corporal

[479] *Canadian Foundation, supra* note 7 at paras. 30 and 40.
[480] The wording of section 43(3)(f) is drawn in part from section 146(2)(b) of the *Youth Criminal Justice Act,* S.C. 2002, c. 1, which deals with the admissibility of statements made by young persons to people in authority. This provision provides enhanced procedural and substantive rights to youths charged with crime.
[481] Larzelere, *et al.*, *supra* note 273; Larzelere, *supra* note 271.

punishment of teenagers is harmful since it may induce aggressive or antisocial behavior.[482] Justification for the use of corrective force by a parent against a teenaged child can be necessary to ensure their compliance with instructions or even their safety, as was demonstrated in *R. v. Swan* (2008).[483] Similarly, a parent must have the ability to restrain or control a child under the age of two years for a variety of reasons. For example, a parent who grabs a toddler to prevent the child from running into the street would be justified in applying force pursuant to section 43.1, as would a parent who restrains a child so that a doctor may administer a vaccination to that child.

Corporal punishment of children between the ages of two and twelve years is countenanced in section 43.2 of the amended provision, subject to two important limitations. First, the corporal punishment must be applied with an educative purpose, and therefore cannot be used against any child who is incapable of benefiting from that correction pursuant to section 43.2. This limitation was provided for in *R. v. Ogg-Moss*[484] and affirmed in *Canadian Foundation*.[485] Second, the definition of "corporal punishment" is restrictive to afford compliance with the *Charter* and other international treaty obligations. The Supreme Court held that corporal punishment, such as the lash, offends section 12 of the *Charter* in *R. v. Smith* (1987).[486] In *Canadian Foundation,* the majority provided an unpersuasive section 12 analysis insofar as it failed to

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[482] *Canadian Foundation, supra* note 7 at para. 37.
[483] *Supra* note 323.
[484] *Ogg-Moss, supra* note 24 at 193-194.
[485] *Canadian Foundation, supra* note 7 at paras. 24-25.
[486] *R. v. Smith, supra* note 129 at para. 89.

discuss the prior ruling in *Smith* and instead based its ruling on the lack of state nexus to the application of the punishment.[487] However, the amended provision eliminates this issue by providing a definition of corporal punishment that differentiates it from the conduct contemplated in *Smith*. The corporal punishment contemplated by section 43.2 involves a more limited application of force that may be applied only by a parent to his/her child in specialized circumstances. The actual definition for "corporal punishment" in section 43.2(4) is derived from the definition employed by the United Nations Committee on the Rights of the Child.[488]

Section 43.3 removes the doctrine of implied consent as a potential recourse for a parent or schoolteacher who applies force to a child. The second portion of the provision keeps open the possibility for a child to consent to the application of force from a parent or schoolteacher, which may be used in the situation of a parent or schoolteacher teaching a child a contact sport or something similar. While it has been suggested that the principle of implied consent could be an appropriate replacement for the current version of section 43,[489] issues pertaining to the widespread acceptance of the principle as well as its scope and application would tend to suggest that it is not. Section 43.3 does not remove the

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[487] It has been suggested that a residuary rights analysis of cruel and unusual punishment under section 7 of the *Charter* may apply with respect to section 43 even if the punishment lacks a direct state nexus, since the effect of the provision is state acceptance of the use of corporal punishment against children. For more on the residuary rights theory, see *Motor Vehicle Act Reference, supra* note 16 at 502-503 per Justice Lamer and *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restricted Trade Practices Commission),* [1990] 1 S.C.R. 425 per Justice La Forest. See also Anand, *supra* note 85 at 873.

[488] See Committee on the Rights of the Child, *supra* note 1 at para. 41.

[489] See Stewart, *supra* note 458.

potential application of the principle of implied consent from other contexts such as allegations of assault between spouses.

Finally, section 43.4 removes the principle of *de minimis* from the arena of child discipline. As discussed above, a robust application of the *de minimis* doctrine could prove to be problematic in terms of circumventing the legislative scheme surrounding the reasonable use of corrective force on children. Unlike section 59(2) of the New Zealand legislation, this suggested provision would serve to prevent any principle of the common law, whether it is a justification, an excuse, or any other principle, from providing protection to any person who applies force against a child.

The amended provision would also address any lingering constitutional issues connected to the current version of section 43. First, the specificity as to scope of the application of the new provision would negate any question as to whether the provision is unconstitutionally vague or overbroad. Second, the amended statutory scheme would arguably be in the best interests of children should the best interests of the child principle be recognized as a principle of fundamental justice in the future. This is due to the limited incursion into children's physical integrity permitted by the provision in conjunction with the overriding concern placed on the safety of the child, the integrity of the family unit, and the social development of the child. Third, the specialized definition of "corporal punishment" provided for under section 43.2 differentiates the corporal

punishment of children by their parents from the cruel and unusual punishment that has been deemed unconstitutional by the Supreme Court. Finally, the issue of children's equality is addressed much more persuasively by the amended provision than in the current version of section 43. While a distinction is still drawn between children and adults based on their age, the effect of the amended provision is not such that it offends the essential human dignity of children. The correspondence factor of the human dignity test is satisfied in the amended provision by the fact that the application of force to children by their parents or schoolteachers is justified only in particular situations that respond to the actual needs and circumstances of children, including but not limited to their safety and social development. Furthermore, the degree of force that can be justified pursuant to the amended provision is limited and relatively innocuous.

