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# *Bambi Meets Godzilla: Children's and Parents' Rights in Canadian Foundation for Children, Youth and the Law v. Canada*

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**Katie Sykes\***

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Unlike parental rights, with their ancient pedigree, children's rights have a relatively recent origin in law, derived largely from international obligations. Since the emergence of the rights of children as rights entitled to recognition in Canada, they have coexisted somewhat uneasily with parents' rights. The author considers this tension between parental and children's rights in the context of the Supreme Court's recent guidance on the defence of reasonable correction in the *Criminal Code* in *Canadian Foundation for Children, Youth and the Law v. Canada*.

After canvassing the judgment's reasons, the author argues that the majority's guidelines for the application of the defence suffer from crucial definition gaps. These gaps both hamper efforts to remedy its current uncertainty and fail to address themes of sexual discipline that often underlie the most controversial cases. Moreover, by failing to recognize that parental and children's rights are innately intertwined and inform each other, and by privileging parental autonomy the Court's decision effectively subsumes children's rights into parental ones. As a result, the tension between the two is glossed over, but only at significant cost to children's autonomy.

Contrairement aux droits parentaux et leur origine ancienne, les droits des enfants n'ont que récemment vu le jour, et ce, par le biais d'obligations internationales. Depuis la mise en vigueur de ces obligations, les deux types de droits ont coexisté dans un certain malaise. L'auteure considère la tension entre les droits parentaux et les droits des enfants dans le contexte de la décision récente de la Cour suprême du Canada statuant sur la défense de la correction raisonnable contenue dans le *Code criminel* dans l'arrêt *Canadian Foundation for Children, Youth and the Law v. Canada*.

Suite à un aperçu du raisonnement de la cour, l'auteure développe l'argument que les indications de la majorité de la Cour au sujet de l'application de la défense souffre d'un important vide définitionnel. Ce dernier nuit aux efforts visant à remédier l'incertitude courante et empêche la considération de sujets de discipline sexuelle qui sous-tendent souvent les cas les plus controversés. De plus, en omettant de reconnaître l'intime entrelacement des droits parentaux et des droits des enfants, et en privilégiant l'autonomie parentale, la décision de la Cour fait des droits des enfants seulement une sous-catégorie de droits parentaux. Par conséquent, la tension entre les deux types de droit est apaisée, mais seulement aux dépens de l'autonomie des enfants.

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To be cited as: (2006) 51 McGill L.J. 131

Mode de référence : (2006) 51 R.D. McGill 131

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## Introduction

This article discusses children’s rights under the *Canadian Charter of Rights and Freedoms*<sup>1</sup> through the prism of the Supreme Court of Canada’s recent decision in *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*.<sup>2</sup> The Court’s most important decision to date on children’s rights involved a constitutional challenge to the *Criminal Code* section<sup>3</sup> that relieves parents and their delegates who use correctional force against children of criminal liability for assault.

In *Canadian Foundation for Children*, the Court was faced with a difficult and divisive issue. The defence of reasonable correction reflects a legislative judgment about where acceptable discipline of children ends and criminally culpable violence against them begins. On the one hand, condemnation of the mistreatment of vulnerable children is a widely shared and deeply held social value. On the other, we are just as deeply committed to the idea that parents’ legitimate decisions about how to raise and discipline their children are in the private sphere and should be shielded from majoritarian dictates and outside interference. What divides such private, protected decisions from behavior that may, and should, be outlawed is, however, a profoundly divisive question. This question has gained additional complexity with the adoption of the *Charter* and with the emergence of a jurisprudence of children’s rights both in Canada and at the international level.

*Canadian Foundation for Children* is a puzzling decision, and it was a disappointing result for advocates of children’s rights. Given the conflict of important social values it raised, the most obvious way for the Court to address the issue would have been to find that section 43 was a prima facie violation of children’s rights. It could then have addressed, in the context of section 1 justification, the broad social consensus that certain minor uses of force against children are not the state’s business. Instead, the majority found no violation of children’s rights even in the first instance. It declined to recognize the “best interests of the child” as a principle of fundamental justice to be balanced against other such principles, and found that section 43, a special defence that only applies on the basis of the victim’s age, was not a violation of children’s equality rights. Although one might have expected the decision to focus on the difficult balance to be struck between children’s rights and competing social values, the decision in fact barely gives children’s rights status to have a place in the competition.

How did this result come about? I argue here that there is (as there almost invariably is in cases about the rights of children) an important third force at work, in

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> [2004] 1 S.C.R. 76, 234 D.L.R. (4th) 257, 2004 SCC 4 [*Canadian Foundation for Children* cited to S.C.R.].

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

addition to children's rights and the broader values and interests of society: the individual rights of parents.<sup>4</sup> Surprisingly, the Court barely acknowledges the importance of parents' rights to its reasoning, but their importance is manifest both in its reasoning and the legal tradition on which it relies. In fact, in important and perhaps determinative ways, the Court actually equates children's rights with parents' rights, in a situation where one might more naturally see them as pitted against each other. As a result, children's rights, which are conceptually difficult rights of relatively recent vintage, are effectively subsumed into their grown-up counterparts: parental rights, which have long roots in a powerful common law and constitutional tradition. This is how, in a case that offered the most important opportunity so far to formulate children's rights in Canadian constitutional law, the rights of children ended up so startlingly truncated.

Bringing together children's rights and parents' rights in this way is something like the famous encounter of the young fawn and the big monster in the short animated movie *Bambi Meets Godzilla*.<sup>5</sup> Godzilla squashes Bambi before the contest even begins. The conflict was similarly one-sided in this case, where children's rights were relegated to secondary, derivative status before any overt analysis of competing values even began.

This article begins with a background section setting out the development and status of children's and parents' rights in Canadian law, the history of the defence of reasonable correction, and the interpretive difficulties to which it has given rise. The next section summarizes the Supreme Court's decision and the three dissenting opinions in *Canadian Foundation for Children*. Finally, I will analyze what I see as the major flaws in the decision: first, the virtual impossibility of applying the Court's new interpretation of section 43 in a manner that gives practical effect to its holding that the section immunizes only non-harmful uses of force; and second, the various ways in which the Court's analysis places child claimants in a disadvantageous position relative to other *Charter* applicants.

## I. Background

### A. Parents' Rights

Parental rights have an ancient pedigree, akin to common law rights such as property and bodily integrity. Parents' rights are connected to the idea that there is a

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<sup>4</sup> I use the term "parents' rights" as a convenient shorthand. The rights in question apply also to caretakers who are not the child's biological parents, such as foster parents. These rights can be delegated to third persons, such as teachers. The rights of caregivers and teachers are derived from the rights of parents, who, at common law, could delegate their obligations and prerogatives to others.

<sup>5</sup> *Bambi Meets Godzilla* (Marv Newland, 1969) is a two-minute animated film. The credits roll as Bambi peacefully grazes in a meadow. Godzilla comes along and stomps on Bambi. The credits roll.

realm of autonomy in private decision making that is fundamental to individual freedom and is protected from intrusion.

Parents’ rights also have a place in constitutional law that predates the *Charter*. Section 93 of the *Constitution Act, 1867*<sup>6</sup> limited legislative power in favour of individual citizens’ rights to send their children to Protestant or Catholic schools, as the case might be, if they did not share the majority religion of the province. Section 93, which has been described by the Supreme Court as “a ‘comprehensive code’ of denominational school rights,”<sup>7</sup> illustrates just how significant and cherished was this right, an aspect of the common law prerogative of custody and control of one’s children. Arguably, the historical compromise leading to Confederation would not have been possible had this right not been given constitutional protection.<sup>8</sup> It could be said, then, that parents’ rights (or, at least, an aspect thereof) are the oldest constitutionalized individual rights in Canadian law.

The constitutional status of parents’ rights has been reaffirmed in the *Charter* era. In *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*,<sup>9</sup> a majority of the Supreme Court held that parental rights were a liberty interest protected by section 7 of the *Charter*. The claimants were Jehovah’s Witnesses, parents of a baby with severe medical problems. When the state attempted to impose a blood transfusion for the baby that the parents opposed because of their religious beliefs, they brought a constitutional challenge under subsection 2(a) (freedom of religion) and section 7 (fundamental justice) of the *Charter*. Although the challenge did not succeed, the plurality judgment written by Justice LaForest enshrined certain aspects of the common law tradition of parental autonomy as constitutional rights. Justice LaForest held that there was “a protected sphere of parental decision-making”<sup>10</sup> included in the liberty interest protected by section 7 of the *Charter*.

This conclusion was based on two principles: first, the presumption that parents act in the best interests of their children and that the state is “ill-equipped”<sup>11</sup> to intervene in family decision making; and second, parents’ “deep personal interest as parents in fostering the growth of their own children.”<sup>12</sup> The state could, of course, intervene in extraordinary circumstances, but such intervention would have to be justified, must “[conform] to the values underlying the *Charter*,”<sup>13</sup> and be subject to oversight by the courts. Thus the common law parental right of custody and control—even to the point of holding the power of life and death over the child—gained the

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<sup>6</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>7</sup> *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 27, 140 D.L.R. (4th) 385 [*Adler* cited to S.C.R.].

<sup>8</sup> “Without this ‘solemn pact’, this ‘cardinal term’ of Union, there would have been no Confederation” (*ibid.* at para. 29).

<sup>9</sup> [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1 [*B.(R.)* cited to S.C.R.].

<sup>10</sup> *Ibid.* at para. 85.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

status of a constitutional right. This right imposes powerful constraints on the state's capacity to act in the realm of family policy.

After *B.(R.)*, then, parents' rights are clearly enshrined in Canadian constitutional law as a quintessential aspect of individual freedom. That said, the case also indicated that these rights have limits, based in part on social concern for protecting the welfare of the child.

### **B. Children's Rights**

By contrast to the long-established rights of parents, recognition of the special rights-claims of children is a fairly recent development. As Barbara Bennett Woodhouse puts it, "[c]hildren and juveniles are the newest kids on the human rights block."<sup>14</sup>

The most important development in the recognition of children's rights was the advent of the *United Nations Convention on the Rights of the Child*.<sup>15</sup> Based on an accommodation of various cultural and legal concepts of children's rights from around the world, the *UNCRC* is the most widely accepted of all international human rights instruments.<sup>16</sup> It has been ratified by 192 countries: every country in the world except the United States and Somalia.<sup>17</sup>

The *UNCRC* reflects the fact that children, who as a basic matter are entitled to the same human rights as all human beings, also have particular needs and circumstances that necessitate a different approach to the protection of their rights. Notably, children are dependent on others for their well-being and even their survival, and their personalities are still in the process of developing. Recognition of their human rights requires that they, like adults, be protected from abuse and oppression. In practice, such protection would be relatively meaningless unless children were also ensured a nurturing environment.

