An Excerpt -- CSI 2210f/g King's University College

P. Ryan

Canadian Foundation for Children, Youth and the Law *v.* Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4

MAJORITY RULING --

1 THE CHIEF JUSTICE —

The issue in this case is the constitutionality of Parliament's decision to carve out a sphere within which children's parents and teachers may use minor corrective force in some circumstances without facing criminal sanction. The assault provision of the *Criminal Code*, R.S.C. 1985, c. C-46, s. 265, prohibits intentional, non-consensual application of force to another. Section 43 of the *Criminal Code* excludes from this crime reasonable physical correction of children by their parents and teachers. It provides:

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

The Canadian Foundation for Children, Youth and the Law (the "Foundation") seeks a declaration that this exemption from criminal sanction: (1) violates s. 7 of the *Canadian Charter of Rights and Freedoms* because it fails to give procedural protections to children, does not further the best interests of the child, and is both overbroad and vague; (2) violates s. 12 of the *Charter* because it constitutes cruel and unusual punishment or treatment; and (3) violates s. 15(1) of the *Charter* because it denies children the legal protection against assaults that is accorded to adults.

2 The trial judge and the Court of Appeal rejected the Foundation's contentions and refused to issue the declaration requested. Like them, I conclude that the exemption from criminal sanction for corrective force that is "reasonable under the circumstances" does not offend the *Charter*. I say this, having carefully considered the contrary view of my colleague, Arbour J., that the defence of reasonable correction offered by s. 43 is so vague that it must be struck down as unconstitutional, leaving parents who apply corrective force to children to the mercy of the defences of necessity and "*de minimis*". I am satisfied that the substantial social consensus on what is reasonable correction, supported by comprehensive and consistent expert evidence on what is reasonable presented in this appeal, gives clear content to s. 43. I am also satisfied, with due respect to contrary views, that exempting parents and teachers from criminal sanction for reasonable correction does not violate children's equality rights. In the end, I am satisfied that this section provides a workable, constitutional standard that protects both children and parents.

I. Does Section 43 of the *Criminal Code* Offend Section 7 of the *Charter*?

3 Section 7 of the *Charter* is breached by state action depriving someone of life, liberty, or security of the person contrary to a principle of fundamental justice. The burden is on the applicant to prove both the deprivation and the breach of fundamental justice. In this case the Crown concedes that s. 43 adversely affects children's security of the person, fulfilling the first requirement.

4 This leaves the question of whether s. 43 offends a principle of fundamental justice. The Foundation argues that three such principles have been breached: (1) the principle that the child must be afforded independent procedural rights; (2) the principle that legislation affecting children must be in their best interests; and (3) the principle that criminal legislation must not be vague or overbroad. I will consider each in turn.

... the Chief Justice rejected procedural rights for children and the claim that BIC is a fundamental principle of justice. She argued that sec. 43 was not overly vague, if...

18 It follows that s. 43 of the *Criminal Code* will satisfy the constitutional requirement for precision if it delineates a risk zone for criminal sanction. This achieves the essential task of providing general guidance for citizens and law enforcement officers.

(b) *Does Section 43 Delineate a Risk Zone for Criminal Sanction?*

....Since s. 43 withdraws the protection of the criminal law in certain circumstances, it should be strictly construed... ...Section 43 delineates who may access its sphere with considerable precision. The terms "schoolteacher" and "parent" are clear. 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.

22 Section 43 identifies less precisely what conduct falls within its sphere. It defines this conduct in two ways. The first is by the requirement that the force be "by way of correction". The second is by the requirement that the force be "reasonable under the circumstances". The question is whether, taken together and construed in accordance with governing principles, these phrases provide sufficient precision to delineate the zone of risk and avoid discretionary law enforcement.

...First, the person applying the force must have intended it to be for educative or corrective purposes... ...Accordingly, s. 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour. The purpose of the force must always be the education or discipline of the child...

25 Second, the child must be capable of benefiting from the correction. This requires the capacity to learn and the possibility of successful correction. Force against children under two cannot be corrective, since on the evidence they are incapable of understanding why they are hit (trial decision reflex, (2000), 49 O.R. (3d) 662, at para. 17). A child may also be incapable of learning from the application of force because of disability or some other contextual factor. In these cases, force will not be "corrective" and will not fall within the sphere of immunity provided by s. 43.

...Then the Chief Justice argues in support of the term "reasonable under the circumstances" as being an acceptable way to "delineate areas of risk, without incurring the dangers of vagueness" so long as there are relatively well defined limits...

30 The first limitation arises from the behaviour ... ... that causes harm or raises a reasonable prospect of harm. ... People must know that if their conduct raises an apprehension of bodily harm they cannot rely on s. 43. Similarly, police officers and judges must know that the defence cannot be raised in such circumstances.

