INTRODUCTION

Section 43 of the Criminal Code has been around a long time. It was first added to the Criminal Code in 1892.[1] Until 1955, masters were also able to avail themselves of a §43 defence if they used force on an apprentice.[2] Now, only children remain vulnerable to legalized assault under §43[3]. As it now stands, §43 reads as follows:

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

Section 43 of the Criminal Code provides a defence to particular classes of people after the offence of assault has been proven.

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[1] *Criminal Code,* S.C. 1892 .29 §55.

[2] *Criminal Code, S.*C. 1955

[3] *Criminal Code,* R.S.C. 1985, c. C-46 s.43.

Section 43 does not exist in a vacuum

The Canadian Teachers Federation, who appeared as interveners in the most recent case to challenge the constitutional validity of §43, list on their web page[4] several situations which they believe require the continued protection of §43. For convenience I reproduce that list here:

a) the need to protect students or teachers when a fight occurs at school, including restraining students if necessary;

b) escorting an uncooperative student to the principal's office;

c) ejecting a student who refuses to leave the classroom, or the school itself;

d) placing a young student on the bus, in a situation where that student had been on a field trip and refuses to return to the bus;

e) restraining a cognitively-impaired student; and

f) intervening in a potentially disruptive situation to prevent escalation into something more dangerous.

While these are apparently examples of socially useful applications of force, the applicability of §43 is questionable in all of them. In *Ogg-Moss*[5], the Supreme Court of Canada

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[4]Canadian Teachers Federation, "*Maintaining a safe and secure school learning environment*", Online : http://www.ctf-fce.ca/E/WHAT/OTHER/section43.htm, date accessed: 15 July 2002.

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

examined in detail the proper application of §43, and the unanimous decision in that case casts a great deal of doubt on the applicability of a §43 defence in all of the above situations.

Restraining a violent student to protect other students and teachers, and intervening in a potentially disruptive situation to prevent escalation into something more dangerous are not examples of using force for the purpose of correction[6]; neither is escorting a student to the principal's office, or ejecting a student from the classroom or school[7]. Placing a reluctant student on a bus is hardly corrective[8]. The Supreme Court of Canada dealt squarely with the

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[6]Dickson J., writing for a unanimous court in *R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173 said "*... § 43 is not necessary for the protection of persons using physical force in response to violent or dangerous behaviour...*" and later in the same paragraph: "*Section 43* ***only*** *applies to "correctional" force unrelated to ... the protection of others."* (emphasis added).

[7]Presumably the student in this hypothetical situation is an older student who does not require supervision, i.e. a teenager. See *Canadian Foundation for Children Youth and the Law* v. *Canada (Attorney General)*, 49 O.R. (3d) 662 at para. 17. Ejecting a young student (under 12) from the school without arranging suitable supervision would likely attract the attention of the child protection services and law enforcement regardless of how or why it was done.

[8]The purpose of such application of force being primarily, if not exclusively, to get the child on the bus so that the field trip may resume.

issue of the availability of a §43 defence to a charge of assault on a cognitively impaired person, in *Ogg-Moss*[9], and unanimously ruled that there is a three part test to establish a §43 defence for someone who can place themselves within one of the categories of persons whom §43 protects. First, the person applying the force must have applied the force with the intent that it be corrective, second, the person being corrected must be capable of learning from the correction, and third, the force used must be reasonable in the circumstances.

If the developmentally delayed child is not, to the knowledge of the accused, capable of learning from the correction, §43 provides no defence.[10] If the developmental delay does not impair the child's ability to learn from the application of force it is not relevant. The fact that the Canadian Federation of Teachers included developmental delay in the description of the child suggests that the delay referred to is likely significant enough to vitiate a §43 defence.

On the same web page, in response to its rhetorical question "*What would happen if Section 43 were removed from the Criminal Code?*"[11], the Canadian Teacher's Federation

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[9]*R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173.

[10]*R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173.

[11]Canadian Teachers Federation, "*Maintaining a safe and secure school learning environment*", Online : http://www.ctf-fce.ca/E/WHAT/OTHER/section43.htm, date accessed:

answers: "*It would likely result in a dramatic increase in the number of assault charges filed and prosecuted*."[12]

This fear of increased frequency of prosecution, even if valid, ignores several limitations inherent in §43 of the Criminal Code. That a teacher is accused of applying force to a pupil is not sufficient to sustain §43 as a defence to a charge of assault. The force must have been applied for the purposes of correction[13] (which is arguably not the case in the examples above), it must be have been reasonable in the circumstances,[14] and the person to whom the force is applied must, to the knowledge of the accused, have been capable of learning from the correction[15]. If any one of these conditions is not met, a defence based on §43 must fail.

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15 July 2002.

[12]Canadian Teachers Federation, "*Maintaining a safe and secure school learning environment*", Online : http://www.ctf-fce.ca/E/WHAT/OTHER/section43.htm, date accessed: 15 July 2002.

[13] *R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173.

[14] *R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173.

[15] *R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173.

Also apparently ignored is the applicability of other statutory defences such as self defence,[16] preventing the commission of an offence,[17] preventing assault,[18] and assertion of right to house or real property[19]. There are, in addition, common law defences such as necessity,[20] implied or deemed consent,[21] and the maxim *"de minimis non curat lex"*, which, though not clearly defined in either statute or common law, is translated from Latin as "The law does not notice or concern itself with trifling matters"[22].

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[16] *Criminal Code*, R.§C. 1985, c. C-46 §34(1) and §34(2).

[17] *Criminal Code*, R.§C. 1985, c-C-46 § 27.