Parliamentary amendment of section 43 is an advisable action. The current version has been plagued with difficulties in its application for decades. It is also constitutionally unsound. The Supreme Court has attempted to provide guidance on the proper scope and application of section 43 on two separate occasions, but uncertainties remain. The amendments I suggest would ultimately serve to limit any lingering ambiguity regarding the justified use of corrective force against children, while concurrently satisfying any remaining constitutional concerns.

IV. CONCLUSION

The continued ambiguity surrounding section 43 following *Canadian Foundation* indicates that change is necessary. At first blush, repealing section 43 gives the impression of progress, however this impression is erroneous. Without section 43, parents and teachers will be left with very few options to defend their application of reasonable corrective force. The common law alternatives of necessity, *de minimis,* and deemed consent cannot provide adequate protection. Necessity only applies in exigent circumstances and both *de minimis* and deemed consent have yet to receive recognition as existing in Canadian criminal law by a majority in the Supreme Court of Canada. The only viable option for clarifying the law surrounding the justification of the application of reasonable corrective force is to amend section 43 in a manner that respects both the constitutional rulings in *Canadian Foundation* and the social science evidence surrounding the physical discipline of children.

CONCLUSION

In this thesis I have argued that Parliamentary reform of section 43 is necessary to ensure that it is consistently and appropriately applied by the criminal justice system. The Supreme Court's attempt in *Canadian Foundation* to narrow the application of section 43 in accordance with current social science consensus was laudable. However, post-*Canadian Foundation* cases demonstrate that the Supreme Court failed to adequately resolve some key interpretational issues surrounding section 43 and that lower courts continue to misapply the Supreme Court's ruling in *Canadian Foundation.* After two failed attempts to clarify the law surrounding section 43 at the Supreme Court of Canada, it has become clear that Parliament must become involved.

I have suggested that amendment of section 43, as opposed to complete repeal, would be the most preferable action for Parliament to undertake. Any amendment should take into account the constitutional imperatives established by the Supreme Court as well as the current social science literature on the use of physical discipline by parents on their children

Physical correction of children by their parents and teachers is a complicated legal issue that has yet to be adequately addressed in jurisprudence or legislation. It involves a delicate and complex balancing between the autonomy of the family, the rights of children, and the state's responsibility to protect children. Finding the appropriate balance is even more difficult when the social

sciences are unable to provide concrete conclusions as to the effects of physical discipline on children. The best alternative is the enactment of a new legislative scheme designed according to that balance, which will provide parents, children and schoolteachers with unambiguous limits on the justified use of corrective force in Canada.

BIBLIOGRAPHY

LEGISLATION

Act Respecting Assistance for Victims of Crime, R.S.Q. c. A-13.2.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being schedule B to the *Canada Act 1982,* (U.K.) 1982, c. 11.

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12.

Constitution Act, *1867* (U.K.), 30 & 31 Vict., c. 3.

Crimes (Substituted Section 59) Amendment Act 2007, (N.Z.), 2007/18.

Criminal Code, R.S.C., 1985, c. C-4.

Criminal Code, R.S.C. 1970, c. C-34.

Criminal Code, R.S.C. 1906, c. 146.

Criminal Code, S.C. 1892, c. 29.

Criminal Code, S.C. 1953-54, c. 51.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

Environmental Protection Act, R.S.O. 1980, c. 141.

Family Law Act, S.A. 2003, c. F-4.5.

Victims Bill of Rights, C.C.S.M. c. V-55.

Victims of Crime Act, R.S.A. 2000, c. V-3.

Victims of Crime Act, R.S.B.C. 1996, c. 478.

Victims of Crime Act, R.S.N.W.T. 1988, c. 9 (Supp.).

Victims of Crime Act, R.S.N.W.T.(Nu.) 1988, c. 9 (Supp.).

Victims of Crime Act, R.S.P.E.I. 1988, c. V-3.2.

Victims of Crime Act, S.S. 1995, c. V-6.011.

Victims' Rights and Services Act, S.N.S, 1989, c. 14.

Victims Services Act, S.N.B. 1987, c. V-2.1.

Youth Criminal Justice Act, S.C. 2002, c. 1.

TREATIES

Convention on the Rights of the Child, 20 November 1989, CAN. T.S. 1992 No. 3.

International Covenant on Civil and Political Rights, 1966, C.T.S. 1976/47; 999 U.N.T.S. 171.

BILLS

Bill S-21, *An Act to Amend the Criminal Code (protection of children)*,1st Sess., 38th Parl., 2004

Bill S-207, *An Act to Amend the Criminal Code (protection of children)*,1st Sess., 39th Parl., 2006.