.... further precision on what is reasonable under the circumstances may be derived from international treaty obligations. Statutes should be construed to comply with Canada's international obligations... (which) confirm that physical correction that either harms or degrades a child is unreasonable.

32 Canada is a party to the United Nations *Convention on the Rights of the Child*. Article 5 of the Convention requires state parties to

respect the responsibilities, rights and duties of parents or . . . other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 19(1) requires the state party to

protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. [Emphasis added.]

Finally, Article 37(*a*) requires state parties to ensure that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment" (emphasis added). This language is also found in the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, to which Canada is a party. Article 7 of the Covenant states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The preamble to the *International Covenant on Civil and Political Rights* makes it clear that its

provisions apply to "all members of the human family". From these international obligations, it follows that what is "reasonable under the circumstances" will seek to avoid harm to the child and will never include cruel, inhuman or degrading treatment.

33 Neither the *Convention on the Rights of the Child* nor the *International Covenant on Civil and Political Rights* explicitly require state parties to ban all corporal punishment of children.

...Citing a number of international documents the Chief Justice concludes that they can be read to support mild corporal punishment that is "properly focus on the prospective effect of the corrective force upon the child, as required by s. 43."...

40 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. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered by s. 43. It is wrong for law enforcement officers or judges to apply their own subjective views of what is "reasonable under the circumstances"; the test is objective. The question must be considered in context and in light of all the circumstances of the case. The gravity of the precipitating event is not relevant.

...

...The Chief Justice proceeds to argue that sec. 43 does not constitute a violation of the Charter's sec 12 protection against cruel and unusual punishment...

III. Does Section 43 of the *Criminal Code* Offend Section 15 of the *Charter*?

50 Section 43 permits conduct toward children that would be criminal in the case of adult victims. The Foundation argues that this distinction violates s. 15 of the *Charter*, which provides that "[e]very individual is equal before and under the law" without discrimination. ...The difficulty with this argument, as we shall see, is that it equates equal treatment with identical treatment, a proposition which our jurisprudence has consistently rejected. ...

52 Section 43 makes a distinction on the basis of age, which s. 15(1) lists as a prohibited ground of discrimination. The only question is whether this distinction is

discriminatory under s. 15(1) of the *Charter*. ... The test is whether a reasonable person possessing the claimant's attributes and in the claimant's circumstances would conclude that the law marginalizes the claimant or treats her as less worthy on the basis of irrelevant characteristics... The best we can do is to adopt the perspective of the reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs... ... Against this backdrop, the question may be put as follows: viewed from the perspective of the reasonable person identified above, does Parliament's choice not to criminalize reasonable use of corrective force against children offend their human dignity and freedom, by marginalizing them or treating them as less worthy without regard to their actual circumstances? [*There are*] four factors helpful in answering this question: (1) pre-existing disadvantage; (2) correspondence between the distinction and the claimant's characteristics or circumstances; (3) the existence of ameliorative purposes or effects; and (4) the nature of the interest affected.

56 The first *Law* factor, vulnerability and pre-existing disadvantage, is clearly met in this case. Children are a highly vulnerable group. Similarly, the fourth factor is met. The nature of the interest affected — physical integrity — is profound. No one contends that s. 43 is designed to ameliorate the condition of another more disadvantaged group: the third factor. This leaves the second factor: whether s. 43 fails to correspond to the actual needs and circumstances of children.

57 This factor acknowledges that a law that "properly accommodates the claimant's needs, capacities, and circumstances" will not generally offend s. 15(1): *Law*, *supra*, at para. 70. "By contrast, a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory"... The question in this case is whether lack of correspondence, in this sense, exists.

58 Children need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield children from psychological and physical harm. In so acting, the government responds to the critical need of all children for a safe environment. Yet this is not the only need of children. Children also 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.

59 Section 43 is Parliament's attempt to accommodate both of these needs. It provides parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law. The criminal law will decisively condemn and punish force that harms children, is part of a pattern of abuse, or is simply the angry or frustrated imposition of violence against children; in this way, by decriminalizing only minimal force of transient or trivial impact, s. 43 is sensitive to children's need for a safe environment. But s. 43 also ensures the criminal law will not be used where the force is part of a genuine effort to educate the child, poses no reasonable risk of harm that is more than transitory and trifling, and is reasonable under the circumstances. Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than

help them. So Parliament has decided not to do so, preferring the approach of educating parents against physical discipline.

... ...

68 I am satisfied that a reasonable person acting on behalf of a child, apprised of the harms of criminalization that s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child's dignity has been offended in the manner contemplated by s. 15(1). Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of s. 43 on a child's sense of dignity. Yet, as emphasized, the force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting. Section 43 is not arbitrarily demeaning. It does not discriminate. Rather, it is firmly grounded in the actual needs and circumstances of children. I conclude that s. 43 does not offend s. 15(1) of the *Charter*.