[18] *Criminal Code*, R.§C. 1985, c. C-46 §37(1) and §37(2).

[19] *Criminal Code*, R.§C. 1985, c. C-46 §41(1).

[20]Accepted as a common law defence by the Supreme Court of Canada in *Perka* v. *R.*, 42 C.R. (3d)113, [1984] 2 §C.R. 233, 14 C.C.C. (3d) 385. See also: Don Stuart, *Canadian Criminal Law a Treatise*, 4th ed. (Scarborough: Carswell, 2001) at 512-533.

[21]See *R.* v. *A.E. (2000)*, 146 C.C.C. 449 (ON C.A.) at para 29; *R.* v. *Jobidon*, [1991] 2 §C.R. 714 at para§ 59 - 130.

[22] Bryan A. Garner, ed. *Black's Law Dictionary*, 7th ed., (St. Paul, MN : West Publishing, 1999) at 1630 §v. <<Legal Maxims>>.

More importantly, it suggests that what is sought to be protected is the use of force on children without judicial review or any protection of the child's right under §7 the Canadian Charter of Rights and Freedoms to not be deprived of security of the person except in accordance with the principles of fundamental justice. Although the two issues are closely linked there is a real difference between the accused having been acquitted by virtue of §43 after a trial (which arguably serves to meet the fundamental justice requirements of §7 of the *Charter*)[23] and not being charged at all without the formal inquiry into whether §43 provides a defence which a trial would provide.

In holding that §43 of the Criminal Code does not breach the §7 Charter (security of the person) rights of children, McCoombs J. found that:

> *"The interests of children are adequately represented by the Crown, which prosecutes the case."* [24]

which is true only if the case is prosecuted.

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[23] *Canadian Foundation for Children Youth and the Law* v. *Canada (Attorney General) (2000)*, 49 O.R. (3d) 662 at para 82.

[24] *Canadian Foundation for Children Youth and the Law* v. *Canada (Attorney General) (2000)*, 49 O.R. (3d) 662 at para 82.

A case which goes unreported or un-investigated or in which no charges are laid because of the mere existence of §43 of the Criminal Code is not one in which the child's interests are adequately represented by anyone. It is the failure to report or investigate these cases which the Canadian Teacher's Federation appears to be concerned about preserving.

It is important to note that like any defence, §43 of the Criminal Code will not become legally significant until the elements of the offence (of assault) have been proven by the Crown. The offence of assault is defined in §265 of the Criminal Code as follows:

265 (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Under this definition, not only must the Crown establish that one person applied force to another (or threatened to do so), and did so intentionally, but it must also establish that the application of force was without consent. While it is unlikely in the extreme that an

uncooperative child would expressly consent to being struck or restrained, expressed consent is not the only form of consent recognized at law[25]**.** Neither is §43 of the criminal code the only statutory defence to a charge of assault.

The answer to the Canadian Teachers Federation question "*What would happen if Section 43 were removed from the Criminal Code?*"[26] is: nothing much would change if §43 were simply repealed. The enactment of §43, being (other than its characterization as a justification rather than an excuse) a codification of the common law, did nothing to invalidate the common law. Legislation only supercedes the common law to the extent to which it is inconsistent with the common law. Further, common law defences are specifically preserved by §8(3) of the *Criminal Code.*

Absent some accompanying legislation, the repeal of §43 would leave the common law from which § 43 evolved untouched. From a practical standpoint, the law would be changed only in that the intentional application of force to a child would no longer be justified, it would

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[25] See generally: *R.* v. *Ewanchuk (1999),* 131 C.C.C. (3d) 481 (§C.C.).

[26]Canadian Teachers Federation, "*Maintaining a safe and secure school learning environment*", Online : http://www.ctf-fce.ca/E/WHAT/OTHER/section43.htm, date accessed: 15 July 2002.

instead only be authorized or excused, and it would be more difficult to locate the source of the authorization or excuse for the application of force to a child.

Whether and how a finding of constitutional invalidity would affect the availability of existing common law defences would depend on the basis for and the wording of that ruling. Before an assessment of potential changes to the common law, it is appropriate to evaluate the common law as it stood when §43 was enacted which is how it now stands and would continue to stand if §43 were simply repealed.

Existing Common Law Defences

1. **Implied / Deemed Consent**

The common law recognizes the right of a parent to apply force in a reasonable manner for the benefit of the child.[27] This right evolved from the ancient Roman concept of *"patria protestas"*, the power of the father, which was virtually absolute – including the ability to sell children into apprenticeships and to have them put to death.

That power has gradually been narrowed. In *Commentaries on the Laws of England,* published in 1766, Sir William Blackstone, after a discussion of the history of *patria protestas*

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[27] *R.* v. *E.(A.) (2000)*, 146 C.C.C. (3d) 449 (ON C.A.) At para 29.

and its evolution under the common law of England describes the then current common law as follows:

> *"The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. ... He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed."*[28]

Canadian common law of the implied or deemed consent defence has evolved to be far narrower still. The common law still recognizes that parents have the right:

> "*...to apply force in a reasonable manner for the benefit of the child."*[29]

That right is not an absolute, and is inherently limited by its foundation on a balancing of rights and interests identified by Weiler J.A. as follows in *R.* v. *E.(A.)*:

> "*On the one hand, the law must protect children and those who are defenceless from unwarranted bodily interference; on the other hand, persons engaged in looking after a*

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[28]Sir William Blackstone, *Blackstone's Commentaries on the Laws of England, vol. 4, 21st* ed. (London: Sweet & Maxwell, 1844).

