Court File No. 29113

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL
FOR THE PROVINCE OF ONTARIO)

BETWEEN:

CANADIAN FOUNDATION FOR CHILDREN,
YOUTH AND THE LAW

APPELLANT
(Applicant)

- and -

THE ATTORNEY GENERAL IN RIGHT OF CANADA

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT

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PART I - STATEMENT OF FACTS

Introduction

1. Hitting people breaches fundamental rights of respect for human dignity and physical integrity. Children are people too. The existence of a special defence to justify assaulting children for correction breaches their right to equal protection of the law. Hitting children to punish them for misbehaviour is harmful to children and of no benefit to their education: "*it is never okay to spank children; it is a bad idea and it doesn't work*", says Health Canada. Yet the Attorney General seeks to justify such assaults in order to protect parents and teachers who mistakenly believe that assaulting children is necessary for their own good. The Court of Appeal agreed, in an adult-centred judgment, that found that the state's interest in protecting parents outweighed the *rights* of children to physical integrity, respect for their human dignity and to equal protection from assault.

(a) What Section 43 Justifies

2. The s. 43 defence has existed in Canadian criminal legislation since the 1892 *Criminal Code*, which codified the English common law. It authorizes the physical punishment of children, including spanking, hitting, and slapping. The English common law, with its origins in Roman law, also allowed the use of corporal punishment by husbands against wives, by employers against adult servants and by masters against apprentices.[1] An early English case, *Regina v. Hopley*[2], makes clear that the purpose of the defence was to permit punitive applications of physical force: "by the law of England, a parent or a schoolmaster … may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment". The right of a master to use force on his apprentice was removed from the *Code* in 1955. Corporal punishment of criminals, by whipping, was removed in 1972.

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[1] Sharon D. Greene, "The Unconstitutionality of Section 43 of the Criminal Code: Children's Right to be Protected from Physical Assault" Parts 1 and 2 (1998), 41 Crim.L.Q. 288, 462, Appellant's Record, 1480-1507; Law Reform Commission of Canada, Working Paper 38 at 57, Appellant's Record at 1432; Anne McGillivray, "'He'll learn it on his body': Disciplining Childhood in Canada Law" (1997) 5 International Journal of Children's Rights 193 at 200, 206, Appellant's Record at 1377, 1383 [McGillivray, "Disciplining Childhood"].

[2] *Regina v. Hopley* (1860), 2 F.& F. 202 [Tab 43].

3. This Court held in *Ogg-Moss v. The Queen* that the defence applies to force used only on children under age 18. The effect of the section is to deprive *children* of the protection of the criminal law. In describing the purpose of the section, this Court stated as follows:

> Section 43 authorizes the use of force "by way of correction". As Blackstone noted, such "correction" of a child is countenanced by the law because it is "for the benefit of his education". Section 43 is, in other words, a *justification*. It exculpates a parent, school-teacher 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 [emphasis in original].[3]

4. Blackstone clearly distinguished between restraint and force used for the purpose of correction. In his *Commentaries*, he stated that a father "may also delegate part of his paternal authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis* [in the place of a parent], and has such a portion of the power of the parent committed to his charge, *viz*. that of *restraint* ***and*** *correction*, as may be necessary to answer the purposes for which he is employed."[emphasis added][4] The phrase "force by way of correction" clearly means physical punishment (or hitting), not restraint.

5. The Court of Appeal characterized the type of force justified under this section as being "limited physical punishment" which includes spanking. Physical punishment is assault with the intent to cause pain in order to correct behaviour. The Courts have consistently found that causing pain is a necessary aspect of correction.[5] A review of cases invoking s.43 over the last 15 years, and recent police charging practices, reveal tolerance for violence against children including the infliction of injury and the use of weapons.[6] In the Superior Court, Justice McCombs acknowledged that "even some of the recent decisions have invoked s.43 to find reasonable doubt where the evidence disclosed injury and the use of objects to impose corporal