In keeping with these special concerns, the *UNCRC* guarantees children a number of "positive rights"—that is, rights to be supported and to have actions taken on their behalf. Under the *UNCRC*, children have, *inter alia*, the right of access to health care and public health programs that protect them from childhood mortality and disease,<sup>18</sup> the right "to benefit from social security,"<sup>19</sup> the right to "a standard of living adequate for the child's physical, mental, spiritual, moral and social

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<sup>14</sup> Barbara Bennett Woodhouse, "The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine" (1991) 2 U. Pa. J. Const. L. 1 at 1.

<sup>15</sup> GA Res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989) 167 [*UNCRC*].

<sup>16</sup> UNICEF, "Convention on the Rights of the Child" Introduction, online: UNICEF <<http://www.unicef.org/crc/crc.htm>>.

<sup>17</sup> Although the U.S. and Somalia have not ratified the *UNCRC*, both countries have formally signed it.

<sup>18</sup> *UNCRC*, *supra* note 15, art. 24.

<sup>19</sup> *Ibid.*, art. 26(1).

development,<sup>20</sup> and the right to free and compulsory primary education.<sup>21</sup> Furthermore, the *UNCRC* gives children rights that must be respected not only by the state, but also by the private persons who are responsible for their care. Paragraph 2 of article 27 provides that “[t]he parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.”<sup>22</sup>

Canada, as a party to the *UNCRC*, has accepted these obligations under international law. In Canadian constitutional law, however, a doctrine of children’s rights as robust and comprehensive as that set out in the *UNCRC* has yet to emerge. The *Charter* does not include any rights specific to children, and finding a place for children’s rights in the framework of *Charter* jurisprudence presents special difficulties.

Children are protected from unfair discrimination on the basis of age under section 15 of the *Charter*. Age-based discrimination is a particularly complex area of the Supreme Court’s equality jurisprudence, and *Charter* arguments based on it can be among the most burdensome for a claimant to sustain. This is because, as the Court has recognized, age differences do result in real differences for the purposes of the law, requiring different legal treatment. Differential legal treatment based on age can be, depending on the context, invidious, innocuous, or even essential to protect the interests of those whose youth or advanced age renders them vulnerable.

Adding to the difficulty of developing a strong Canadian jurisprudence of children’s rights is the fact that children’s rights are derived from a somewhat different model of human rights than the model on which the *Charter* was primarily based. In oversimplified terms, there have been two such models in the history of rights theory. The first developed from the classical liberal concept of the relationship between the individual and the state. Its fundamental principle is the protection of a zone of individual freedom from undue state incursions or coercive action. This model of human rights has long historical roots and is relatively uncontroversial; it underlies the basic civil, political, and legal rights that any nontyrannical society is expected to recognize.

A second model of human rights has emerged more recently, in large part informed by the development of human rights doctrine in international law in the latter half of the twentieth century. This model views human rights not only as negative freedoms but also as positive entitlements to participation in a just society from a position of some degree of socio-economic equality.

The text of the *Charter* is, to a significant extent, based on the liberal model. It guarantees a set of individual rights that limits state action, does not overtly refer to positive or socio-economic rights, and gives prominence to the classic civil rights and

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<sup>20</sup> *Ibid.*, art. 27(1).

<sup>21</sup> *Ibid.*, art. 28(1)(a).

<sup>22</sup> *Ibid.*, art. 27(2).

negative freedoms. *Charter* jurisprudence, however, has nudged Canadian constitutional law in the direction of a theory of rights based on substantive equality and “human dignity,” especially in the area of equality rights. Positive rights are not expressly set out in the text, but the Supreme Court has left some room for judicial recognition of positive rights.<sup>23</sup> It is, however, among the most controversial areas in constitutional law. On the whole, judges are more comfortable with (and more likely to enforce) rights that fit into the classic liberal framework.

It is conceptually difficult to find a place for children’s rights in the liberal model for many reasons. At the centre of the liberal idea of rights is the concept of the individual as a free, self-sufficient entity. This concept does not reflect children’s reality. Children are to varying degrees dependent on others for their well-being and their very survival, and their individual selfhood is as yet incompletely formed. Mere negative liberties, without more, would not be very helpful to children. Any theory of children’s rights that reflects their real needs must recognize that they have a moral and legal claim not merely to be let alone, but to the nurturing and support required for their healthy development. Furthermore, to be truly meaningful those rights must apply to children’s relationships—not just with the state, but with the individuals who are typically responsible for caring for them: their parents. This latter idea is alien to the Canadian constitutional framework, where rights apply only as between an individual and the state and not as between individuals.

### C. *The Defence of Reasonable Correction*

Section 43 of the *Criminal Code*, described in the marginal note as “Correction of child by force,” provides 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.<sup>24</sup>

In various forms, the defence of reasonable correction can be traced through the common law and as far back as Anglo-Saxon and Roman law.<sup>25</sup> English common law permitted flogging of children and apprentices by those charged with their care. Sir William Blackstone summarized the defence as permitting a father to discipline a child “in a reasonable manner ... for the benefit of his education.”<sup>26</sup> The idea that

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<sup>23</sup> See *Gosselin v. Quebec (A.G.)*, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 2002 SCC 84, in which the Court declined to recognize a claim of rights to government benefits and an adequate standard of living, while leaving open a small possibility that such rights might be recognized in special circumstances.

<sup>24</sup> *Criminal Code*, *supra* note 3, s. 43.

<sup>25</sup> See Anne McGillivray, “‘He’ll Learn it on His Body’: Disciplining Childhood in Canadian Law” (1997) 5 Int’l J. Child. Rts. 193 at 198-206.

<sup>26</sup> Sir William Blackstone, *Commentaries on the Laws of England*, 15th ed. by Edward Christian (London: A. Strahan for T. Cadell and W. Davies, 1809) Book 1 at para. 452.



parents had the legal right to discipline their children physically was imported to Britain's American colonies. Elizabeth Bartholet, a leading American scholar of family and child welfare law, notes that a Massachusetts statute of 1646 even went so far as to allow fathers to order the execution of a rebellious or stubborn child over fifteen years old.<sup>27</sup>

The defence appeared in the Canadian *Criminal Code* of 1892<sup>28</sup> as one of a cluster of justifications that addressed the use of force by persons in authority (the other defences covered masters of ships maintaining discipline and surgeons performing operations).<sup>29</sup> The 1892 version of the defence was worded almost identically to the current section 43, except that it covered the use of force against apprentices (this part of the section was dropped in 1953).<sup>30</sup>

The Department of Justice has considered repealing or amending section 43, and a succession of government and government-sponsored reports have recommended its abolition.<sup>31</sup> In addition, there have been at least seven private members' bills introduced since 1994 seeking its repeal.<sup>32</sup> Despite the controversy surrounding it, section 43 remains essentially unchanged since its codification in the late nineteenth century.

Prior to *Canadian Foundation for Children*, the leading Supreme Court case on section 43 was *R. v. Ogg-Moss*.<sup>33</sup> The defendant, a counsellor who worked with the disabled, was charged with assault after hitting a profoundly developmentally disabled twenty-one-year-old patient under his care. He argued that section 43 applied to him because his relationship to the patient was functionally that of a parent or caretaker to a child. Justice Dickson (as he then was), writing for the court, rejected that argument and held that section 43 should be strictly construed:

One of the key rights in our society is the individual's right to be free from unconsented invasions on his or her physical security or dignity and it is a central purpose of the criminal law to protect members of society from such invasions. I agree with the Attorney General that any derogation from this right and this protection ought to be strictly construed.<sup>34</sup>

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<sup>27</sup> See Elizabeth Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (Boston: Beacon Press, 1999) at 33. The law was called the *Massachusetts Stubborn Child Statutes*.

<sup>28</sup> *Criminal Code, 1892*, S.C. 1892 (55 & 56 Vict.), c. 29, s. 55.

<sup>29</sup> *Ibid.* These three defences are retained under the same heading in the present *Criminal Code*. See *Criminal Code, supra* note 3, ss. 43-45.

<sup>30</sup> McGillivray, *supra* note 25 at 208.

<sup>31</sup> McGillivray refers to 13 such reports between 1976 and 1995 "expressing profound concern about the defence," and says that most are in favour of abolition (*ibid.* at 229).

<sup>32</sup> See online: The Committee to Repeal Section 43 of the Criminal Code of Canada <<http://www.repeal43.org/political.html>>.

<sup>33</sup> [1984] 2 S.C.R. 173, 11 D.L.R. (4th) 549 [*Ogg-Moss* cited to S.C.R.].

<sup>34</sup> *Ibid.* at 183.

Because section 43 withdrew the equal protection of the criminal law from a class of persons, effectively designating them as “second-class citizens,”<sup>35</sup> Justice Dickson reasoned that membership of that class should be interpreted narrowly.

Observing that section 43 was a justification, rather than an excuse, Justice Dickson also highlighted another aspect of the defence: its roots in a long-established cultural tradition that views corporal punishment not merely as a wrong that the law will tolerate in some circumstances, but as an aspect of parents’ rights over their children. The defence “exculpates a parent, schoolteacher or person standing in the place of a parent who uses force in the correction of a child, because it considers such an action not a wrongful, but a *rightful*, one.”<sup>36</sup>

After *Ogg-Moss*, the most influential interpretation of section 43 is a decision of the Saskatchewan Court of Appeal, *R. v. Dupperon*.<sup>37</sup> The court’s enumeration of some of the major factors to be considered in assessing “reasonableness” was adopted by courts across the country. In *Dupperon*, a father strapped his thirteen-year-old son, who had briefly run away from home. The father struck the boy about ten times on his bare buttocks, leaving bruises. The Court of Appeal upheld the trial judge’s determination that this punishment exceeded what was reasonable. The court, adopting the finding in *R. v. Baptiste*,<sup>38</sup> indicated that the question of reasonableness depended on “the custom of [the] community.”<sup>39</sup> The court summarized the factors to be considered as follows:

[T]he court will consider, both from an objective and a subjective standpoint, such matters as the nature of the offence calling for correction, the age and character of the child and the likely effect of the punishment on this particular child, the degree of gravity of the punishment, the circumstances under which it was inflicted, and the injuries, if any, suffered.<sup>40</sup>

The fact that the punishment left marks on the child was not enough in itself to establish unreasonableness and the fact that it caused pain certainly was not; if punishment was not painful “its whole purpose would be lost.”<sup>41</sup> But injuring the child to the extent of endangering him, or punishing with the intention of injuring, would be *per se* unreasonable.