[29] *R.* v. *E.(A.) (2000),* 146 C.C.C. (3d) 449 (ON C.A.) At para 26.

child must be protected from state interference when acting in the best interests of the child. Accordingly, as noted by the trial judge, it is in the public interest that an infant be deemed to consent to applications of force by a parent done "for the good of the child and, indeed, for the survival of the child"."[30]

Because of this balancing of rights approach, a parent's authority to apply force to a child is limited by several restrictions which derive from the child's rights. Implied consent is not carte blanche, it is inherently limited.[31] The force used must be for the purpose of caring for the child,[32] and must not exceed what is reasonable in the circumstances or clearly be beyond the ordinary norm of parental conduct.[33] Where the force used is excessive, this common law limitation is codified in section 26 of the Criminal Code, which is discussed below.

The protection afforded by this common law principle may be both broader and narrower than that offered by section 43 as currently interpreted.

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[30] *R.* v. *E.(A.) (2000)*, 146 C.C.C. (3d) 449 (ON C.A.) At para 29.

[31] *R.* v. *E.(A.) (2000)*, 146 C.C.C. 449 (ON C.A.) at para 33.

[32] *R.* v. *E.(A.) (2000)*, 146 C.C.C. (3d) 449 (ON C.A.) At para 33.

[33] *R.* v. *E.(A.) (2000)*, 146 C.C.C. (3d) 449 (ON C.A.) At para 37 and 42.

While section 43 has been held to be inapplicable if bodily harm is either intended or caused,[34] implied consent is not necessarily so limited.

In R. v. Barron,[35] a boy was charged with manslaughter, via assault, for pushing another boy down a flight of stairs thereby causing the boy's death. The trial judge held that the deceased boy had impliedly consented to rough-housing on the stairs as they descended.

Although this was not a case in which section 43 could have played a role, it clearly establishes that implied consent is not necessarily vitiated by the fact that injury or death results from the application of force. As the courts have noted, the appropriate result will undoubtedly depend on the peculiar circumstances of each case.[36]

Section 43 of the criminal code is broader than the common law doctrine of implied consent in that it provides automatic protection to "school teachers and persons standing in the

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[34] *R.* v. *Myers*, [1995] P.E.I.J. No . 180; 136 Nfld. & P.E.I. R. 68; 423 A.P.R. 68 at para 27 P.E.I.J.

[35] *R.* v. *Barron (1985)*, 23 C.C.C. (3d) 544 (Ont. C.A.).

[36] *R.* v. *Jobidon* [1991] 2 §C.R. 714; [1991] §C.J. No. 65. at para 130 §C.R.

place of a parent"[37]**,** while the common law allows only that a parent ***may*** delegate authority to use reasonable force to a "schoolmaster or tutor, who is then in loco parentis". (Emphasis added)

Whether such delegation under the common law would have to be expressed, or could be implicit in the sending of a child to school has not yet been determined conclusively, but in *R.* v. *Ogg-Moss*[38] Dickson J., speaking for the unanimous Supreme Court of Canada, adopted the Pittard[39] ruling in saying:

> ***"As the decision in Pittard, supra, clearly indicates, delegation cannot simply be inferred from the fact of placing a child in the care of another."***[40]

Although both *Pittard* and *Ogg-Moss* were cases involving charges of assault against individuals who were found to not be teachers, the nature of the statement quoted above is general enough that it arguably could be cited as authority for a denial of the protection of the

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[37] *Criminal Code*, R.§C. 1985, c. C-46 §43.

[38] *R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173.

[39] *North Carolina* v. *Pittard (1980)*, 263 §E. 2d 809 (N.C. App.).

[40] *R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173.

common law defence of implied consent to teachers unless there was an express delegation of authority from a parent to the teacher.

Without reversing itself, and in the absence of §43, the Supreme Court could extend the protection of the common law against conviction for assault when reasonable force is applied to a child for the purpose of correction to teachers through the established requirement that conduct be wrongful before it attracts criminal sanction.

It would not be necessary to find that the application of force by a teacher to a pupil is righteous or justified to acquit on this basis; a finding that under the circumstances the conduct was insufficiently wrongful to merit the stigmatization of criminal sanction would suffice.[41]

3. Requirement that conduct be wrongful before it attracts criminal sanction

The Supreme Court of Canada has repeatedly held that it is a fundamental requirement of the common law that there be a sufficient element of personal fault to sustain a finding of criminal responsibility.[42] After the introduction of the Charter, the Supreme Court of Canada

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[41] *R.* v. *Elek*, [1994] Y.J. No. 31 (Y.T.C.)

[42] *R.* v. *Sault Ste. Marie (City) (1978)*, 40 C.C.C. (2d) 353 161; [1978] 2 §C.R. 1299.

held that the requirement of personal fault is a constitutional minimum under §7 of the *Charter*.[43]

Justice Sopinka, speaking for a unanimous Supreme Court clearly stated:

"It is axiomatic that in criminal law there should be no responsibility without personal fault"[44], and went on to say:

"The criminal law is based on proof of personal fault and this concept is jealously guarded when a court is asked to interpret criminal provisions, especially those with potentially serious penal consequences."[45]

Whether a sufficient degree of personal fault can be established on the grounds that the accused is a teacher, and therefore not explicitly protected by the common law doctrine of implied consent, is an open question. Courts would likely be hesitant to convict a teacher for an intentional application of reasonable force to a pupil who was capable of learning from the application of force, which was done for the benefit of the education of the pupil, was intended

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[43] *Reference re: § 94(2) of Motor Vehicle Act (1985)*, 23 C.C.C. (3d) 289; 24 D.L.R. (4th) 536; [1985] 2 §C.R. 486.

[44] *Regina* v. *DeSousa (1992)*, 76 C.C.C. (3d) 124 at 134.