Bill S-209, *An Act to Amend the Criminal Code (protection of children)*,2nd sess., 39th Parl., 2007.

Bill S-204, *An Act to Amend the Criminal Code (protection of children),* 3rd Sess., 40th Parl., 2010.

JURISPRUDENCE

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Blencoe v. British Columbia, [2000] 2 S.C.R. 307.

Boucher v. The Queen, [1955] S.C.R. 16.

Canada (Attorney-General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610.

Canadian Foundation of Children, Youth and the Law v. Canada (Attorney General) (2004), 2004 SCC 4, 16 C.R. (6th) 203, 234 C.L.R. (4th) 257 (S.C.C.).

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) (2000), 146 C.C.C. (3d) 362, 188 D.L.R. (4th) 718 (Ont. S.C.J.).

*Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) (*2002), 48 C.R. (5th) 218, 161 C.C.C. (3d) 178, 207 D.L.R. (4th) 632 (Ont. C.A.).

Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122.

Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350.

Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711.

Dagenais v. CBC, [1994] 3 S.C.R. 835.

French Estate v. Ontario (Attorney General), 1996 CanLII 8289 (ON S.C.).

Gosselin v. Quebec, [2002] 4 S.C.R. 429.

Howlett v. Karunaratne (1988), 64 O.R. (2d) 418.

Krieger v. Law Society (Alberta), [2002] 3 S.C.R. 372.

Law v. Canada, [1999] 1 S.C.R. 497.

Lovelace v. Ontario, [2000] 1 S.C.R. 950;

McKinney v. University of Guelph, [1990] 3 S.C.R. 229.

Miller v. R., [1977] 2 S.C.R. 680.

Miron v. Trudel [2995] 2 S.C.R. 418.

New Brunswick v. G. (J.), [1999] 3 S.C.R. 46.

Nova Scotia v. Walsh, [2002] 4 S.C.R. 325.

Ontario v. Canadian Pacific, [1995] 2 S.C.R. 1030.

Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69.

*Quebec (Ministre de la Justice) c. Canada (Ministre de la Justice)*10 C.R. (6th) 281.

R. v. Appleby (1990), 78 C.R. (3d) 282 (Ont. Prov. Ct.).

R. v. A.B., [2008] O.J. No. 4421 (S.C.J.).

R. v. B. (A.S.), [2006] B.C.J. No. 3447 (B.C. Prov. Ct.).

R. v. Beck, [2008] N.J. No. 110 (Nfld. P.C.).

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295.

R. v. Blakeman, (1988), 48 C.R.R. 222 (Ont. H.C.).

R. v. Brown, [2005] Nu.J. No. 10 (Nun. C.J.).

R. v. Butler, [1992] 1 S.C.R. 452.

R. v. Carson, [2004] O.J. No. 1530 (Ont. C.A.).

R. v. Cey (1989), 48 C.C.C. (3d) 480 (Sask. C.A.).

R. v. Chapman, [2008] O.J. No. 4391 (Ont. C.J.).

R. v. Clay, [2003] 3 S.C.R. 735.

R. v. Cook, [1997] 1 S.C.R. 1113.

R. v. Cuerrier, [1998] 2 S.C.R. 371.

R. v. Darrach, [2000] 2 S.C.R. 443.

R. v. Dejong, [2005] B.C.J. No. 2546 (B.C. Prov. Ct.).

R. v. Demelo, 2009 ONCJ 267 (C.J.).

R. v. Demers, [2004] 2 S.C.R. 489.

R. c. Deschatelets, [2008] J.Q. no. 10501 (C.Q. crim. & pen.).

R. v. Downey, [2002] N.S.J. No. 442 (N.S. S.C.).

R. v. D.P., [2004] N.J. No. 38 (Nfld. Prov. Ct.).

R. c. Dubois, [2007] J.Q. no. 4217 (C.Q. crim. & pen.).

R. v. Dupperon (1984), 43 C.R. (3d) 70 (Sask. C.A.).

R. v. Earl (2006), 240 N.S.R. (2d) 197 (S.C.).

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713.