Notably, while the Court of Appeal agreed with the trial judge on the question of reasonableness, it overturned his finding that the punishment in this case was not “by way of correction.”<sup>42</sup> The evidence was that the father had beaten the child while

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<sup>35</sup> *Ibid.* at 187.

<sup>36</sup> *Ibid.* at 193 [emphasis in original].

<sup>37</sup> (1984), [1985] 2 W.W.R. 369, 16 C.C.C. (3d) 453, 37 Sask. R. 84 (C.A.) [*Dupperon* cited to W.W.R.].

<sup>38</sup> (1980), 61 C.C.C. (2d) 438 (Ont. Prov. Ct.).

<sup>39</sup> *Ibid.* at 443.

<sup>40</sup> *Dupperon*, *supra* note 37 at 377.

<sup>41</sup> *R. v. Campeau* (1951), 103 C.C.C. 355 at 360, 14 C.R. 202 (Que. C.A.).

<sup>42</sup> *Dupperon*, *supra* note 37 at 372.

angrily yelling at him that he had to “grow up to be a man and not a bum on 20th Street.”<sup>43</sup> The trial judge concluded that the father’s behaviour indicated uncontrolled anger. To the Court of Appeal, however, it was clear that the punishment was corrective, because the child exhibited behavioural problems and was difficult to control. The court appeared to apply a mixed objective-subjective test: the question it asked was whether the accused had reasonable grounds to believe that the child deserved the punishment he received. Here “there were ample grounds upon which the appellant could conclude that Michael was deserving of a more severe punishment than he had already meted out to him and I am satisfied that he honestly believed that a strapping was required by way of correction.”<sup>44</sup>

*Dupperon* provided a more comprehensive framework for the application of section 43 than had previously existed, but it hardly resolved the profound difficulties that the defence presents to trial judges. In fact, *Dupperon* itself illustrates the ambiguity of the concepts that courts are required to work with in interpreting this section. The disagreement between the trial and appellate courts over the issue of correction suggests not so much that they were using different legal tests as that “correction” is in the eye of the beholder.

Furthermore, the Court of Appeal’s analysis of “reasonableness” raises some difficult questions upon considering its logical implications. Pain, the court acknowledges, is an inevitable consequence of physical punishment. Indeed, it is its very purpose. It follows that parents who hit their children, by definition, intend to cause them pain. But hitting them with the intention of injuring them is outside the scope of section 43. Discerning the fine distinction between intent to hurt and intent to injure, if such a distinction exists, must be challenging indeed for a trier of fact. Furthermore, a beating that causes severe injury is automatically considered unreasonable, but a beating that leaves lasting marks—presumably, a form of injury—may or may not be, depending on the circumstances. But if the parent intended to injure—that is, it would seem, if the parent intended to leave bruises—then the assault is unreasonable. It seems to follow that the court contemplates the possibility that a parent can hit a child intending only to cause him pain and not to bruise him, leave him with (unintended) bruises, and be acquitted. The general presumption that people intend the natural consequences of their actions would surely be unusually difficult to overcome in such circumstances, where, *ex hypothesi*, the parent is deliberately hitting the child with the purpose of causing pain.

It is hardly surprising that the post-*Dupperon* case law continues to exhibit uncertainty and inconsistency, or that acquittals can occur even when the facts point to excessive or disproportionate uses of force. Two factors emerge as rough predictors of conviction or acquittal. One is “lasting injury,” which in modern cases is often (not

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<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* at 374.

always) assessed by whether the beating left lasting bruises or welts.<sup>45</sup> The other is the judge's personal attitude towards corporal punishment.

A somewhat notorious case illustrating the second factor is *R. v. K.(M.)*,<sup>46</sup> where a father hit and kicked an eight-year-old child to punish him for opening a packet of sunflower seeds when his parents had told him not to. The defendant was convicted, conditionally discharged, and ordered to undergo anger management counselling. The Manitoba Court of Appeal unanimously overturned the conviction, ruling that the charges should never have been laid. Justice O'Sullivan, writing for the court, opined that it was a waste of law enforcement resources to prosecute "a father who in good faith administers punishment to his son in a manner which the trial judge deemed to be excessive, but which was well within the range of what has been generally accepted by parents in this province over the years,"<sup>47</sup> rather than pursuing "real criminals."<sup>48</sup> He expressly referred to his own childhood to support his understanding of what was accepted in the community:

The discipline administered to the boy in question in these proceedings was mild indeed compared to the discipline I received in my home. There were times when I thought my parents were too strict, but in retrospect I am glad that my parents were not subjected to prosecution or persecution for attempting to keep the children in my family in line.<sup>49</sup>

In her dissenting opinion in *Canadian Foundation for Children*, Justice Arbour cites a litany of cases where the accused were acquitted under section 43 after applications of considerable force:<sup>50</sup> using karate against grade ten schoolchildren,<sup>51</sup> slapping a four-year-old in the face hard enough to leave a lasting hand-shaped imprint,<sup>52</sup> grabbing a child by the hair and pushing her head against a cupboard,<sup>53</sup> striking a thirteen-year-old boy in the mouth hard enough to cause a swollen lip,<sup>54</sup> making two teenaged girls strip to their bras and panties and strapping them with a belt,<sup>55</sup> and strapping a twelve-year-old with a leather belt leaving bruises that doctors

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<sup>45</sup> See McGillivray, *supra* note 25 at 213. Some child-protection authorities also use this rule of thumb to distinguish between permissible spanking and child abuse. See *e.g.* U.S., Oregon Department of Human Services, "What is Child Abuse and Neglect?", online: Oregon Department of Human Services <[http://www.oregon.gov/DHS/children/abuse/abuse\\_neglect.shtml](http://www.oregon.gov/DHS/children/abuse/abuse_neglect.shtml)>.

<sup>46</sup> [1992] 5 W.W.R. 618, 16 C.R. (4th) 121 (Man. C.A.) [*K.(M.)* cited to W.W.R.].

<sup>47</sup> *Ibid.* at para. 4.

<sup>48</sup> *Ibid.* at para. 2.

<sup>49</sup> *Ibid.* at para. 5.

<sup>50</sup> *Canadian Foundation for Children*, *supra* note 2 at paras. 152-70.

<sup>51</sup> *R. v. Wetmore* (1996), 172 N.B.R. (2d) 224 (Q.B.(T.D.)).

<sup>52</sup> *R. v. Wood* (1995), 176 A.R. 223 (Prov. Ct.).

<sup>53</sup> *R. v. Vivian*, [1992] B.C.J. No. 2190 (S.C.) (QL).

<sup>54</sup> *R. v. V.L.*, [1995] O.J. No. 3346 (QL) (Prov. Div.).

<sup>55</sup> *R. v. Fritz* (1987), 55 Sask. R. 302 (Q.B.) [*Fritz*].

predicted would last seven to ten days.<sup>56</sup> No doubt there are counter-examples of cases where comparable conduct resulted in conviction.

In short, the case law under section 43 is contradictory and confusing, influenced by subjective and unpredictable predilections of the judges charged with applying the defence. The cases cited above are ample evidence that this confusion can result in inadequate protection of children. Regardless of the outcome of the constitutional argument, an authoritative interpretation of section 43 from the Supreme Court of Canada was sorely needed to establish the parameters of the defence more clearly.

## II. *Canadian Foundation for Children: A Summary of the Decision*

In *Canadian Foundation for Children*, the Court was squarely faced with the difficult question of the extent to which a child’s right to bodily integrity and equal protection of the law is limited by the right of parents to make private, autonomous decisions about how to run their families. Nevertheless, the Court did not really come to grips with this question. Although concerns about family autonomy clearly drove the decision, the Court did not directly deal with the conflict the case presented between parents’ and children’s rights. Nor did it unpack the difficulties of a constitutional jurisprudence that attempts to accommodate both the modern values of substantive equality and protection of the vulnerable, and the ancient common law rights of parents, rooted both in family hierarchy and in a philosophy of individual autonomy. Moreover, because the Court imposed unusual burdens on children as *Charter* claimants, it made it less likely that children will be able to establish *Charter* rights in subsequent cases, thus diminishing the scope for these important issues to be dealt with in the future.

One surprising feature of the case is that, though there were vigorous disagreements between the members of the Court, with three separate dissents, all the judges’ positions on the final outcome—what kinds of applications of force against children are permissible under the *Criminal Code* and the constitution—are remarkably similar.<sup>57</sup>

The majority interprets section 43 to cover only the “the mildest forms of assault.”<sup>58</sup> Conduct that “causes harm or raises a reasonable prospect of harm” is not protected.<sup>59</sup> Teachers are not allowed to use physical force to punish children, but only to “remove children from classrooms or secure compliance with instructions.”<sup>60</sup>

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<sup>56</sup> *R. v. Robinson* (1986), 1 Y.R. 161 (Terr. Ct.).

<sup>57</sup> *Canadian Foundation for Children*, *supra* note 2: “Although I come to a conclusion which may not be very different from that reached by the Chief Justice, I do so for very different reasons” (*ibid.* at para. 131, Arbour J.).

<sup>58</sup> *Ibid.* at para. 30

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* at para. 38.

Parents still have some leeway to discipline their children physically, but it is restricted by a number of qualifications relating to the age of the child, the state of mind of the parent, and the nature of the force used.

Apparently, what the Court had in mind as the most unproblematic instance of a use of force that would be covered by the defence is the kind of nonconsensual touching that parents routinely employ, such as grabbing a child's arm to stop her from running into the street or pushing a child into a car seat. But for section 43, these actions would be included in the *Criminal Code's* definition of assault because that definition is so broad. Most people would probably agree, however, that they should not be criminalized. Nevertheless, it is clear that corporal punishment—that is, the deliberate application of painful force so as to discourage bad behaviour—is still covered by the defence. The dissenting judges' opinions (one of which would have upheld section 43 for parents but not for teachers, and two of which would have struck it down altogether) have similar themes, and set out similar considerations for the legislature to take into account in redrafting the section to comply with the constitution.