[45] *Regina* v. *DeSousa (1992)*, 76 C.C.C. (3d) 124 at 134.

for the purpose of correction and which would not provide grounds for the conviction of a parent under the same circumstances.

Although the Supreme Court of Canada has held that delegation of authority **cannot be** implied from the mere fact that a parent leaves a child in the care of another person,[46] it is important to remember that those cases were decided in the light of §43's protection of teachers, and arguably turned primarily on the finding that the accused in question were not teachers. Absent §43, and confronted with a choice between convicting a teacher or finding that teachers have implicit delegation of parental authority to apply reasonable force to a child for the benefit and education of the child under the doctrine of implied or deemed consent, the Court would almost certainly opt to extend the scope of implied consent to include teachers.

As an alternative to expanding the common law defence of implied or deemed consent, the Courts could invoke the maxim *de minimis non curat lex*, as suggested in the case law discussed below.

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[46] *R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173.

4. De Minimis Non Curat Lex

De minimis non curat lex is a well established common law doctrine which is not clearly defined either in statute or in common law. Black's Law Dictionary (7th ed) defines it as: "[Latin] The law does not concern itself with trifles. – Often shortened to *de minimis.*"[47] The definition of *de minimis* is given in the same dictionary as: "Trifling, minimal" or "(of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case."[48]

The application of *de minimis non curat lex* is entirely discretionary and highly contextual.[49] This is not a defence which hinges on legal technicalities, nor is it based on any precise definition. As Professor Stuart notes in his treatise:

> "*The ancient de minimis principle could provide an ideal vehicle for judges to ensure that in some doubtful cases the criminal law can be used with total restraint, and that the accused can be given the full benefit of the doubt even if*

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[47] Bryan A. Garner, ed. *Black's Law Dictionary*, 7th ed., (St. Paul, MN : West Publishing, 1999) at 1630 443 s.v. <<demise charter>>.

[48] Bryan A. Garner, ed. *Black's Law Dictionary*, 7th ed., (St. Paul, MN : West Publishing, 1999) at 1630 443 s.v. <<demise charter>>.

[49] *R.* v. *Nagel-Joseph*, [1999] B.C.J. No. 3014 at para 14; *R.* v. *Li.*, [1984] O.J. No. 569.

technically guilty. As can be seen most clearly in the decision in S., the maxim can become a vehicle for a judge invoking the social purpose rather than the literal approach to statutory construction."[50]

In *R.* v. *Elek*[51], in applying the *de minimis* maxim, the judge explained that the conduct *" . . was not sufficiently egregious as to amount to criminal misconduct."*

If confronted with the scenario discussed under the heading of implied/deemed consent above, a court could exercise its discretion and apply the *de minimis* maxim to a finding that the accused's conduct was only wrongful in that the accused is a teacher and not a parent, and that given the responsibilities and duties teachers have, any personal fault is within *de minimis*; effectively holding that while the teacher's conduct may have been wrongful to some degree it was insufficiently wrongful to justify the imposition of criminal responsibility and refusing to reach a finding of guilt.

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[50] Don Stuart, *Canadian Criminal Law a Treatise* 4th ed., (Scarborough: Carswell, 2001) at 598. The case referred to as "§" is: *Regina* v. *§*, [1974] 3 W.W.R. 598, (1974) 17 C.C.C. (2d) 181, (1974) 26 C.R.N.§ 130.

[51] *R.* v. *Elek*, [1994] Y.J. No. 31 (Y.T.C.)

5. Necessity (including impossibility)

In the case of Perka[52], the Supreme Court of Canada unanimously recognized a residual common law defence of necessity or impossibility. Dickson J. traces the origin of the defence all the way back to Aristotle. The common law defence of necessity is explained as an extension of the requirement that an act be voluntary for the person(s) who committed the act to be legally culpable. "The criterion is *the moral involuntariness of the wrongful action*", which involuntariness is to be measured not against a standard of theoretical absoluteness, but "*...on the basis of society's expectation of appropriate and normal resistance to pressure.*"[53]

The test laid down by Dickson C.J. in *Perka* consists of three restrictive conditions:

1) "*The defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril*."

2) "*The act in question may only be characterized as involuntary where it was inevitable, unavoidable, and where no reasonable opportunity for an alternative course of action that did not involve a breach of the law was available to the accused*."

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[52] *R.* v. *Perka*, [1984] 2 §C.R. 232.

[53] *R.* v. *Perka*, [1984] 2 §C.R. 232.

3) "*As well the harm inflicted by the violation of the law must be less than the harm the accused sought to avoid*."[54]

Although the defence of necessity has not been raised in cases of the use of force on children,[55] this is likely due to the existence and availability of §43. In the event that §43 was repealed, the common law defence of necessity could be successfully raised by teachers, child care workers, school bus drivers, and other adults who interact with children, depending on the facts of each case and on the court's interpretation of "*direct and imminent peril*".

If the danger of a child not learning the proper social values, or that actions have consequences, were to be accepted as a direct and immediate peril which presents itself each time a child's behaviour is inappropriate, and if the most or only reasonable response was an application of force to the child, and if the courts accept that the harm avoided is, at the extreme,

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[54] *R.* v. *Perka*, [1984] 2 §C.R. 232.

[55]The defence of necessity was mentioned in *R.* v. *T.C.*, [1995] O.J. No. 909., but in that case the accused was a child accused of assaulting a child care worker and the defence of necessity was referred to only in an *obiter* comment made by Nasmith J. indicating that the defence may be available to child care workers in certain situation§

the raising of a sociopath, the defence of necessity could be invoked to avoid a conviction on a charge of assault which resulted from an application of reasonable force on a child for the purpose of correction.