R. v. Emans, [2000] O.J. No. 2984 at para. 26 (Ont. C.A.).

R. v. Ewanchuk (1999) 22 C.R. (5th) 1 (S.C.C.).

R. v. Ferguson, [2008] 1 S.C.R. 96.

R. v. Foote, 2005 CarswellOnt 6470 (C.J.).

R. v. Gale, [2010] N.J. No. 5 (Nfld. Prov. Ct.).

R. v. Galliani, [2004] O.J. No. 2978 (Ont. S.C.J.).

R. v. G.(C.), [2009] A.W.L.D. 2669 (Alta Prov. Ct.).

R. c. G.B., [2004] J.Q. no. 4568 (C.Q. crim. & pen.).

R. c. G.O., [2005] J.Q. no. 7328 (C.Q. crim. & pen.).

R. v. Goltz, [1991] 3 S.C.R. 485.

R. v. Hess, [1990] 2 S.C.R. 906.

R. v. Heywood,[1994] 3 S.C.R. 761.

R. v. H. (J.K.), [2008] B.C.J. No. 162 (B.C. Prov. Ct.).

R. v. H.L., [2009] O.J. No. 3572 (S.C.J.)

R. v. Hnatiuk, [2000] A.J. No. 545 (Alta. Q.B.).

R. v. Hodder, [2010] N.J. No. 35 (Nfld. Prov. Ct.).

R. v. Hinchey, [1996] 3 S.C.R. 1128.

R. v. Jobidon (1991), 7 C.R. (4th) 233 (S.C.C.).

R. v. Kapp, [2008] 2 S.C.R. 283.

R. v. Kaur (2004), 27 C.R. (6th) 224 (Ont. C.J.).

R. v. Keegstra (1988), 65 C.R. (3d) 289 (Alta. C.A.).

R. v. Keegstra, [1990] 3 S.C.R. 697.

R. v. Kinch, 2005 CarswellOnt 6673 (C.J.).

R. v. Kormos (1998), 14 C.R. (5th) 312 (Ont. Prov. Ct.).

R. v. Kubassek (2004), 25 C.R. (6th) 340 (Ont. C.A.).

R. v. Latimer, [2001] 1 S.C.R. 3.

R. v. Leclerc (1991), 7 C.R. (4th) 292 (Ont. C.A.).

R. v. Lepage (1989), 74 C.R. (3d) 368 (Sask. Q.B.).

R. v. Li, (1984), 16 C.C.C. (3d) 382 (Ont. H.C.).

R. v. Ling (1954), 19 C.R. 173 (Alta T.D.).

R. v. L.(J.A.), [2009] B.C.W.L.D. 4351 (Prov. Ct.).

R. v. Luxton, [1990] 2 S.C.R. 711.

R. v. Lyons, [1997] 2 S.C.R. 309.

R. v. Ma, 2005 CarswellOnt 6905 (C.A.).

R. v. Maddison, 2009 NSPC 16 (Prov. Ct.).

R. v. Malmo-Levine, [2003] 3 S.C.R. 571.

R. v. Marusiak (2003) 324 A.R. 159 (Alta. Q.B.).

R. v. Matsuba (1993), 137 A.R. 34 (Alta. Prov. Ct.).

R. v. Macdonald (1987), 70 Nfld. & P.E.I.R. 64 (Nfld. S.C.).

R. v. McLeod, [2006] A.J. No. 644 (Alta. Prov. Ct.).

R. v. McLeod, 2008 ONCJ 162 (Ont. C.J.).

R. v. M. (D.L.), [2009] B.C.W.L.D. 5832 (Prov. Ct.).

R. v. Merasty, [2002] S.J. No. 584 (Sask. Prov. Ct.).

R. v. Mills, [1999] 3 S.C.R. 668.

R. v. Morgentaler (1975), 20 C.C.C. (2d) 449 (S.C.C.).

R. v. Morgentaler (No. 2), [1988]1 S.C.R. 30.

R. v. Morrisey, [2000] 2 S.C.R. 90.

R. v. Morrow (2009), 12 Alta. L.R. (5th) 382 (Prov. Ct.).

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606.