The main differences, and they are profound differences, between the majority and dissenting judgments are not so much in their conclusions as in their reasoning. Most importantly, the majority judgment is based on an unusually aggressive reinterpretation of section 43, whereas the dissenting judges would restrict its scope as a result of inconsistency with the *Charter*. If, in the end, the different routes taken by the opinions end up in more or less the same place, does it matter?

I argue here that it does indeed matter profoundly, both in terms of the practical effect of this case when section 43 is applied by trial judges in light of the new law, and in terms of the cause of children's constitutional rights more generally. The majority's unorthodox exercise in statutory interpretation results in a version of section 43 with a number of gaps and inconsistencies. There is room for judges to impose their own values, sometimes diminishing the legal protection available for children. When judges simply cannot find clear answers about what the law means, it is possible they will protect the accused by tipping the balance away from adequate child protection.

The Court's reasoning is also deficient because, as noted, it fails to deal straightforwardly with parental rights. The majority does not confront (as the dissenting judgments do in their different ways) three facts: section 43 was designed to protect parents' rights,<sup>61</sup> the protected status of family relationships is the most valid justification for a limited exemption from assault law in the child-parent relationship,<sup>62</sup> and the central issue in the case is the three-way relationship between the state, the child, and the family. Anxiety about the possibility of state overintrusion into family life plays an obvious part in shaping the Court's approach to the case, but

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<sup>61</sup> *Ibid.* at para. 235, Deschamps J.

<sup>62</sup> *Ibid.* at para. 114, Binnie J.

the conflict between family autonomy and children’s rights is neither addressed nor resolved.

### **A. Majority Opinion**

Chief Justice McLachlin wrote the majority opinion for herself and five other judges. The appellant argued that three *Charter* rights had been violated: section 7 (fundamental justice), section 12 (cruel and unusual punishment), and section 15 (equality). The Court held that section 43, properly construed, did not infringe any of those rights. This made it unnecessary to consider the question of justification under section 1 of the *Charter*.

Section 1 justification would be the natural place to work out a balance between the competing values of child-protection and family autonomy. Instead of attempting to define that balance, the Court effectively, but somewhat surreptitiously, imported the balancing exercise into the infringement stage of the *Charter* analysis. It defined the rights claimed by children relatively narrowly and construed section 43 as a provision that protects the interests of *children* as well as adults.

Chief Justice McLachlin’s interpretation of section 43 extracts a great deal of meaning from the qualifying phrases “by way of correction” and “reasonable under all the circumstances.” “By way of correction” is interpreted to mean that the person applying force “must have intended it to be for educative or corrective purposes” and cannot be “motivated by anger or animated by frustration.”<sup>63</sup> The Chief Justice also said that “the child must be capable of benefiting from the correction.”<sup>64</sup> This condition rules out striking children who are incapable of learning because of their age, disability, or other factors. Children under two are categorically excluded “since on the evidence they are incapable of understanding why they are hit.”<sup>65</sup> “Reasonable under the circumstances” means that any corporal punishment that “causes harm or raises a reasonable prospect of harm”<sup>66</sup> is outside the purview of section 43. This, in turn, excludes striking a child with an object, striking the victim’s head, and hitting teenagers,<sup>67</sup> although it is permissible to use force “to restrain or remove an adolescent from a particular situation.”<sup>68</sup>

Under section 7, the appellant argued that the defence was unconstitutionally vague and overbroad, that procedural fundamental justice required independent representation of children in trials where section 43 was pleaded, and that it was a principle of fundamental justice that decisions affecting children should be made in their best interests.

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<sup>63</sup> *Ibid.* at paras. 23-24 [references omitted].

<sup>64</sup> *Ibid.* at para. 25.

<sup>65</sup> *Ibid.* [references omitted].

<sup>66</sup> *Ibid.* at para. 30.

<sup>67</sup> *Ibid.* at para. 37.

<sup>68</sup> *Ibid.* at para. 46.

The majority held that section 43 is not unduly vague when interpreted according to the guidelines in its decision; it provides potential offenders with adequate notice of “when they are entering a zone of risk of criminal sanction.”<sup>69</sup> Nor is the provision overbroad, because the requirements of reasonableness and corrective effect are implicitly included, and those limitations keep the section from applying too broadly. Children do not need to be represented in proceedings involving section 43 because their interests are already represented by the Crown.<sup>70</sup> The “best interests of the child” is not a principle of fundamental justice because, while it is an important principle, it is not paramount to all other considerations and is insufficiently precise.<sup>71</sup>

The appellant’s argument under section 12 of the *Charter*—that section 43 violates the prohibition against cruel and unusual punishment—also failed. The Court held that section 43 permits only “reasonable” uses of force, and what is reasonable by definition cannot be cruel or unusual.<sup>72</sup>

Finally, and perhaps most surprisingly, the Court dismissed the appellant’s argument under section 15 of the *Charter* that section 43 unconstitutionally discriminates against children on the basis of age. Chief Justice McLachlin reached this conclusion while acknowledging that three of the four factors set out in the leading equality rights case, *Law v. Canada (Minister of Employment and Immigration)*,<sup>73</sup> clearly indicate a violation of children’s equality rights.<sup>74</sup>

The determinative factor thus becomes the second one in the *Law* list: correspondence between the distinction made by the legislation and the real needs and circumstances of those affected. It is in this connection that the Court voices its concern that overzealous policing of caregiver discipline might itself be harmful to children. The Court is concerned to protect loving parents and caregivers, and trusted teachers, from being thrown in jail for nothing more than harmless and minor applications of force—or, as Justice Arbour puts it in her dissent, “parents ... being dragged into court for a ‘pat on the bum.’”<sup>75</sup> In the majority’s view, section 43 is congruent with children’s real needs and circumstances—the relevant inquiry for the second *Law* factor—because to employ such a heavy-handed response when a parent

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<sup>69</sup> *Ibid.* at para. 19.

<sup>70</sup> *Ibid.* at para. 6.

<sup>71</sup> *Ibid.* at paras. 10-11.

<sup>72</sup> *Ibid.* at para. 49.

<sup>73</sup> [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law* cited to S.C.R.].

<sup>74</sup> The *Law* factors are (1) whether pre-existing disadvantage, stereotyping, vulnerability or prejudice have been experienced by the group or individual affected; (2) correspondence between the differential treatment imposed by the law and the claimant’s actual needs, characteristics or circumstances; (3) whether the law is designed to or does ameliorate the situation of a more disadvantaged group; and (4) the nature and scope of the interest of the claimant that is affected (*ibid.* at paras. 62-75). See also *Canadian Foundation for Children*, *supra* note 2 at para. 55.

<sup>75</sup> *Canadian Foundation for Children*, *ibid.* at para. 207. Rather cursory research (a text search of the online database of Supreme Court judgments) indicates that this is the only instance of a Supreme Court of Canada judgment in which the word “bum” appears.



or teacher has only used mild force against a child would cause unacceptable additional harm *to the child*. For these reasons, the majority concludes that section 43 does not discriminate against children by depriving them of dignity.<sup>76</sup>

### **B. Justice Binnie**

To Justice Binnie, it was obvious that section 43 was a *prima facie* violation of children’s equality rights. He pointed out that the provision places children in an inferior position solely because they are children, in a manner that directly affects their fundamental rights: “there 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*.”<sup>77</sup> Justice Binnie observed that corporal punishment is humiliating and disrespectful to children,<sup>78</sup> and carving out the use of force against children from otherwise applicable criminal prohibitions confirms their low status in society. To Justice Binnie, this is almost a textbook definition of a legal provision that violates human dignity and offends section 15.

Justice Binnie agreed with the majority that there are important social considerations to be taken into account in assessing whether it is constitutionally justifiable to place children at this special disadvantage, but he argued that those are properly section 1 considerations.<sup>79</sup> It was inappropriate in his view to transplant section 1-type considerations into the internal balancing test under section 15, both because this muddies concepts that the Court has sought in the past to keep analytically distinct, and because it unfairly shifts the burden of proof from the government to the rights-claimant.<sup>80</sup> Justice Binnie cautioned against allowing the “correspondence” factor to become “a sort of Trojan horse to bring into s. 15(1) matters that are more properly regarded as [section 1 justifications].”<sup>81</sup>

Turning to section 1, Justice Binnie found that the social considerations supporting some kind of exemption from assault liability in this context play out differently in relation to parents (or substitute parents) on the one hand, and teachers on the other. Like the majority, he notes that the definition of criminal assault is very broad.<sup>82</sup> He further invoked the doctrine (affirmed in *B.(R.)*) that parents are presumed to act in their children’s best interests and have the right to a large measure of autonomy from the state in governing family affairs.<sup>83</sup> The interplay of these two propositions makes it necessary to have a broad defence like section 43 to protect parents from liability for criminal assault resulting from normal family altercations.

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<sup>76</sup> *Ibid.* at para. 68.

<sup>77</sup> *Ibid.* at para. 72.

<sup>78</sup> *Ibid.* at para. 107.

<sup>79</sup> *Ibid.* at para. 74.

<sup>80</sup> *Ibid.* at para. 101.

<sup>81</sup> *Ibid.* at para. 97.

<sup>82</sup> *Ibid.* at para. 113.

<sup>83</sup> *Ibid.* at para. 114.

In Justice Binnie's view, however, the same justification does not extend to teachers.<sup>84</sup> While accepting that teachers may need to use some form of physical force to maintain discipline and order in schools, he argued that section 43 confers much broader immunity than necessary for that purpose. In his opinion, the *Charter* requires a more limited provision designed to preserve proportionality between legitimate disciplinary needs and children's rights of personal integrity, and it is Parliament's job to draft such a provision.<sup>85</sup> Accordingly, Justice Binnie would have upheld section 43 in relation to parents but struck it down as it applies to teachers.

### C. Justice Arbour

Justice Arbour's dissent focuses on vagueness and overbreadth under section 7. While she praises the majority's interpretive overhaul of section 43 as "a laudable effort to take the law where it ought to be,"<sup>86</sup> she argues that this exercise is only legally justifiable if the law as it stands is found to be inconsistent with the constitution.<sup>87</sup> As an exercise in statutory interpretation, she finds it unconvincing.