It is less likely that the defence of necessity could be used to excuse the use of corporal punishment including spanking, since "*...as an effective alternative to spanking: the experts all endorsed the 'time out' method as an effective and appropriate method of child discipline.*"[56]

The defence of necessity is most likely to succeed in cases of the non-consensual intentional application of force to a child such as the placing of a reluctant child in a car seat or to bed, the removal of a disruptive child from a school bus or the returning of the recalcitrant student to the bus in the hypothetical situation advanced by the Canadian Teachers' Federation as an explanation of their support of the retention of §43.[57]

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[56]*Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)(2002)*, 57 O.R. (3d) 511,[2002] O.J. No. 61 at para 8.

[57]Canadian Teachers Federation, "*Maintaining a safe and secure school learning environment*", Online : http://www.ctf-fce.ca/E/WHAT/OTHER/section43.htm,date accessed: 15 July 2002.

Statutory Defences other than §43

1. **§26 Criminal Code**

Section 26 of the Criminal Code of Canada provides for criminal liability to be imposed on any one who, being authorized by law to use force, uses an amount of force which is excessive. For convenience I reproduce §26 here:

> "*26. Everyone who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.*"[58]

The corollary of this section is that any one who is authorized by law to use force is not criminally responsible for the use of such force unless the force used is excessive. In this way, §26 is a catch-all; in the event that some statute, bylaw, regulation, or common law rule does not include a requirement that the use of force which it authorizes be reasonable and not excessive, §26 of the *Criminal Code* fills the gap and imposes that restriction.

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[58] *Criminal Code*, R.S.C. 1985, c. C-46 §26.

Since " 'a duty imposed by law' may be a duty arising by virtue of either the common law or by statute."[59], it is logical to believe that the term "authorized by law" also includes both statutory and common law authorization.

2. <u>§ 27 Criminal Code</u> (Use of force to prevent commission of offence)

Section 27 of the *Criminal Code* is statutory justification for the intentional application of force without consent to prevent the commission of a serious offence. Anyone who reasonably believes that something which would be a serious offence against either a person or property is about to be done is not only authorized but is justified in using whatever degree of force he reasonably believes is necessary to prevent that thing from being done.

Despite the title of this section, it could be used to justify the application of force to a child as defined in the Y.O.A.[60]**,** (the same definition appears in the forthcoming Y.C.J.A.)[61] who cannot be convicted of an offence. Section 27 does not require that a conviction be possible,

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[59]*Regina* v. *Coyne*, 124 C.C.C. 176 at 179.

[60] *Young Offenders Act*, R.§C. 1985, c. Y-1 § 2.

[61] Bill C-7, *Youth Criminal Justice Act*, 1st Ses§, 37th Parl., 2001, §2 (assented to 19 February 2002).

only that an arrest be possible. Section 27 reads as follows:

> *"27. Every one is justified in using as much force as is reasonably necessary*
>
> *(a) to prevent the commission of an offence*
>
> *(i) for which, if it were committed, the person who committed it might be arrested without warrant, and*
>
> *(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or*
>
> *(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a)."*[62]

Section 13 of the *Criminal Code* prevents the conviction of a person who was under 12 at the time of the act or omission for which they could otherwise be convicted, but it does not declare that the act or omission is not an offence, nor does it preclude the arrest of the person whose act or omission constitutes an offence.

Under section 23.1 of the *Criminal Code*, the fact that the person who committed an offence can not be convicted of that offence (as would be the case if §13 applied) does not preclude any other person from being convicted under sections 21 to 23 of the *Criminal Code*,

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[62] *Criminal Code*, R.§C. 1985, c. C-46 §27.

which create the offences of being parties to an offence. For there to be parties to an offence, there must be an offence.

Section 13 of the *Criminal Code* does not negate the offence, nor does it prevent or forbid the arrest of anyone, it merely precludes conviction for the commission of the offence if the accused is less than twelve years old.

2. §34 Criminal Code (Self Defence against unprovoked assault)

Section 34(1) of the Criminal Code codifies a justification for the use of reasonable force to defend one's self against an ***unprovoked***[63] ***assault***, but is limited in that it expressly restricts its application to circumstances in which there is no intention to cause either death or grievous bodily harm to the assailant.

> ***"****§34(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself."*

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[63]Provocation is defined in § 36 as "...provocation by blows, words or gesture§", Criminal Code, R.§C. c. C-34 §36

Although not directly applicable to §34, a more helpful definition of provocation is found in §232 (2) of the *Criminal Code*, which deals with the reduction of a charge of murder to one of manslaughter if the defendant establishes that he was provoked into committing the actus reus and which reads as follows:

> *"232(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool."*

For a person to be found to have provoked an assault under this definition that person must have committed "A **wrongful act or insult** sufficient to deprive an ordinary person of the power of self control..." (emphasis added). Absent wrongful conduct on the part of the accused (whether a parent, a teacher or any other person), §34 provides justification for the reasonable application of force in self defence.

The term "ordinary person" has been interpreted to mean an ordinary person of the same age and sex as the person who may have been provoked, and must also share any other factors which would give the act or insult in question special significance, including having experienced

the same series of acts or insults as that person.[64] The appropriateness and applicability of these tests to the determination of whether a teacher or other adult provoked a child to assault them remain open questions since the existence of §43 renders them moot.

It is unlikely that a Court would lightly determine that a teacher could not avail him or her self of a §34 defence because the child's assault of the teacher was provoked – for any action by a teacher to be considered provocation, that action would have to be found to be wrongful. Public policy concerns, specifically the need for teachers to maintain discipline and control of their classes for the safety of all students therein would dictate a high standard for provocation under those circumstances.