R. v. O'Connor, [1995] 4 S.C.R. 411.

R. v. Oakes, [1986] 1 S.C.R. 103.

R. v. Ogg-Moss, [1984] 2 S.C.R. 173.

R. v. Olink, [2009] A.W.L.D. 1925 (Prov. Ct.).

R. v. Overvold, [1972] 6 W.W.R. 473 (N.W.T. Mg. Ct.).

R. v. Paice (2005), 29 C.R. (6th) 1 (S.C.C.)..

R. v. Palombi (2007), 222 C.C.C. (3d) 528 (Ont. C.A.).

R. v. Peleshaty, [1950] 1 W.W.R. 108 (Man. C.A.).

R. v. Penno, [1990] 2 S.C.R. 865

R. v. Perka, [1984] 2 S.C.R. 232.

R. v. Persaud, 2007 CarswellOnt 2792 (S.C.J.).

R. v. Plummer, 2006 CarswellOnt 4483 (C.J.).

R. v. Power, [1994] 1 S.C.R. 601.

R. v. Power, [2008] N.J. No. 266 (Nfld. Prov. Ct.).

R. v. Prosper, [1994] 2 S.C.R. 236.

R. v. Rashid, 2007 CarswellOnt 9469 (C.J.).

R. v. Rennato (2007), 73 W.C.B. (2d) 320 (Ont. C.J.).

R. v. R.(J.), 2006 CarswellOnt 5524 (S.C.J.).

R. v. Robart, [1997] N.S.J. No. 149 (N.S. C.A.).

R. v. R. (T.J.) (2006), 66 Alta. L.R. (4th) 359 (Prov. Ct.).

R. v. Ruzic, [2001] 1 S.C.R. 687.

R. v. Sangwais (2004), 252 Sask. R. 231 (Prov. Ct.).

R. v. Schroeder, [2006] O.J. No. 4310 (Ont. S.C.J.).

R. v. Seaboyer, [1991] 2 S.C.R. 577.

R. v. Sharpe, [2001]1 S.C.R. 45.

R. v. Sinclair (2008), 56 C.R. (6th) 29 (Man. C.A.).

R. v. Shand (1997) 164 N.S.R. (2d) 252 (N.S. S.C), leave to appeal refused (1998), 166 N.S.R. (2d) 74 (N.S. C.A.).

R. c. S.J.-B., [2004] J.Q. no. 15788 (C.Q. crim. & pen.).

R. v. Smith, [1987] 1 S.C.R. 1045.

R. v. Smith (2006), 70 W.C.B. (2d) 648 (Sask. Prov. Ct.).

R. v. S. (M.M.), [2010] B.C.W.L.D. 887 (B.C. Prov. Ct.).

R. v. Stimpson (1974), 17 C.C.C. (2d) 181 (Man. Prov. Ct.).

R. v. Swan (2008), 58 C.R. (6th) 126, 1008 CarswellOnt 1384 (S.C.J.).

R. v. T.(V.), [1992] 1 S.C.R. 749.

R. c. Therien, [2008] J.Q. no. 5929 (C.M.).

R. v. Tom (2007), 2007 BCSC 1407 (B.C.S.C.).

R. v. Tourand (2007), 298 Sask. R. 303 (Prov. Ct.).

R. v. U.(C.M.T.), [2007] B.C.W.L.D. 3393 (Prov. Ct.).

R. v. U. (M.), 2005 CarswellOnt 8708 (S.C.J.).

R. v. W. (B.W.), [2010] A.W.L.D. 42 (Prov. Ct.).

R. v. White, [1997] O.J. No. 146 (Ont. C.J.).

R. v. Wiles, [2005] 3 S.C.R. 895.

R. c. Y., [2006] J.Q. no. 10184 (C.M.).

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

Re ss. 193 and 195.1 of the Criminal Code (Prostitution Reference), [1990] 1 S.C.R. 1123.

Reward (The) (1818), 165 E.R. 1482, 2 Dods. 265 at 1485 (Eng. Adm. Ct.).

RJR-MacDonald Inc. v. Canada (Attorney-General), [1995] 3 S.C.R. 199.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519.

Shtitz v. C.N.R., [1927] 1 D.L.R. 951 at 959 (Sask. C.A.).

Smythe v. The Queen, [1971] S.C.R. 680.

Soenen v. Director of Edmonton Remand Centre (1983), 6 C.R.R. 368 (Alta. Q.B.).

Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877.

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restricted Trade Practices Commission), [1990] 1 S.C.R. 425.

Vriend v. Alberta, [1998] 1 S.C.R. 493.

Winnipeg Child and Family Services v. K.L.W. [2000] 2 S.C.R. 519.

SECONDARY SOURCES

Agarwal, Rahool Parkwash. "An Autonomy-Based Approach to Section 15(1) of the Charter" (2007) 12 Rev. Const. Stud. 83.

Anand, Sanjeev. "Reasonable Chastisement: A Critique of the Supreme Court's Decision in the 'Spanking' Case" (2004) 41 Alta. L.Rev. 871.

Archard, David. *Children: Rights and Childhood,* 2nd Ed. (London: Routledge, 2004).

Archibald, Brue P. "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions Between Punitive and Restorative Paradigms of Justice" (1998) 3 Cdn. Crim. L.R. 68.

Baumrind, Diana. "Necessary Distinctions" (1997) 8:3 Psychological Inquiry 176.

——. "The Discipline Controversy Revisted" (1996) 45:4 Family Relations 405.

Bitensky, Susan H. “Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children” (1998) 31 U. Mich. J. L. Reform 353.

Blackstone, Sir William. *Commentaries on the Laws of England,* 2nd Ed. Revised, Thomas M. Cooley, Ed. (Chicago: Callaghan and Company, 1876).

Bredt Christopher D. & Adam M. Dodek . "Breaking the *Law's* Grip on Equality: A New Paradigm for Section 15" (2003) 20 Sup. Ct. L. Rev. (2d) 33.

Bredt, Christopher & Ira Nishisato. “The Supreme Court’s New Equality Test: A Critique” (2000) 8 Canada Watch 16.

Bugental, Daphne Blunt, Gabriela A. Martorell, & Veronica Barraza. “The hormonal costs of subtle forms of infant maltreatment” (2003) 43:1 Hormones and Behavior 237.

Canada, Senate, *Debates of the Senate, Official Report (Hansard),* 39 (28 May 2009) at 927 (Sen. Hervieux-Payette).

Canada, Senate, *Debates of the Senate, Official Report (Hansard),* 48 (18 June 2009) at 1256 (Hon. John D. Wallace).

Canadian Press & Leger Marketing. *Child Abuse Report* (Montreal: Canadian Press & Leger Marketing, 2002).