Justice Arbour devotes particular attention to the history and development of section 43 within Canadian criminal law. As she points out, the majority's restrictive interpretation of a criminal defence by the courts, correlatively expanding the scope of criminal liability, is extraordinary.<sup>88</sup>

Justice Arbour regarded the majority's rendition of section 43 as inconsistent with both the section's historical genesis and its place in the structure of the *Criminal Code*. She points out that section 43 "is rooted in an era where deploying 'reasonable' violence was an accepted technique in the maintenance of hierarchies in the family and in society."<sup>89</sup> Additionally, section 43 is apparently applicable to all the offences of which simple assault, as set out in section 265 of the *Criminal Code*, comprises the basic building block—including assault with a weapon and assault causing bodily harm. Nothing in the language of section 43 precludes its applicability to these offences.<sup>90</sup> This contextual reading suggests that even an assault with a weapon or causing bodily harm "that is more than merely transient or trifling in nature"<sup>91</sup> can be "reasonable under the circumstances" within the meaning of section 43 as its drafters intended to express it.<sup>92</sup>

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<sup>84</sup> *Ibid.* at para. 125.

<sup>85</sup> *Ibid.* at para. 128.

<sup>86</sup> *Ibid.* at para. 135.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* at paras. 135, 138.

<sup>89</sup> *Ibid.* at para. 173.

<sup>90</sup> Justice Arbour notes the contrast with the defence of provocation, which is expressly made available only as a defence to murder (*ibid.* at para. 146).

<sup>91</sup> *Criminal Code*, *supra* note 3, s. 2.

<sup>92</sup> *Canadian Foundation for Children*, *supra* note 2 at para. 146.

Justice Arbour further noted that despite years of applying section 43, even with the benefit of prior appellate guidance on its meaning,<sup>93</sup> courts have treated it as an expansive and protean defence. To this point, they have not identified any of the categorical exclusions Chief Justice McLachlin imported into it. Parliament’s choice of the phrase “reasonable under the circumstances” indicated that trial courts have broad discretion to work out on a case by case basis what is reasonable in the particular circumstances before them. That phrase “has precluded, until [this decision], the demarcation, at the outset, of some sets of circumstances as unreasonable in all cases.”<sup>94</sup>

Bearing in mind the experience of courts in applying section 43, Justice Arbour agreed with the appellant that the defence was too vague to establish a workable framework for interpretation and application. Indeed, the standard “reasonable under the circumstances,” in this context, cannot be anything but impossibly subjective and vague, though the concept of reasonableness is not inherently amorphous. “Reasonableness” works where there is “[s]ome general agreement as to the standard against which to measure” what is reasonable and what is not.<sup>95</sup> Section 43 has no such external standard, because corporal punishment of children is “a controversial social issue,” one which by its nature engages personal beliefs, convictions, experiences, and emotions. There is no social consensus on what is reasonable in this connection.<sup>96</sup>

Justice Arbour would have struck down the section for vagueness, and left it to Parliament to reconsider and, if necessary, redraft.<sup>97</sup> In her view, however, redrafting section 43 would not be necessary to avoid the evils that the majority fears: benign parents and teachers being dragged off in handcuffs for the most trivial applications of force. She argues that the defence of *de minimis non curat lex* should be recognized as part of Canadian criminal law, and that, together with the common law defence of necessity, would serve the purpose of guarding against excessively zealous enforcement.<sup>98</sup>

#### **D. Justice Deschamps**

Like that of Justice Binnie, Justice Deschamps’s dissent focuses on equality rights. Also like Justice Binnie, she regards this as a rather obvious case of discrimination, describing the impugned defence as “discriminatory at a very direct and basic level.”<sup>99</sup> Justice Deschamps agrees with the other dissenting judges in rejecting the majority’s reinterpretation of section 43 which, in her view, “turn[s] the

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<sup>93</sup> *Ibid.* at para. 181.

<sup>94</sup> *Ibid.* at para. 148.

<sup>95</sup> *Ibid.* at para. 184.

<sup>96</sup> *Ibid.* at para. 185.

<sup>97</sup> *Ibid.* at para. 194.

<sup>98</sup> *Ibid.* at paras. 195-207.

<sup>99</sup> *Ibid.* at para. 240.

exercise of statutory interpretation into one of legislative drafting.”<sup>100</sup> She understood section 43 as a broad defence that includes even “serious uses of force against children”<sup>101</sup>—and therefore discriminates against them.

Of all the judgments, Justice Deschamps’s pays the most attention to the historic and ongoing vulnerability of children. She emphasizes the traditional legal view of children as property or chattels.<sup>102</sup> She views this tradition, not as a long-ago, rejected past, but as on a continuum with the present, when children are still in a position of legal and practical weakness. To Justice Deschamps, the spanking defence was an important factor in perpetuating this regressive concept of the child, “a throwback to old notions of children as property.”<sup>103</sup>

Justice Deschamps’s approach to the justification analysis under section 1 was influenced by her view that section 43 is directly and invidiously discriminatory against children. She argued that the Court should not be overly deferential in assessing the justifiability of “a serious infringement to such a basic right as physical integrity against a vulnerable group such as children.”<sup>104</sup> She accepts that carving out a “protected sphere” for parents and teachers, and preserving the traditional reluctance of the state to intervene in child-rearing, are pressing and substantial goals.<sup>105</sup> She rejects, however, one of the respondent’s key justificatory arguments: that section 43 also serves to protect children from the consequences of prosecution of their caregivers. She sees this argument as an anachronistic and impermissible attempt to transform section 43 from a measure designed to preserve parental rights into a child-protection measure, which it was never intended to be.<sup>106</sup>

### III. Critique of the Decision: How the Court’s Approach Undermines Children’s Rights

There are two basic flaws that can be identified in the majority’s decision. First, the law on corrective force after *Canadian Foundation for Children* fails to afford children the protection that the Court apparently intended it to. Ultimately the reason for this is that the Court attempted to interpret section 43 virtually out of existence, while at the same time preserving it. This effort is inherently contradictory and gives rise to an assortment of more specific contradictions and unanswered questions. As a result, the defence is just as difficult to apply as it was before this decision—perhaps more so. As a result, it will almost inevitably be applied in a manner that

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<sup>100</sup> *Ibid.* at para. 216.

<sup>101</sup> *Ibid.* at para. 213.

<sup>102</sup> *Ibid.* at para. 225.

<sup>103</sup> *Ibid.* at para. 226.

<sup>104</sup> *Ibid.* at para. 237.

<sup>105</sup> *Ibid.* at para. 234.

<sup>106</sup> *Ibid.* at para. 235.

insufficiently protects children. This prediction is borne out by the first post-*Canadian Foundation for Children* case applying section 43: *R. v. Boyd*.<sup>107</sup>

Second, there are various aspects of the Court’s decision that place children in a position of disadvantage as compared to other *Charter* applicants. The distinctive perspective of children is undervalued and their independent voices are virtually shut out. The decision creates a double standard for *Charter* claimants, imposing more difficult burdens on children as compared to adult applicants in *Charter* cases.

Both of these shortcomings can be connected to the same root cause. The most important analytical move the majority makes is to classify section 43 as a measure that children, rather than (or in addition to) parents, need. Bearing in mind that it is parents who benefit from the shield from criminal liability that the defence affords, the Court’s reasoning indicates that the majority understands the rights of children to be implicitly, and inherently, limited in a way that other constitutional rights are not: by the competing rights of parents. More precisely, the Court does not analyze children’s rights as being in competition with parents’ rights so much as it conflates them, or subsumes children’s interests within the rights of families and parents. Not only is this an approach that undermines the full and equal humanity of children, it is also anomalous in a constitutional framework that typically resolves conflicts between rights and interests through section 1 justification.

#### **A. The New Interpretation of Section 43: Paradoxes and Lacunae**

The Court’s goal in setting out new guidelines for the application of section 43 is to resolve the mess that existed in the case law to date, and to remove the scope for arbitrary and subjective interpretations by trial judges. The decision does make some progress towards that goal, by designating certain specific kinds of conduct as expressly forbidden. But within those parameters there is still great uncertainty. If the Court’s more general prohibitions—no beatings that cause “harm”, or are provoked by anger or frustration—are taken seriously and if their logical implications are followed through, it would seem that corporal punishment (as opposed to resorting to force to restrain or move a child) would be ruled out altogether. Yet the Court did hold that “mild” corporal punishment by parents is justifiable under section 43. This inconsistency makes it difficult, to say the least, for trial judges to ascertain what is permissible and what is not.

##### **1. Defining “Harm”**

The notion that harmful applications of force are excluded from the reasonable correction defence is central to the Court’s decision. “Section 43 does not exempt from criminal sanction conduct that causes harm or raises a reasonable prospect of

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<sup>107</sup> (2004), 368 A.R. 48, 2004 ABPC 125 [*Boyd*].

harm,” but applies only to “the mildest forms of assault.”<sup>108</sup> It is for trial judges to work out where the boundary lies between “mild”, harmless assaults and harmful ones. Their task is complicated by the mixed signals the Court sends as to what constitutes harm.

We must begin with the premise that there are some forms of physical punishment of children that are not harmful. It stands to reason, as the Saskatchewan Court of Appeal held in *Dupperon*, that the use of force to cause physical pain cannot be ruled out, because causing pain is the whole point of corporal correction. So there must be a category of conduct that, although it is deliberately intended to cause pain, is not “harmful” in the sense intended by Chief Justice McLachlin.

Initially, what comes to mind is the prior rule of thumb under section 43 that a spanking that leaves lasting marks is unreasonable. The Court’s use of the word “transitory” suggests that the old test of lasting physical injury may still apply. Yet this interpretation would not be consistent with certain other aspects of the Court’s reasoning. Although she does not emphasize this point, Chief Justice McLachlin does indicate fairly clearly that harm to development, emotions, or dignity are also prohibited.

Corporal correction of teenagers, for instance, is categorically ruled out, because “it can induce aggressive or antisocial behaviour.”<sup>109</sup> The implication is that any form of corporal punishment that can induce aggressive or anti-social behaviour is excluded from the scope of section 43. It is unclear what kind of timeline is envisioned. If corporal punishment is (or could be) a contributing factor to the development of aggression years later, does that count? Or is Chief Justice McLachlin referring only to immediate, retaliatory aggression?