In the event that grievous bodily harm or death results from the defensive application of force, §34(2) provides a defence regardless of whether the attack was provoked, conditional only on the accused reasonably believing that the force applied was the only way to prevent death or grievous bodily harm being inflicted on himself. Section 34(2) reads as follows:[65]

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[64] *R.* v. *Thibert*, [1996] 1 §C.R. 37; 104 C.C.C. (3d) 1; 45 C.R. (4th) 1.

[65] *Criminal Code*, R.§C. c. C-34 § 34(2).

(2) Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

3. §37 Criminal Code (Preventing assault)

Section 37(1) of the *Criminal Code* codifies a justification for anyone who uses force to prevent an assault either on himself or on anyone under his protection, provided only that the force used is no more than is necessary.

Unlike §34, the availability of §37(1) as a defence is not contingent on whether the prevented assault was provoked, and the degree of harm inflicted on the aggressor does not affect the availability of the defence. Neither is the availability of §37(1) limited to the use of force for the prevention of grievous bodily harm, as is a §27 defence. If the force used was necessary to prevent an assault, the defence is available. For convenience I reproduce §37(1) here:

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

The scope of §37(1) is limited by §37(2) which denies the applicability of §37(1) where there is: "*...wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.*"[66]

Section 37(2) does not add much to the interpretation of §37(1) since it would be impossible to establish that the force applied was simultaneously necessary, as required by §37(1), and willfully excessive under §37(2).

The term "anyone under his protection" is not defined in the *Criminal Code*, but would certainly include parents, foster parent, guardian or head of family all of whom owe a duty to a child under §215(1) of the *Criminal Code*,[67] and anyone who stands in *loco parentis* to a child since they have therefore assumed all of the duties of a parent toward that child.[68] Teachers

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[66] *Criminal Code*, R.§C. c. C-34 § 37(2).

[67] *Criminal Code*, R.§C. c. C-34 § 215(1)

[68] *R.* v. *Ogg-Moss*, [1984] 2 §C.R. 173; citing with approval *Bennet* v. *Bennet (1879)*,

would almost certainly also be protected by §37 whether they stand in *loco parentis* or not,[69] since they have a duty to protect the children they are charged with supervising as part of their jobs.

4. §41 Criminal Code (Defence of House or Real Property).

> *"§ 41(1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary."*

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10 Ch. D. 474 at 477-78. In which Jessel M.R. held that "*... a person in loco parentis means a person taking upon himself the duty of a father of a child to make a provision for that child*.".

[69] *Criminal Code*, R.§C. c. C-34 § 215(1)(c)

IF SECTION 43 IS REPEALED WITHOUT BEING REPLACED

As discussed under each individual heading above, a simple repeal of §43 without the enactment of any substitute legislation would have no effect at all on the common law which preceded §43, and would therefore make no difference to the likelihood of conviction for the use of force on a child without consent.

If section 43 of the Criminal Code is unconstitutional, on what basis?

There are several possible grounds for finding §43 unconstitutional. In *Canadian Foundation for Children, Youth and the Law* v. *Canada,*[70] Goudge J.A., writing for the court, examined the applicability of sections 7, 12, and 15 of the *Canadian Charter of Rights and Freedoms* to §43 of the *Criminal Code*. Goudge J.A. found that section 7 was not breached, section 12 was not applicable and any violation of the section 15 rights of children would be saved by section 1.

Section 7 of the Charter

The appellant and respondent in *Canadian Foundation for Children Youth and the Law* v. *Canada (Attorney General)* both agreed that the personal security interests of children were

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[70]Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 57 O.R. (3d) 511, [2002] O.J. No. 61

violated by §43 of the *Criminal Code*, so the argument focused on whether that violation was contrary to the principles of fundamental justice.[71] Goudge J.A. finds that §43 of the *Criminal Code* does not violate the procedural requirements of fundamental justice because there is no procedure to be assessed as to whether it meets the requirements of fundamental justice.

> "*Section 43 sets up no procedure which is to be tested against the principles of natural justice* or procedural fairness."[72]

Goudge J.A. goes on to say:

> "*The infringement of the child's personal security interest arises from Parliament's decision to enact the section, not from any legal process conducted pursuant to the section.*"[73]

If this is correct, then the only way any provision can violate principles of natural justice

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[71]Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 57 O.R. (3d) 511, [2002] O.J. No. 61 at paras 15-16 O.R.

[72]Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 57 O.R. (3d) 511, [2002] O.J. No. 61 at para 35 O.R.

[73]Ibid.

or procedural fairness is to provide an unfair process. While procedural fairness requires that any procedure provided must be sufficiently fair, the absence of any process whatsoever equals compliance with procedural fairness. This cannot be correct. If procedural fairness is a component of fundamental or natural justice, then a failure to provide any procedure whatsoever when *Charter* rights are infringed must be inconsistent with the principles of fundamental justice.

There is further reason to doubt the validity of the court's finding that §43 of the *Criminal Code* does not violate §7 of the *Charter*. In the very next sentence, Goudge J.A. asserts:

> "*Given that the decision is embodied in a properly passed law, there can be no question of the section violating the procedural aspect of fundamental justice.*"[74]

If this statement is correct, then no validly enacted law can breach the procedural fairness requirement of fundamental justice. Rights granted by section 7 of the *Canadian Charter of Rights an d Freedoms* can never be breached unless the legislation which violates those rights or authorizes or empowers someone to violate those rights is invalid because it has not been

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[74]Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 57 O.R. (3d) 511, [2002] O.J. No. 61 at para 35.

properly enacted. Section 7 of the *Charter* is therefore meaningless. This position cannot be correct. Section 7 of the *Charter* must be given meaning, as must section 52(1) of the Constitution Act, 1982, which specifies that "*... any law which is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*"[75] It is therefore not correct to assert that a violation of rights is shielded from Constitutional or Charter review by virtue of being incorporated in validly enacted legislation.