Canadian Teacher’s Federation, “Section 43 of the Criminal Code of Canada,” online: Canadian Teacher’s Federation <http://www.ctf-fce.ca/documents/Priorities/EN/advocacy/section43/index.asp>).

Carter, Mark. “Corporal punishment and prosecutorial discretion in Canada” (2004) 12 The International Journal of Children’s Rights 41.

——. “The Children’s Trilogy: *Canadian Foundation for Children…*, *D.B.*, *C.A.* and the Relationship Between the “Best Interests of the Child” Principle and the “Principles of Fundamental Justice” in S. Anand, ed., *Children and the Law: Essays in Honor of Professor Nicholas Bala* (2009), [forthcoming in 2010].

Colvin, Eric & Sanjeev Anand. *Principles of Criminal Law,* 3rd ed., (Toronto: Thomson Carswell, 2007).

Committee on the Rights of the Child. *General Comment No. 8*, CRC/C/GC/8, 42d Sess., (2006).

Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties Under Article 40 of the Convention,* Thirty-fourth session, CRC/C/15/Add. 215 (2003).

Coughlan, Stephen. "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 Can. Crim. L.R. 147.

Darling, Nancy & Laurence Steinberg. "Parenting style as context: An integrative model" (1993) 113:3 Psychological Bulletin 487.

Davis, Samuel M. & Mortimer D. Schwartz. *Children's Rights and the Law*, (Toronto: Lexington Books, 1987).

DeCoste, F.C. "On "Educating Parents": State and Family in *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)"* (2004) 41 Alta. L. Rev. 870.

DelBigio, Greg. "Letter to Senator Joan Fraser" (4 June 2008), online: Canadian Bar Association <http://www.cba.org/CBA/submissions/pdf/08-31-eng.pdf>.

D'Onofrio, Brian M. *et al.* "The role of the children of twins design in elucidating causal relations between parent characteristics and child outcomes" (2003) 44:8 Journal of Child Psychology and Psychiatry 1130.

Durrant, Joan E. *A Generation Without Smacking: The impact of Sweden's ban on physical punishment,* (Save The Children: London, 2000).

——. "Evaluating the Success of Sweden's Corporal Punishment Ban" (1999) 23:5 Child Abuse & Neglect 435.

——. "Legal Reform and Attitudes Toward Physical Punishment in Sweden" (2003) 11:2 International Journal of Children's Rights 147.

——. "Trends in Youth Crime and Well-Being Since the Abolition of Corporal Punishment in Sweden" (2000) 31:4 Youth Society 437.

Durrant, Joan E. *et al.* "Protection of Children from Physical Maltreatment in Canada: An Evaluation of the Supreme Court's Definition of Reasonable Force" (2009) 18:1 Journal of Aggression, Maltreatment & Trauma 64.

Elections New Zealand, “2009 Referendum,” online: Elections New Zealand <http://www.elections.org.nz/elections/referendum/2009-referendum.html>.

—— “Final Result by Electorate for the Citizens Initiated Referendum 2009 on the question "Should a smack as part of good parental correction be a criminal offence in New Zealand?" (25 August 2009) online: Elections New Zealand <http://www.electionresults.govt.nz/2009_citizens_referendum/2009_referendum_results.html>.

Epoch New Zealand, “Physical Discipline of Children and the Child Discipline Law” (November 2009) online: The Yes Vote <http://yesvote.org.nz/files/2009/11/epoch-november-2009.pdf>.

Friedman, S.B.& S.K. Schonberg. "The short- and long-term consequences of corporal punishment" (1996) 98 Pediatrics 803.

Flynn, Clifton P. “Exploring the Link between Corporal Punishment and Children’s Cruelty to Animals” (1999) 61:4 Journal of Marriage and the family 971.

Fuselier, Christopher B. “Corporal Punishment of Children: California’s Attempt and Inevitable Failure to Ban Spanking in the Home” (2007) 28 J. Juv. L. 82.

Fyfe, R. James. “Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada” (2007) 70 Sask. L. Rev. 1.

Gershoff, Elizabeth Thompson. “Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review” (2002) 128:4 Psychological Bulletin 539.

Gershoff, Elizabeth T & Susan H. Bitensky. “The Case Against Corporal Punishment of Children: Converging Evidence from Social Science Research and International Human Rights Law and Implications” (2007) 13:4 Psychology, Public Policy, and Law 231.

Gorman, Wayne. “Prosecutorial Discretion in a Charter-Dominated Trial Process” (2001) 44 Crim. L.Q. 15.

Greene, Sharon D. “The Unconstitutionality of s. 43 of the Criminal Code: Children’s Right to be Protected from Assault, Part I” (1999) 41 Crim. L.Q. 288.

Greschner, Donna. “Does *Law* Advance the Cause of Equality?” (2001) 27 Queen’s L.J. 299.

Grogan-Kaylor, Andrew. “The effect of corporal punishment on antisocial behavior in children” (2004) 28:3 Social Work Research 153.