Either way, it would be difficult to separate corporal punishment of teenagers from corporal punishment of any other child on this criterion. Studies indicate that corporal “correction” does not correct bad behaviour, but does create aggression.<sup>110</sup> Research has shown a correlation between corporal punishment and “noncompliance and aggression in childhood, adolescent delinquency, dangerous violent offending, wife battering and child abuse.”<sup>111</sup> The work of Murray Straus, a leading researcher on childhood discipline, has found that even relatively mild physical punishment is comparable to outright abuse in its long-term effects on the developing child. Physical punishment contributes to adolescent depression, violence in school, juvenile offending, domestic violence, and masochistic sex.<sup>112</sup>

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<sup>108</sup> *Canadian Foundation for Children*, *supra* note 2 at para. 30.

<sup>109</sup> *Ibid.* at para. 37.

<sup>110</sup> McGillivray, *supra* note 25 at 220-21.

<sup>111</sup> *Ibid.* at 236 [footnotes omitted].

<sup>112</sup> Murray A. Straus, *Beating the Devil Out of Them: Corporal Punishment in American Families* (New York: Lexington Books, 1994). See also Katherine Covell & R. Brian Howe, *The Challenge of Children’s Rights for Canada* (Waterloo, Ont.: Wilfrid Laurier University Press, 2001).

Chief Justice McLachlin also indicates that mental injury is included in the concept of harm. At paragraph 32, she explains that the *UNCRC* is an important interpretive tool to be used in determining what is “reasonable under the circumstances,” since statutes should be construed so as to comply with international treaty obligations.<sup>113</sup> Paragraph 1 of article 19 of the *UNCRC* specifies that state parties must “protect the child from all forms of physical *or mental* violence.”<sup>114</sup> Corporal punishment using implements is unreasonable because it is “physically *and emotionally* harmful.”<sup>115</sup> The Court has also held in another context that emotional injury is a form of bodily harm.<sup>116</sup>

Consistency with *McCraw* and compliance with the *UNCRC* would appear to dictate that harm includes emotional harm, and that the use of force so as to cause psychological harm, even in the absence of physical injury, cannot be transitory or trifling. Yet, as outlined above, the research on corporal discipline shows that there is good reason to believe that spanking to punish usually causes some degree of both immediate and long-term mental harm. Again, this is also a matter of common sense. For many children, it is obviously deeply distressing (and thus emotionally harmful) to be deliberately struck by a loved and trusted caregiver. Indeed, that is one of the reasons corporal punishment is used: to shock children into compliance when they do not respond to other forms of control. Children who are regularly spanked may not respond with as much shock or emotional pain, but for such children the long-term emotional harm may well be worse.<sup>117</sup>

Another form of harm to be considered is harm to dignity. Injury to the child’s dignity must also, as a matter of constitutional logic, be included in the harm that places assault outside the scope of section 43. This follows from the fact that the Court found no violation of section 15. The core purpose of section 15, as the Court has repeatedly held, is the protection of human dignity; so if section 43 does not offend section 15, it must not expose children’s dignity to harm.

It is difficult to imagine how the use of force to discipline can be anything but harmful to dignity. As the father in *Boyd* testified, it is the purpose of spanking to let the child know that the parent is “in charge,”<sup>118</sup> and therefore that the child is subordinate. The intimate family setting is also a hierarchical one, where the use of force against a small, powerless person by a bigger, stronger, and more powerful person reinforces the lowly status of the child. And because spanking takes place in

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<sup>113</sup> *Supra* note 15.

<sup>114</sup> *Ibid.*, art. 19(1) [emphasis added].

<sup>115</sup> *Canadian Foundation for Children*, *supra* note 2 at para. 37 [emphasis added].

<sup>116</sup> *R. v. McCraw*, [1991] 3 S.C.R. 72 at 81, 128 N.R. 299 [*McCraw* cited to S.C.R.] (holding that psychological harm is included in “serious bodily harm” within the meaning of the *Criminal Code*, *supra* note 3, s. 264.1(1)(a)).

<sup>117</sup> See Straus, *supra* note 112.

<sup>118</sup> *Boyd*, *supra* note 107 at para. 10.

the private rather than the public sphere, it tends to be invisible to the outside world and immune to community censure.

The Supreme Court has therefore created a logical conundrum for trial courts. Section 43 only applies to conduct that does not cause harm, including, based on the logic of the decision and on the Court's other case law, harm to development, emotions, and dignity. Yet it is far from clear that there is any form of corrective force that is not harmful in at least one of those senses. This leaves trial courts with a confusing task, namely, trying to identify the content of a category that arguably does not exist.

Not surprisingly, in the first reported case applying the new interpretation under section 43, the trial judge fell back on a familiar and more concrete dividing line: unreasonable punishment leaves marks, reasonable punishment does not. In *Boyd*, Judge Wilkins found that there was insufficient evidence to prove that the spanking administered by the defendant to his son had left the boy with bruises. In a single sentence, he held that "[c]onsidering all of the circumstances in this case I conclude that the force used by the accused falls within the scope enunciated by the Supreme Court of Canada and was 'a minor corrective force of a transitory and trifling nature.'"<sup>119</sup> The judgment appears to imply that, had the judge accepted proffered evidence that the beating did leave bruises on the child's buttocks, the verdict would have been different.

The case illustrates how the criminal burden of proof may have the effect of immunizing assaults that are neither transitory nor trifling from culpability. The father punished his son by spanking him three times<sup>120</sup> while the boy was spending the weekend with him. When the child returned to his mother's home, she noticed bruises on his buttocks while she was bathing him. The child told the mother that the bruises were caused by his father's spanking him. The mother called the police. Photographs of the bruises were introduced at trial. The defence argued that the injuries could have been caused by tobogganing. The trial judge neither accepted nor rejected this theory, but it was enough to raise a reasonable doubt that the father had caused the bruises.

Opinions may differ on whether smacking an eight-year-old on the buttocks three times is transitory and trifling. But it is surely beyond dispute that hitting a child hard enough to leave lasting bruises is not what Chief Justice McLachlin had in mind when she set out the new, narrow scope of section 43. The fact that the defendant was able to take advantage of section 43, even though he probably (but not undoubtedly) did exactly that, is arguably an unintended side effect of the many areas of ambiguity and internal tension that remain in the new incarnation of section 43. It remains unclear what is prohibited and what is protected.

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<sup>119</sup> *Ibid.* at para. 26.

<sup>120</sup> The trial judge accepted these facts based on the father's testimony even though the child's evidence was that he was struck eight times (*ibid.* at para. 9).



## 2. Defining “Correction”

To come within the immunity offered by section 43, the use of force must not only be “reasonable” in degree, it must also be for the purpose of correction. There are two aspects to this requirement: the state of mind and purpose of the person applying force, and the child’s susceptibility to correction.

The person using force must intend it to be “for educative or corrective purposes,” and cannot be “motivated by anger or animated by frustration.”<sup>121</sup> The defence applies only to “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.”<sup>122</sup> Although the use of force must address the child’s behaviour, its reasonableness is not to be judged with reference to “the gravity of [the] child’s wrongdoing,” because this would invite “a punitive rather than [a] corrective focus;”<sup>123</sup> on this point, *Canadian Foundation for Children* overruled *Dupperon*. But there must have been some wrongdoing because “force employed in the absence of any behaviour requiring correction by definition cannot be corrective.”<sup>124</sup>

The child must be able to learn from corporal chastisement and there must be “the possibility of successful correction.”<sup>125</sup> Force used against children under two is per se not corrective because the evidence shows that such young children cannot understand why they are being hit.<sup>126</sup> If anything else in the circumstances—such as disability of the child—indicates that the child cannot learn from physical correction, the defence does not apply.<sup>127</sup>

This analysis of “correction”, like the court’s analysis of “reasonableness”, sends trial judges off on a quest to find a mythical beast: in this case, “sober, reasoned” applications of force by a parent who is not angry or frustrated to a child who will learn and “benefit” from being hit.

The Court’s description of “sober, reasoned uses of force” sounds as if it were written by someone who has never seen a real family. It is an instructive exercise to try to conjure up in one’s mind an image of a calm, rational parent hitting his or child without a trace of anger or frustration. If such a picture can be imagined at all, it is quite a disturbing one. I think it is fair to say that parents very rarely hit their children in a state of cool, logical calm. Family life is often full of tumult and conflict, and parents do lose control and get angry and frustrated. Indeed, the fact that many good, loving parents will use force to restrain or even punish their children in the midst of

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<sup>121</sup> *Canadian Foundation for Children*, *supra* note 2 at para. 24.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.* at para. 35.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.* at para. 25.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

this normal family turmoil is surely the most persuasive justification for having a provision like section 43 that protects such conduct from criminalization.

The requirement that the child be “capable of benefiting from the correction” is similarly unrealistic in light of the extensive research, discussed above, indicating that even mild forms of physical discipline have the opposite of a beneficial effect on children. Children can and do learn from being spanked, but often what they learn is not at all constructive: to use violence and aggression themselves, to attack siblings, to escalate non-compliant behaviour, and worse.

In short, *Canadian Foundation for Children* establishes a very difficult, if not impossible, test for corrective purpose. One might expect, as a practical matter, that trial judges will simply evade many of its internal contradictions by resorting to conclusive reasoning and allowing the criminal burden of proof to do the work. *Boyd* bears out that expectation. In that case, the trial judge summarily concluded, without any discussion, that the child was “capable of benefiting from the correction.”<sup>128</sup> There was some discussion on the father’s motive. The evidence showed that the boy screamed at his father that he hated him and was going to sue him and told him to shut up, and then the father spanked him. The accused testified that he was not angry but “upset” and “bothered” at the time.<sup>129</sup> He stated, in response to leading questions apparently put by his own counsel, that his motivation was not revenge or malice but discipline:

Q: Was the spanking for revenge?

A: No.

Q: Was it out of maliciousness?

A: No.

Q: So what was the spanking for?

A: It was a disciplinary action at the time ‘cause he had—all the other disciplinary things, the timeout, putting him in the corner, and the one-to-one dialogue was happening.