Therefore, if §43 of the *Criminal Code* violates a child's personal security interests under section 7 of the *Charter*, given that it fails to require any procedure be followed before justifying a violation of those interests and is therefore inconsistent with the principles of fundamental justice, §43 must be found to be a violation of the child's rights under section 7 of the *Charter;* and the analysis must proceed to a determination of whether section 1 of the *Charter* intervenes to preserve §43 of the *Criminal Code* as reasonable and demonstrably justified in a free and democratic society. Given that in reaching the point of proceeding to a section 1 analysis it has already been determined that the violation is inconsistent with the principles of fundamental justice, it is unlikely in the extreme that §1 of the *Charter* will save §43 of the *Criminal Code.*

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[75] *The Constitution Act, 1982*, Enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11 § 52(1).

If §43 is held to violate §7, and to not be saved by §1 of the Charter

Subsequent to a finding that §43 of the *Criminal Code* is a violation of a child's rights under §7 of the *Charter* as an infringement of the child's right to security of the person in a manner which is inconsistent with the principles of fundamental justice and which is not saved as reasonable and demonstrably justified in a free and democratic society under §1 of the *Charter*, the only appropriate remedy is to strike down §43 of the *Criminal Code*.

Such an order would almost certainly be suspended to allow Parliament to respond to it either by invoking the notwithstanding provisions in §33 of the *Charter* or be enacting a revised §43 to comply with the court's ruling.

For a court to render §43 compliant with the requirements of §7 would require the establishment of a procedural system to protect the child's rights. The creation of such a system is properly the domain of Parliament since it necessarily involves the consideration of complex public policy concerns and a balancing of rights consistent with those concerns.

If §43 were struck down based on §7, the common law from which it evolved would likely be struck down with it since the common law also permits the use of force (infringement of personal security) on children without any procedural protection for them. The effect of such a finding, if not suspended, would be to render use of force on children by anyone subject to the

same criminal sanctions as if such force were used on an adult. The only remaining common law defences against a charge of assault on a child predicated on the use of force for the purpose of correction would be the maxim *de minimis non curat lex* and the emerging doctrine of *necessity*.

Section 12 of the Charter

In his reasons in *Canadian Foundation for Children, Youth and the Law*, Goudge J.A. dismisses the appellant's section 12 *Charter* argument in three short paragraphs which assert that §12 of the *Charter* does not apply to §43 of the *Criminal Code* because the state is neither involved in either inflicting the physical punishment nor responsible for its infliction.[76]

This argument is not convincing for a number of reasons. Firstly, some of the people who are justified in the use of reasonable force for the purposes of correction on children by §43 of the *Criminal Code* clearly derive their authority from the state. Children's Aid workers and foster parents (who stand *in loco parentis* by virtue of a court order), adoptive parents (whose parental authority also originates in a court order), and teachers who are agents of the state and whose actions are those of the state.

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[76] *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, 57 O.R. (3d) 511, [2002] O.J. No. 61

In *Douglas College*[77], and *Eldridge*[78] the Supreme Court of Canada held that community colleges were agents of the state because they were controlled by the state and administering a state program in furtherance of a state objective. Public and Separate school teachers are more directly under the control of the Provincial government in that their curriculum is set by the government and all of their funding comes either directly from government or from the levying of taxes under authority delegated by government.

As with corporations, the state must act through agents. When a teacher applies force to a child the state is involved in inflicting the punishment. When the state actively through legislation authorizes and justifies the use of force on children, while stigmatizing the use of force on adults it is encouraging others to inflict the punishment.

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[77] *Dougals/Kwantlen Faculty Assn.* v. *Douglas College*, [1990] 3 §C.R. 570.

[78] *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 §C.R. 624.

Secondly, §43 of the *Criminal Code* not only authorizes the use of force, it justifies it. In *Eldridge*, the Supreme Court of Canada held that:

> *"There is no doubt, however, that the Charter also applies to action taken under statutory authority."* [79]

Later in that same judgment the Court goes on to say:

> "*Since neither Parliament not a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter."*[80]

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[79] *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 §C.R. 624 at para 21.

[80] *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 §C.R. 624 at para 21. The Court also cites *James* v. *Cowan*, [1932] A.C. 542 (P.C. Australia), at p.558, in which Lord Atkin wrote: "*The Constitution is not to be mocked by substituting executive for legislative interference with freedom*".

and also:

> **"***It is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the Charter, they cannot authorize or empower another person to do so.***"**[81]

Therefore, whether the action which §43 justifies and authorizes is taken directly by the state or not is irrelevant. Unless the state would have the authority to take identical action it can not enable any one to do so. The determination of whether the state could exercise the power it is authorizing others to use must include an analysis under §12 of the *Charter*.

Although §43 of the *Criminal Code* should be subjected to a §12 *Charter* analysis, it would not be struck down as a result of such scrutiny. The test for establishing a violation of §12 was set out by the Supreme Court of Canada in *R.* v. *Smith*,[82] as:

> "*...whether the punishment prescribed is so excessive as to outrage standards of decency.***"**[83]

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[81] *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 §C.R. 624 at para 35.

[82] *R.* v. *Smith*, [1987] 1 §C.R. 1045.