Grusec, Joan E. & Jacqueline J. Goodnow. “Impact of parental discipline methods on the child’s internalization of values: A reconceptualization of current points of view,” (1994) 30:1 Developmental Psychology 4.

Hardt, Jochen & Michael Rutter. “Validity of adult retrospective reports of adverse childhood experiences: Review of the evidence” (2004) 45:2 Journal of Child Psychology and Psychiatry 260.

Hogg, Peter W. *Constitutional Law of Canada,* looseleaf (Scarborough: Thomson Canada Limited, 2007).

——. "What is Equality? The Winding Course of Judicial Interpretation" (2005) 29 Sup. Ct. L. Rev. (2d) 39.

Hogg, Peter W. & Allison A. Bushell. “The Charter Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn’t Such A Bad Thing After All)“ (1997) 35 Osgoode Hall L.J. 75.

Hogg, Peter W., Allison A. Bushell Thornton & Wade K. Wright. “*Charter* Dialogue Revisted—Or “Much Ado About Metaphors”” (2007) 45 Osgoode Hall L.J. 1.

Holden, George W. “Perspectives on the Effects of Corporal Punishment: Comment on Gershoff” (2002) 128: 4 Psychological Bulletin 590.

Jordan, Michael David. “Parents Rights and Children’s Interests” (1997) Can. J.L. & Juris. 363.

Justice for Children and Youth, “Who We Are,” online: Justice for Children and Youth http://www.jfcy.org/.

Kazdin, Alan E. & Corina Benjet. “Spanking Children: Evidence and Issues” (2003)12:3 Clinical Child and Family Psychology Review 99.

Larzelere, Robert E. “A review of the outcomes of parental use of nonabusive or customary physical punishment” (1996) 98:4 Pediatrics 824.

——. “Child Outcomes of Nonabusive and Customary Physical Punishment by Parents: An Updated Literature Review” (2000) 3:4 Clinical Child and Family Psychology Review 199.

——. "Children and Violence in the Family: Scientific Contributions (A Submission to the UN Global Study on Children and Violence)" (March 30, 2005), online: <http://ches.okstate.edu/facultystaff/Larzelere/acp.sub.32005.pdf>.

Larzelere, Robert E. & Brett R. Kuhn. "Comparing Child Outcomes of Physical Punishment and Alternative Disciplinary Tactics: A Meta-Analysis" (2005) 8:1 Clinical Child and Family Psychology Review 1.

Larzelere, Robert E., Brett R. Kuhn & Byron Johnson. "The Intervention Selection Bias: An Underrecognized Confound in Intervention Research" (2004) 130:2 Psychological Bulletin 289.

Larzelere, Robert E. & Byron Johnson. "Evaluations of the Effects of Sweden's Spanking Ban on Physical Child Abuse Rates: A Literature Review" (1999) 85 Psychological Reports 381.

Larzelere, Robert E. *et al.* "Punishment Enhances Reasoning's Effectiveness as a Disciplinary Response to Toddlers" (1998) 60:2 Journal of Marriage and Family 388.

Lawrence, Julie & Anne B. Smith. "Aotearoa/New Zealand Families: Their Perspectives on Child Discipline and Recent Legislative Change" (2008) 12:2 Childrenz Issues 17.

Lopez, N.L., J.L. Bonenberger & H.G. Schneider, "Parental disciplinary history, current levels of empathy, and moral reasoning in young adults" (2001) 3: 2 North American Journal of Psychology 193.

Lynch, Stacy K. *et al.* "A Genetically Informed Study of the Association Between Harsh Punishment and Offspring Behavioral Problems" (2006) 20:2 Journal of Family Psychology 190.

McGillivray, Anne. "He'll Learn it on His Body: Disciplining Childhood in Canadian Law" (1997) 5 Int'l J. Child Rts. 193.

——. "Nowhere to stand: Correction by force in the Supreme Court of Canada," in S. Anand, ed., *Children and the Law: Essays in Honor of Professor Nicholas Bala* (2009), [forthcoming 2010].

McLoyd, Vonnie C. & Julia Smith. "Physical discipline and behavior problems in African American, European American, and Hispanic children: Emotional support as a moderator" (2002) 54:1 Journal of Marriage and the Family 40.

Milne, Cheryl . *Canadian Foundation for Children, Youth and the Law v. The Attorney General in Right of Canada: Factum of the Appellant,* (2003) [unpublished, archived at http://www.jfcy.org/PDFs/factum.doc].

——. "The Limits of Children's Rights under Section 7 of the Charter: Life, No Liberty and Minimal Security of the Person" (2005) 17 Nat'l J. Const. L. 199.

Mitchell, Drew. "*R. v. Kaur:* Child Assault and Children's Rights after *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney Genera)*" (2005) 27 C.R. (6th) 230.

Moreau, Sophia R. "The Wrongs of Unequal Treatment" (2004) 54 U. Toronto L.J. 291**.**

Mulvaney, Matthew K. & Carolyn J. Mebert. "Parental Corporal Punishment Predicts Behavior Problems in Early Childhood" (2007) 21:3 Journal of Family Psychology 389.