...The Chief Justice summarizes her opinion with the following...

70 I would answer the constitutional questions as follows:

1. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

3. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

5. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

DISSENTING OPINIONS --

Per Binnie J. (dissenting in part): By denying children the protection of the criminal law against the infliction of physical force that would be criminal assault if used against an adult, s. 43 of the *Criminal Code* infringes children's equality rights guaranteed by s. 15(1) of the *Charter*. To deny protection against physical force to children at the hands of their parents and teachers is not only disrespectful of a child's dignity but turns the child, for the purpose of the *Criminal Code*, into a second class citizen. Such marginalization is destructive of dignity from any perspective, including that of a child. Protection of physical integrity against the use of unlawful force is a fundamental value that is applicable to all.

The majority in this case largely dismisses the s. 15(1) challenge because of the alleged correspondence between the actual needs and circumstances of children and the diminished protection they enjoy under s. 43. In the majority view, the objective of substantive equality (as distinguished from formal equality) calls for the differential treatment of children. Here, however, the "correspondence" factor is used as a sort of Trojan horse to bring into s. 15(1) matters that are more properly regarded as "reasonable limits . . . demonstrably justified in a free and democratic society" (s. 1). Section 43 protects parents and teachers, not children. The justification for their immunity should be dealt with under s. 1.

The use of force against a child, which in the absence of s. 43 would result in a criminal conviction, cannot be said to "correspond" to a child's "needs, capacities and circumstances" from the vantage point of a reasonable person acting on behalf of a child who seriously considers and values the child's views and developmental needs. Furthermore, the use of the "correspondence" factor to deny equality relief to children in this case is premised on the view that the state has good reason for treating children differently because of the role and importance of family life in our society. However, to proceed in this way just incorporates the "legitimate objective" element from the s. 1 *Oakes* test into s. 15, while incidentally switching the onus to the rights claimant to show the legislative objective is not legitimate, and relieving the government of the onus of demonstrating proportionality, including minimal impairment. This denies children the protection of their right to equal treatment.

The infringement of children's equality rights is saved by s. 1 of the *Charter* in relation to parents and persons standing in the place of parents. The objective of s. 43 of limiting the intrusion of the *Criminal Code* into family life is pressing and substantial and providing a defence to a criminal prosecution in the circumstances stated in s. 43 is rationally connected to that objective. As to minimal impairment, the wording of s. 43 not only permits calibration of the immunity to different circumstances and children of different ages, but it allows for adjustment over time. The proportionality requirements are met by Parliament's limitation of the s. 43 defence to circumstances where: (i) the force is for corrective purposes, and (ii) the measure of force is shown to be reasonable in the circumstances. What is reasonable in relation to achievement of the legitimate legislative objective will not, by definition, be disproportionate to such achievement. Moreover, the salutary effects of s. 43 exceed its potential deleterious effects when one considers that the assault provisions of the *Criminal Code* are just a part, and perhaps a less important part, of the overall protections afforded to children by child welfare legislation. To deny children the ability to have their parents successfully prosecuted for reasonable corrective force under the *Criminal Code* does not leave them without effective recourse. It just helps to keep the family out of the criminal courts. Section 43 in relation to parents is justified on this basis.

The extension of s. 43 protection to teachers has not been justified under the s. 1 test. Parents and teachers play very different roles in a child's life and there is no reason why they should be treated on the same legal plane for the purposes of the *Criminal Code*. The logic for keeping criminal sanctions out of the schools is much less compelling than for keeping them out of the home. While order in the schools is a legitimate objective, giving non-family members an immunity for the criminal assault of children "by way of correction" is not a reasonable or proportionate legislative response to that problem. Section 43 does not minimally impair the child's equality right, and is not a proportionate response to the problem of order in the schools.

Per Arbour J. (dissenting): Section 43 of the *Criminal Code* can only be restrictively interpreted if the law, as it stands, offends the Constitution and must therefore be curtailed. Absent such constitutional restraints, it is neither the historic nor the proper role of courts to enlarge criminal responsibility by limiting defences enacted by Parliament. The reading down of a statutory defence amounts to an abandonment by the courts of their proper role in the criminal process. Nothing in the words of s. 43, properly construed, suggests that Parliament intended that some conduct be excluded at the outset from the scope of its protection. This is the law as we must take it in order to assess its constitutionality. To essentially rewrite it before validating its constitutionality is to hide the constitutional imperative.