[83] *R.* v. *Smith*, [1987] 1 §C.R. 1045 at para 53, citing with approval Laskin C.J.'s

Using this test, §43 of the *Criminal Code* cannot violate §12 of the *Charter*, since it justifies only the use of force which is reasonable. Any use of force which would be so excessive as to outrage standards of decency so as to constitute cruel and unusual punishment would, by definition, be well outside the protection of §43.

Violations of §12 are unlikely to be saved by §1 of the *Charter* since to do so would require a court to find that something which outrages standards of decency is nevertheless a reasonable limitation, prescribed by law and demonstrably justified in a free and democratic society.

Section 15 of the Charter

No analysis of whether §43 of the Criminal Code breaches §15 of the Charter is necessary since it clearly and on its face draws a distinction on the proscribed grounds of age and provides for differential treatment on that basis.

Section 1 Charter Analysis

A finding that a legislative provision infringes or violates a *Charter* right does not end the

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judgment in *Miller and Cockriel* v. *The Queen*, [1977] 2 §C.R. 680 at 688.

enquiry into the Constitutional validity of that provision since all rights granted by the *Charter* are subject to such reasonable limitations, prescribed by law as may be demonstrably justified in a free and democratic society.[84]

In *Canadian Foundation for Children, Youth and the Law v. Canada*[85], Goudge J.A., states that:

> *"The question is not whether a parent using reasonable force on a child for corrective purposes is a good or a bad thing. The question is whether Parliament's decision not to criminalize that conduct violates the Charter of Rights and Freedoms."*

Surely the two questions are not separate matters. Any evidence which could indicate whether a parent (or schoolteacher or person standing in the place of a parent[86]) using reasonable force on a child for corrective purposes is a good or bad thing must form part of the court's consideration of whether there exists a pressing and substantial objective sufficient to justify

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[84] *Canadian Charter of Rights and Freedoms,*

[85]Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 57 O.R. (3d) 511, [2002] O.J. No. 61 at para 3 (O.R)..

[86]Section 43 of the Criminal Code of Canada provides the same protection to these people as to parent§

overriding a Charter right in a free and democratic society. Conclusive proof that such application of force is a good thing would be far more likely to lead to the conclusion that such an objective exists than would contrary conclusive evidence.

If Goudge J.A. is right in his assertion regarding the use of corporal punishment that: "The government has clearly and properly determined that it is bad."[87], then §43 of the *Criminal Code* fails a §1 *Charter* analysis at the first stage. There can be no pressing and substantial objective to permit or justify the violation of one person's *Charter* rights by another person for a purpose which is, on balance, clearly bad. Unless Goudge J.A. was mistaken or new evidence is adduced to refute his assertion that corporal punishment is bad, any violation of a *Charter* right will end in a determination of which remedy the court should order.

Alternatively, §43 could fail at the minimal impairment stage of a §1 *Charter* analysis. A justification is morally and legally more than an excuse.[88] All the attacker needs to avoid a

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[87]*Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, 57 O.R. (3d) 511, [2002] O.J. No. 61 (ON C.A.) at para 52 (O.R.).

[88]The Supreme Court of Canada unanimously endorsed the distinction between a justification and an excuse, the former challenging the wrongfulness of the action and the latter conceding the wrongfulness of the action but asserting that in the circumstances the actor should

conviction is an excuse. Because §43 justifies rather than excuses the use of force, if that force is contrary to the *Charter* §43 goes further than necessary to protect teachers, parents and people standing in the place of parents from criminal convictions for the use of reasonable force for the purpose of correction.

Justification, with its message of moral correctness could preclude civil action arising from the attack. For that same reason, a justification could be used as evidence that a parent did nothing wrong in the context of a family court custody dispute. An excuse, with its message of moral incorrectness which should not be criminally punished in the circumstances would not be as persuasive. In the family law context, it would have the opposite effect.

If section 43 failed a Constitutional analysis, the question of appropriate remedy would likely be answered either by reading down §43 by converting it from a justification to an excuse, or by striking down § 43 in its entirety and possibly suspending the effect of that declaration to give Parliament time to respond.

By striking down the words "justified in" and reading in the words "not criminally liable for", §43 could be rendered compliant with the minimal impairment requirement without

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not be penalized for the action, in *Perka* v. *R.*, 42 C.R. (3d) 113; [1984] 2 §C.R. 233; 14 C.C.C. (3d) 385.

counteracting the stated purpose of §43[89]. Since it is not necessary to strike §43 down entirely, a Court would not be likely to do so, and if it did so it would certainly suspend any such declaration for a sufficient period of time to permit Parliament to either enact a re-worded §43, or to invoke the notwithstanding provisions of §33 of the *Charter*.

Neither remedy would necessarily affect the common law because the common law does not justify the use of force on children, but rather excuses it under appropriate conditions and circumstances.

Section 43 could also fail a §1 *Charter* analysis at the balancing of salutary and deleterious effects stage, since no salutary effects have been shown to exist, and the infringement of the *Charter* right is itself a deleterious effect.

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[89] The purpose being the creation of a sphere of authority for parents, teachers and people who stand in *loco parenti§* See *Canadian Foundation for Children Youth and the Law* v. *Canada (Attorney General)*, 57 O.R. (3d) 511, [2002] O.J. No. 61 (ON C.A.) at para 30.

RELIGIOUS FREEDOM

Religious freedom does not include freedom to violate another individual's rights. One individual's right to swing his fist ends just before that fist strikes another person, regardless of whether the motivation for the swinging of the fist is anger, malice or religion. There is a difference between the right to believe something and the right to practice it when that practice infringes the rights of others either individually or collectively.

(Church of God)