Naylor, Bronwyn & Bernadette Saunders. "Whose Rights? Parents, Children and Discipline" (2009) 34:2 Alternative Law Journal 80.

New Zealand Herald, "One arrest as thousands join 'March for Democracy'" (21 November 2009), online: New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10610750>.

Nicholas, Barry. *An Introduction to Roman Law,* (Oxford: Clarendon press, 1962).

Noonan, Sheila. *Annotation to R. v. Ogg-Moss,* (1984), 41 C.R. (3d) 297.

Proulx, Michel & David Layton. *Ethics and Canadian Criminal Law*, (Toronto: Irwin Law Inc., 2001).

Quigley, Tim. "Correction of Children: The Supreme Court Divided" (2004) 16 C.R. (6th) 286.

Raz, J. "Legal Rights" (1984) 4 Oxford J. Legal Stud. 1.

REAL Women of Canada, "July/August 2007 Newsletter," online: REAL Women of Canada <http://www.realwomenca.com/page/newslja0704.html>.

Reaume, Denise G. "Discrimination and Dignity" (2003) 64 La. L. Rev. 645.

Repeal 43 Committee. "About Us," http://www.repeal43.org/about.html accessed November 29, 2009.

Roach, Kent. "Victims' Rights and the Charter" (2005) 49 Crim. L.Q. 474.

——. "Searching for Smith: The Constitutionality of MMS" (2001) 39 Osgoode Hall L.J. 367.

Roberts, Julian V. "Changing Public Attitudes Towards Corporal Punishment: The Effects of Statutory Reform in Sweden" (2000) 24:8 Child Abuse & Neglect 1027.

Simons, Ronald L., Christine Johnson & Rand D. Conger. "Harsh Corporal Punishment versus Quality of Parental Involvement as an Explanation of Adolescent Maladjustment" (1994) 56:3 Journal of Marriage and Family 591.

Small, Joan. *"Canadian Foundation for Children Youth and the Law v. Canada (Attorney General)*: The Supreme Court of Canada Gives Children's Human Rights a Hiding" (2004) 3 J. L. & Equal. 209.

——. "Parents and Children: Welfare, Liberty, and *Charter* Rights" (2005) 4 J. L. & Equal. 103.

Stewart, Hamish. "Parents, Children, and the Law of Assault" (2009) 32 Dalhousie L.J. 1.

Straus, Murray A. *Beating the Devil out of them: Physical Punishment in American Families* (2nd Ed.), (New Brunswick, NJ: Transaction Publishers, 2001).

——. "Discipline and Deviance: Physical Punishment of Children and Violence and Other Crime in Adulthood" (1991) 38:2 Social Problems 133.

Straus, Murray A. & Carrie L. Yodanis, "Corporal Punishment in Adolescence and Physical Assaults on Spouses in Later Life: What Accounts for the Link?"(1996) 58:4 Journal of Marriage and Family 825.

Straus, Murray A. & Vera E. Mouradian. "Impulsive corporal punishment by mothers and antisocial behavior and impulsiveness of children" (1998)16:3 Behavioral Sciences and the Law 353.

Strauss, S.A. "Book Review of *South African Criminal Law and Procedure* by E.M. Burchell, J.S. Wylie & P.M.A. Hunt," (1970) 87 So. Afr. L.J. 470.

Stuart, Don. *Annotation to R. v. Swan,* (2008) 58 C.R. (6th) 126.

——. *Canadian Criminal Law: a Treatise*, 4th ed., (Toronto: Carswell, 2001).

——. *Charter Justice in Canadian Criminal Law,* 4th ed., (Toronto: Carswell, 2005).

Sykes, Katie. "Bambi Meets Godzilla: Children's and Parent's Rights in *Canadian Foundation for children, Youth and the Law v. Canada*" (2006) 51 McGill L.J. 131.

Taylor, Nicola & Anne Smith. "Repealing a Defence for the Physical Punishment of Children: Changing the Law in New Zealand" (2008) 12:2 Childrenz Issues 7.

Thomas, Eleanor M. "Aggressive Behaviour Outcomes for Young Children: Change in Parenting Environment Predicts Change in Behaviour" (October 2004), online: < http://www.statcan.gc.ca/pub/89-599-m/89-599-m2004001-eng.pdf>.

Turner, Heather A. & David Finkelhor. "Physical punishment as a stressor among youth" (1996) 58:1 Journal of Marriage and the Family 155.

Wolff, Hans Julius. *Roman Law: An Historical Introduction*, (Norman: University of Oklahoma Press, 1951).

Wood, Beth. "The Long Road to Reform" (2008) 12:2 Childrenz Issues 13.

Woodhouse, Barbara Bennett. "'Who Owns the Child?' *Meyer* and *Pierce* and the Child as Property" (1992) 33 Wm. & Mary L. Rev. 995.

Vanek, David. "Prosecutorial Discretion" (1988) 30 Crim. L.Q. 219.