Section 43 of the *Criminal Code* infringes the rights of children under s. 7 of the *Charter*. The phrase "reasonable under the circumstances" in s. 43 violates children's security of the person interest and the deprivation is not in accordance with the relevant principle of fundamental justice, in that it is unconstitutionally vague. A vague law violates the principles of fundamental justice because it does not provide "fair warning" to individuals as to the legality of their actions and because it increases the amount of discretion given to law enforcement officials in their application of the law, which may lead to arbitrary enforcement. 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. Canadian courts have been unable to articulate a legal framework for s. 43 despite attempts to establish guidelines and have been at a loss to appreciate the "reasonableness" referred to by Parliament. "Reasonableness" with respect to s. 43 is linked to public policy issues and one's own sense of parental authority and always entails an element of subjectivity. Conceptions of what is "reasonable" in terms of the discipline of children, whether physical or otherwise, vary widely, and often engage cultural and religious beliefs as well as political and ethical ones. While it may work well in other contexts, in this one the term "reasonable force" has proven not to be a workable standard and the lack of clarity is particularly problematic here because the rights of children are engaged. The restrictions put forth by the majority with respect to the scope of the defence in s. 43 have not emerged from the existing case law. These restrictions are far from self-evident and would not have been anticipated by many parents, teachers or enforcement officials. Attempts at judicial interpretation which would structure the discretion in s. 43 have failed to provide coherent or cogent guidelines that would meet the standard of notice and specificity generally required in the criminal law.

Since s. 43 is unconstitutionally vague, it cannot pass the "prescribed by law" requirement in s. 1 of the *Charter* or the minimal impairment stage of the *Oakes* test and accordingly cannot be saved under that section. Striking down the provision is the most appropriate remedy, as Parliament is best equipped to reconsider this vague and controversial provision. Striking down s. 43 will not expose parents and persons standing in the place of parents to the blunt instrument of the criminal law for every minor instance of technical assault. The common law defences of necessity and *de minimis* adequately protect parents and teachers from excusable and/or trivial conduct. The defence of necessity rests upon a realistic assessment of human weaknesses and recognizes that there are emergency situations where the law does not hold people accountable if the ordinary human instincts overwhelmingly impel disobedience in the pursuit of self-preservation or the preservation of others. Because the s. 43 defence only protects parents who apply force for corrective purposes, the common law may have to be resorted to in any event in situations where parents forcibly restrain children incapable of learning, to ensure the child's safety, for example. With respect to the common law defence of *de minimis*, an appropriate expansion in the use of that defence would assist in ensuring that trivial, technical violations of the assault provisions of the *Criminal Code* do not attract criminal sanctions.

Per Deschamps J. (dissenting): The ordinary and contextual meaning of s. 43 cannot bear the restricted interpretation proposed by the majority. Section 43 applies to and justifies an extensive range of conduct, including serious uses of force against children. There was agreement with Arbour J. that the body of case law applying s. 43 is evidence of its broad parameters and wide scope. Where, as here, the text of the provision does not support a severely restricted scope of conduct that would avoid constitutional disfavour, the Court cannot read the section down to create a constitutionally valid provision. It is the duty of the Court to determine the intent of the legislator by looking at the text, context and purpose of the provision.

Section 43 infringes the equality guarantees of children under s. 15(1) of the *Charter*. On its face, as well as in its result, s. 43 creates a distinction between children and others which is based on the enumerated ground of age. Moreover, the distinction or

differential treatment under s. 43 constitutes discrimination. The government's explicit choice not to criminalize some assaults against children violates their dignity. First, there is clearly a significant interest at stake because 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. Second, children as a group face pre-existing disadvantage in our society and have been recognized as a vulnerable group time and again by legislatures and courts. Third, the proposed ameliorative purposes or effects factor does not apply and has only a neutral impact on the analysis. Lastly, s. 43 perpetuates the notion of children as property rather than human beings and sends the message that their bodily integrity and physical security is to be sacrificed to the will of their parents, however misguided. 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.

The infringement of s. 15(1) is not justified as a reasonable limit under s. 1 of the *Charter*. The legislative objective behind s. 43 of recognizing that parents and teachers require reasonable latitude in carrying out the responsibility imposed by law to provide for their children, to nurture them, and to educate them is pressing and substantial. As well, there does appear to be a rational connection between the objective and limiting the application of the criminal law in the parent-child or teacher-pupil relationship. However, it is clear that less intrusive means were available that would have been more appropriately tailored to the objective. 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. It could also have been better tailored in terms of those to whom it applies, those whom it protects, and the scope of conduct it justifies. A consideration of the proportionality between the salutary and deleterious effects of the application of s. 43 also supports the conclusion that the proportionality part of the *Oakes* test has not been met. The deleterious effects impact upon such a core right of children as a vulnerable group that the salutary effects must be extremely compelling to be proportional. The discrimination represented by s. 43 produces the most drastic effect in sending the message that children, as a group, are less worthy of protection of their bodies than anyone else.

The striking down of s. 43 is the only appropriate remedy in this case and s. 43 should be severed from the rest of the *Criminal Code*. It does not measure up to *Charter* standards and, thus, must cede to the supremacy of the Constitution to the extent of any inconsistency.