Q. You say it was your last resort?

A. It was my last resort.<sup>130</sup>

The judge accepted this testimony, which seems to have been rehearsed to fit with the new legal test, in spite of expressing some doubts about it:

In assessing the facts of this case and the credibility of the accused, it is somewhat difficult to believe his testimony that he was not angry and that this was not a factor in the disciplinary action taken by him. On the other hand, I do not reject his evidence and ... I accept his explanation that the spanking was

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<sup>128</sup> *Boyd*, *supra* note 107 at para. 18.

<sup>129</sup> *Ibid.* at para. 10.

<sup>130</sup> *Ibid.*

done for corrective purposes, as a last resort and was not done out of anger, maliciousness or revenge.<sup>131</sup>

### 3. Sexualized Discipline

The majority in *Canadian Foundation for Children* makes clear that section 43 is not a defence to the crimes of assault with a weapon or assault causing bodily harm, because conduct that would meet the definitions of those offences cannot be transitory and trifling. Sanjeev Anand suggests that “presumably, any form of sexual assault”<sup>132</sup> would also be excluded, and this proposition is certainly consistent with the Court’s reasoning, although it is less unequivocally spelled out in the judgment. Sexual assault should be excluded because it is harmful on any reasonable interpretation of the word.

The Court’s use of international law in the interpretation of section 43 also indicates that the defence does not apply to sexual assault. Paragraph 1 of article 19 of the *UNCRC*, which Chief Justice McLachlin used as an aid in interpreting section 43, states that children must be protected from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”<sup>133</sup> But, although Chief Justice McLachlin cites this provision, in her judgment the emphasis stops just before the words “including sexual abuse.”

The Court does not specifically direct its attention to the interaction between corporal correction and sexual abuse. This oversight is significant. The conjunction of the spanking defence with the crime of sexual assault has given rise to anomalies in the law that the Court could and should have corrected in this case, but to which it was not attuned. I suggest that the failure to be absolutely clear that any assault of a sexual nature is outside the ambit of section 43 leaves scope for future applications of the defence that will subvert the Court’s presumed intention in *Canadian Foundation for Children*, as well as continuing to subvert the policy underlying Canadian sexual assault law.

Mark Carter has analyzed the clash between the values underlying the ancient defence of reasonable correction and the reconceptualized offence of sexual assault.<sup>134</sup> As he points out, the substitution of “sexual assault” for “rape” in the *Criminal Code*<sup>135</sup> represented a shift of focus to the violent nature of sexual offences, and more particularly to the fact that sexual assault is an assertion of power and control. By

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<sup>131</sup> *Ibid.* at para. 24.

<sup>132</sup> Sanjeev Anand, “Reasonable Chastisement: A Critique of the Supreme Court’s Decision in the ‘Spanking’ Case” (2004) 41 *Alta. L. Rev.* 871 at 871.

<sup>133</sup> *Supra* note 15, art. 19(1) [emphasis added].

<sup>134</sup> Mark Carter, “The Corrective Force Defence (Section 43) and Sexual Assault” (2001) 6 *Can. Crim. L. Rev.* 35.

<sup>135</sup> *Supra* note 3, s. 271.

contrast, section 43 “makes violent conduct *non-culpable* only because it is supposed to have been undertaken in pursuit of what is essentially the same goal; corporal punishment involves the use [of] physical force to exercise power and control over victims.”<sup>136</sup> Carter believes that “[i]t would be difficult to find two legislative provisions that reflect more divergent philosophies.”<sup>137</sup>

The Court’s project of carving out a category of nonculpable disciplinary force becomes even more complicated when one tries to work out where sexual assault fits in. Discipline and sexualized aggression are (it hardly needs to be said) not mutually exclusive. Indeed, themes of sexual control and sexual dominance are an undercurrent running through many of the reported cases on section 43.

One of those themes is control of girls’ sexuality. An example cited by McGillivray<sup>138</sup> is the case of *R. v. Fritz* involving two troubled sisters aged fifteen and thirteen.<sup>139</sup> They were living with their uncle and aunt, who were acting as foster parents to them after they had spent years moving between foster homes, relatives’ homes, and group homes. The girls lied and stole, and also flaunted their sexuality. The aunt saw them “petting” with boys on a camping trip, “emerging from some bushes with their tops off” while two boys mooned them, and standing in the basement “virtually undressed while a number of boys were peering at them through the basement window.”<sup>140</sup> The two girls were punished by being strapped on the buttocks by their uncle, after being made to strip down to their bras and panties. The judge found that this conduct was justified because the accused had unsuccessfully tried other methods of disciplining the children, and “[t]hey had reason to be shocked by the sexual behaviour of their two young nieces.”<sup>141</sup>

Despite the obvious element of sexual subjugation in an adult man’s strapping on the buttocks two pubescent (and sexually precocious) girls, naked apart from their underwear, the uncle in this case was not even charged with sexual assault. This may reflect an assumption on the part of prosecutors that the use of force against a child is taken out of the purview of sexual assault by the existence of a disciplinary motive.

The same assumption was made explicit by the Alberta Court of Appeal in the case of *R. v. W.F.M.*<sup>142</sup> The Court upheld the acquittal of a man who had been charged with sexual assault after spanking his twelve-year-old stepdaughter on her naked buttocks, having made her strip from the waist down.<sup>143</sup> Justice McClung declined to

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<sup>136</sup> Carter, *supra* note 134 at 37 [emphasis in original].

<sup>137</sup> *Ibid.* at 52.

<sup>138</sup> *Supra* note 25.

<sup>139</sup> *Fritz*, *supra* note 55.

<sup>140</sup> *Ibid.* at paras. 24-26.

<sup>141</sup> *Ibid.* at para. 41.

<sup>142</sup> (1995), 169 A.R. 222, 32 Alta. L.R. (3d) 153 (C.A.) [*W.F.M.* cited to A.R.].

<sup>143</sup> The spanking incident was one of three alleged sexual assaults committed on the stepdaughter, but was the only one with a disciplinary purpose. The two other incidents were dismissed as “parent-daughter horseplay” by the court (*ibid.* at para. 2).

overturn “the trial judge’s overriding conclusion that any physical contact between the accused and his stepdaughter was neither sexually motivated nor demonstrably carnal.”<sup>144</sup>

The accused satisfied the trial judge that his intention was to discipline the child, and that intention cancelled out sexual motivation. Justice McClung’s analysis is inconsistent with the test set out in the leading case defining the “sexual” component of sexual assault, *R. v. Chase*.<sup>145</sup> In *Chase*, the Supreme Court definitively established that the relevant test is an objective one. The sexual nature of an assault does not depend on what was in the mind of the accused at the time. Sexual assault is an assault within any one of the definitions in subsection 244(1) of the *Criminal Code* that is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The Court adopted an objective test to determine whether the impugned conduct has the requisite sexual nature:<sup>146</sup> “Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?”<sup>147</sup>

The sexual or carnal content of hitting a pubescent girl, forced to strip from the waist down, on her naked buttocks, is surely obvious from an objective standpoint, no matter how genuine and pure the stepfather’s disciplinary motives.<sup>148</sup> Justice McClung’s analysis in this case would have it that a successful invocation of section 43 can cancel out the sexual nature of this sexual assault. As Carter states, “[s]uch a link [between innocence and intention to discipline] can only exist if section 43 justifies the use of force that extends beyond that which constitutes common assaults, to include that which constitutes sexual assaults.”<sup>149</sup>

Logically, this cannot be the case after *Canadian Foundation for Children*. Chief Justice McLachlin specified that section 43 only applies to simple assaults and thus by implication it does not apply to sexual assault. Nonetheless, the Court’s failure to be explicit about the exclusion of sexual assault from the purview of the defence is problematic.

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<sup>144</sup> *Ibid.* at para. 2.

<sup>145</sup> [1987] 2 S.C.R. 293, 45 D.L.R. (4th) 98 [*Chase* cited to S.C.R.].

<sup>146</sup> *Ibid.* at 137 at 302.

<sup>147</sup> *R. v. Taylor* (1985), 59 A.R. 179 at 184, [1985] 3 W.W.R. 415 (C.A.).

<sup>148</sup> Moreover, as the strong dissent by Fraser C.J.A. in *W.F.M.* makes clear, those motives seem to have been anything but genuine and pure. Basing her analysis on undisputed facts from the trial record, Fraser C.J.A. concluded that the stepfather had exhibited a pattern of “prurient interest” in the girl, and especially in her breasts, over a number of years (*W.F.M.*, *supra* note 142 at para. 33). The child’s mother had asked church elders and Social Services for advice about her husband’s inappropriate touching of her daughter. They installed a lock on the child’s bedroom door to stop the stepfather from coming in. The stepdaughter became withdrawn and eventually went into intensive psychotherapy (eight hours daily for four and a half months) (*ibid.* at paras. 33-37).

<sup>149</sup> Carter, *supra* note 134 at 60.

Furthermore, exclusion from the immunity provided by section 43 of all conduct that is sexual under the *Chase* definition—that is, objectively viewed, violates the sexual integrity of the victim—would (like the exclusion of conduct that causes psychological harm or is not really capable of “correcting” bad behaviour) exclude a great deal. Spanking, especially the popular disciplinary method of spanking on the buttocks, very commonly—perhaps inherently—involves an element of sexual degradation.<sup>150</sup>

Because the Court failed to provide clear guidance that the defence of reasonable correction cannot apply to sexual assault—which would mean that any touching that would be viewed as sexual from an objective standpoint would bring the defendant’s conduct outside the protection of this defence—it is left open to courts applying the new law to resort to the *W.F.M.* line of reasoning and hold that corrective motivation cancels out objectively sexual conduct. This outcome, if it does occur, would be contrary to the public policy behind Canadian sexual assault law. It would also mean that the right of the child in international law to be protected from sexual abuse is not being respected.

### **B. The Inferior Status of Children as Charter Applicants**

In a number of ways, some of them quite subtle, Chief Justice McLachlin discounts the equal status of children as bearers of *Charter* rights in this judgment. She does so both by devaluing the voices of children and by imposing unusually burdensome legal tests on them in their capacity as *Charter* claimants.

#### 1. Silencing Children’s Voices

##### a. Section 15: Perspective

In her analysis of the appellant’s section 15 claim, the Chief Justice notes that the test for discrimination, under *Law*, is usually assessed from the perspective of the claimant as a reasonable person.<sup>151</sup> The Court departs from this rule, however, for child claimants, adopting instead “the perspective of the reasonable person *acting on behalf of a child*, who seriously considers and values the child’s views and developmental needs.”<sup>152</sup> The only reason it gives for this discrepancy is that the normal test might not work for very young children; it would “confront us with the fiction of the reasonable, fully apprised preschool-aged child.”<sup>153</sup>

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<sup>150</sup> For persuasive examples of adults who attribute their troubled sexual development to childhood spanking, see Project NoSpank, a website run by the organization Parents and Teachers Against Violence in Education, online: <<http://www.nospank.net/victims.htm>>.

<sup>151</sup> *Canadian Foundation for Children*, *supra* note 2 at para. 53.

<sup>152</sup> *Ibid.* [emphasis added].

<sup>153</sup> *Ibid.*

Anand is rightly critical of this departure from the *Law* framework:

This perspective risks ignoring significant concerns that children may possess simply because those concerns are not deemed reasonable by a mature adult. Moreover, adopting this perspective opens the Court to criticisms that its approach to s. 15 claims brought by children is paternalistic.<sup>154</sup>

One may concede that it is difficult to imagine a reasonable, well-informed preschooler, yet still find fault with the Court’s approach. Children up to the age of eighteen are affected by section 43 (corporal discipline of teenagers is no longer allowed, but thirteen- to eighteen-year-olds are still subject to nonconsensual touching by parents and teachers to restrain or enforce compliance with directives). There is no difficulty imagining the perspective of a reasonable seventeen-year-old or even twelve-year-old; indeed, it is open to courts to listen directly to such a perspective, should they choose to. Furthermore, as Anand points out, the Court’s discounting of the perspective of young children raises troubling questions about the implications for other groups whose mental capacities are not the same as those of members of mainstream society, such as the mentally handicapped.<sup>155</sup> Removing the perspective of these especially vulnerable rights-claimants is counterproductive in equality law because it means that courts may remain unaware of how the law really affects them. It also perpetuates legal inequality by silencing the voices of the marginalized.

*b. Section 7: Procedural Rights*

The appellant’s argument under section 7 that fundamental justice required independent procedural rights for children in trials involving section 43 was almost summarily rejected. Chief Justice McLachlin noted that “[t]hus far, jurisprudence has not recognized procedural rights for the alleged victims of an offence,” but held that it was unnecessary to decide whether such rights were necessary because children’s interests were already adequately represented at trial by the Crown.<sup>156</sup>

The first observation misses the point of the appellant’s claim. The argument is not that all victims of an offence should be represented at trial, but that children should have a voice in this type of trial because their interests, and their interests alone, are affected in a unique way by section 43. One might think that the input of an advocate representing children’s interests would be most valuable to courts interpreting and applying section 43, especially under the new interpretation, which requires them to define as “reasonable” only corrective force from which children are capable of benefiting. Children and their advocates might be expected to have some valuable insights into what, if anything, that might be.

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<sup>154</sup> Anand, *supra* note 132 at 877.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Canadian Foundation for Children*, *supra* note 2 at para. 6.

Chief Justice McLachlin's second point is counterfactual. The Crown does not appear in a criminal trial to represent the victims of an offence. The parties are the accused and the state. The latter is represented by the Crown. By stating that children's interests are adequately represented by the lawyer who is in court on behalf of another client, the state, the Court simply fails to acknowledge the importance of children's distinct perspective on this issue, which is not equivalent to the views of the state.

*c. Section 7: Vagueness*

In its inquiry into whether section 43 is unconstitutionally vague, the Court looks at the question from the perspective of a criminal accused to whom the defence might apply. The provision would be impermissibly vague if it "prevent[ed] the citizen from realizing when he or she is entering an area of risk for criminal sanction."<sup>157</sup> The focus is on the "zone of risk" of criminal liability.<sup>158</sup> None of the dissenting judges objects to this analysis. However, it is surely questionable in a case where the *Charter* claimants' interests are actually opposed to those of the criminal accused. 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.

2. Imposing a Higher Legal Burden on Children

*a. Section 7: The Best Interests of the Child*

One of the most puzzling aspects of *Canadian Foundation for Children* is the assiduousness with which Chief Justice McLachlin avoids recognizing the "best interests of the child" rule as a principle of fundamental justice. There was no need for this effort, since it is clear from her reasoning that she considers section 43 to be consistent with the best interests of children. She could have assumed without deciding in the appellant's favour on this point. As Anand suggests, the Court may have chosen to repudiate the best interests test as a principle of fundamental justice because it would be too expansive and would implicate too much state action.<sup>159</sup> It could have alleviated that concern by recognizing a qualified version of it, such as the Quebec Court of Appeal's formulation in *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, where it held that it is a principle of fundamental justice that a court must consider the best interests of the child.<sup>160</sup>

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<sup>157</sup> *Ibid.* at para. 16.

<sup>158</sup> *Ibid.* at para. 19.

<sup>159</sup> Anand, *supra* note 132 at 874.

<sup>160</sup> (2003), 10 C.R. (6th) 281 at paras. 215, 231.



The tests Chief Justice McLachlin applies to reach this result are a departure from existing section 7 case law. First, she holds that “best interests” cannot be a principle of fundamental justice because it “may be subordinated to other concerns in appropriate contexts” and does not trump all other principles.<sup>161</sup> This reasoning is surprising. It has not, until now, been one of the indicia of a principle of fundamental justice that it is paramount to all other concerns. Rather, principles of fundamental justice coexist and are balanced against one another. The Court has described its approach in identifying principles of fundamental justice as “essentially one of balancing,”<sup>162</sup> and this is borne out in its jurisprudence.

First, in criminal law, many of the leading *Charter* cases grapple with the balance between fairness to the accused and seeking truth in criminal law. In *B.(R.)*, for instance, the Court held that it was a principle of fundamental justice that the state could intervene to protect the life of the child, but this was modified by the requirement that such intervention be procedurally fair.<sup>163</sup> Both of these competing values are furthered by the principles of fundamental justice.

Furthermore, if principles of fundamental justice under section 7 can never be subordinated to other concerns, it follows that section 1 has no role to play in this context because there is no competing concern that would justify overriding a principle of fundamental justice.<sup>164</sup> Yet the Court has consistently held that a violation of section 7 could be justifiable under section 1 in extraordinary circumstances.<sup>165</sup>

Second, Chief Justice McLachlin adopts an unusually stringent standard in applying the requirement that a principle of fundamental justice be “capable of being identified with some precision.”<sup>166</sup> She holds that the “best interests of the child” fails to meet this test of justiciability because “reasonable people may well disagree about the result that its application will yield.”<sup>167</sup> As Anand points out, the same can be said of other legal principles that are well established as principles of fundamental justice, such as vagueness—whose application in this case gives rise to vehement disagreement among Justices of the Supreme Court of Canada (presumably, very reasonable people).<sup>168</sup>

Either *Canadian Foundation for Children* marks a shift in the Court’s jurisprudence towards making it more difficult for *Charter* claimants generally to

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<sup>161</sup> *Canadian Foundation for Children*, *supra* note 2 at para. 10.

<sup>162</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 45, 208 D.L.R. (4th) 1, 2002 SCC 1 [*Suresh* cited to S.C.R.].

<sup>163</sup> *B.(R.)*, *supra* note 9.

<sup>164</sup> See Anand, *supra* note 132 at 875.

<sup>165</sup> *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 518, 24 D.L.R. (4th) 536. This proposition was recently reaffirmed in *Suresh*, *supra* note 162 at para. 78.

<sup>166</sup> *Canadian Foundation for Children*, *supra* note 2 at para. 11. This standard was articulated in *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 591, 107 D.L.R. (4th) 342.

<sup>167</sup> *Canadian Foundation for Children*, *ibid.* at para. 11.

<sup>168</sup> Anand, *supra* note 132 at 875.

establish a previously unrecognized principle of fundamental justice, or as seems more likely, a uniquely high standard is being imposed on the claimants in this particular case. It appears that the rules for children are special and especially burdensome.

*b. Section 15: Correspondence*

The Court's approach to the *Law* test in this case is unprecedented. *Law* repeatedly stresses that the four factors are supposed to aid a holistic inquiry, with the overarching question being whether the impugned law deprives the claimants of human dignity. It is therefore extraordinary that this case turns on the single factor of "correspondence" when, as Chief Justice McLachlin acknowledges, all three of the other *Law* factors so clearly point towards a violation of section 15. Furthermore, the Court has already held, in its only other judgment on the interpretation of section 43, that it reduces children to the status of "second-class citizens" and that its effect is to deprive them of the equal protection of the law.<sup>169</sup>

The Court could only decide that this provision is not a violation of children's dignity by closing its eyes to the fact that corporal correction reinforces the subservient position of children in the traditional hierarchy of the family. It also had to ignore the fact that hitting children causes harm to dignity even if it does not cause grave physical harm. While one may accept that there ought to be some leeway for parents to assert their authority in this way without inviting the heavy-handed intervention of the criminal law, this is properly, as Justice Binnie argues, a question of justification under section 1. It does not negate the deprivation of dignity that the legalized use of force against children represents. It is hard to imagine the Court taking this approach to any other equality rights-claimant. The inescapable impression is, again, that the bar is higher for children than it is for everybody else.

## Conclusion

*Canadian Foundation for Children* represents a serious setback to the development of children's rights in Canada. The development of an effective, sophisticated jurisprudence of such rights that delivers on the aspirations of the *UNCRC* would require a careful consideration of how children's rights interact with, are shaped by, and change our understanding of parental rights. An appropriate accommodation of these sometimes opposed, but always intertwined, values would necessitate a re-examination of existing concepts of parents' rights. This re-examination is necessary, given that parents' rights are to a certain extent based on discredited legal doctrines and an outdated, hierarchical model of the family.

This re-examination was bypassed in *Canadian Foundation for Children* because the majority did not squarely address the accommodation of parents' and children's

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<sup>169</sup> *Ogg-Moss*, *supra* note 33 at 187, 183.

rights. Because section 43 protects the autonomy of families, and because the Court was concerned that reducing that protection would be harmful to children, it characterized the provision challenged by the child-claimants as one that benefited them. This analysis effectively subsumed children’s rights within the autonomy interests of their parents.

*Canadian Foundation for Children* presented the Supreme Court with the opportunity to enshrine the independent and unique rights of children within Canadian constitutional jurisprudence. Instead, the majority’s analysis reinforces children’s subordinate place in the hierarchy of the family, and denies their autonomy.

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