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[3] *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173 at 193 [*Ogg-Moss*] [Tab 21].
[4] Blackstone (1803), Book I, chap. 16, s. 2, 453, quoted in *Ogg-Moss*, *ibid*. at 185 [Tab 21].
[5] Anne McGillivray, *Child Physical Assault: Law, Equality and Intervention* (Discussion Paper prepared for the Court Challenges Program of Canada, 2002) at 4 [McGillivray, *Child Physical Assault*] [Tab 96], *R. v. Campeau* (1995), 103 C.C.C. 355 at 360 [Tab 25].
[6] Landau Affidavit at paras. 23-26, Appellant's Record at 1293-94; MacKay Affidavit at paras. 8-9, Appellant's Record at 1331-32; Greene, *supra* note 1 at 297-98, Appellant's Record at 1485-1486; McGillivray, "Disciplining Childhood", *supra* note 1.

punishment on children."[7] The Court of Appeal suggested that these cases may have been wrongly decided but did not state why.

6. Acquittals for violence, infliction of injury and use of weapons on children have been entered in many cases. For example:

- Grandparent struck his granddaughter with a belt – *R. v. H. (V.)*, [2001] N.J. No. 307;
- A father struck his 14 year old daughter with a belt leaving welts and bruises on the back of her legs – *R . v. C. (G.C.)* [2001], N.J. No. 290 (Nfld.T.D.);
- A father struck his 11 year old son with a belt leaving a buckle-shaped mark in his thigh – *R. v. Bell*, [2001] O.J. No. 1820 (Sup. Ct.);
- A father punished his two children with a horse harness leaving welts – *R. v. S.(N.)*, [1999] O.J. No. 320 (Gen. Div.);
- Uncle of two 13 and 14 year old girls told them to strip to their bra and panties and strapped them with a plastic belt across the buttocks and thighs – *R. v. Fritz and Fritz*, (1988) 55 Sask. R. 302 (Q.B.);
- A father, in trying to forcibly remove his 15 year old son from a room, punched him and knocked him down causing scratches, a bruise on his forehead and considerable pain for "some days" – *R. v. Pickard*, [1995] B.C.J. No. 2861 (Prov. Ct.);
- A father struck his 12 year old daughter with a leather belt 4-5 times causing bruising – *R. v. Robinson* (1987), 1 Y.R. 161 (Terr. Ct.);
- A father spanked his 8 year old son hard enough to cause marks of bruising and discolouration – *R. v. Goforth*, [1991] S.J. No. 524 (Q.B.);
- A mother hit her 6 year old daughter on the buttocks with a plastic ruler, breaking the ruler and causing bruises and red marks – *R. v. J.(O.)*, [1996] O.J. No. 647 (Prov. Div.);
- A foster mother hit a 9 year old girl on the arm with a ruler causing bruising and breaking the ruler – *R. v. Dunfield*, [1990] N.B.J. No. 115 (Q.B.);
- A foster mother slapped a 7 year old on the hand and wrist approximately 12 times causing bruising – *R. v. Wheeler*, [1990] Y.J. No.191 (Terr. Ct.);
- The 16 year old girl's brother-in-law, who was in the place of a parent, taped her naked to a post in the basement and struck her 10 to 12 times with a wooden paddle leaving red marks – *R. v. Taylor* (1985), 19 C.C.C. (3d) 156 (Alta. C.A.).[8]

7. Justice McCombs acknowledged that the case law shows "divergent standards" in deciding what constitutes reasonable force, with judges imposing "their own personal views rather than an objective standard of reasonableness."[9] In *R. v. Wheeler*, a judge commented that "it is easy to jump to conclusions from looking at the bruise and reason backward that the force was

[7] Reasons for Judgment, para. 63, Appellant's Record at 18.
[8] The accused was acquitted at trial on the basis of s.43 but the Court of Appeal ordered a new trial on the grounds that the trial court had not properly interpreted the sexual assault provision. See Mark Carter "The Corrective Force Defence and Sexual Assault" (2000), 6 Can.Crim.L.R. 35 [Tab 87].
[9] Reasons for Judgment, para. 61, Appellant's Record at 18.

excessive."[10] In *R. v. K.(M.)* O'Sullivan J.A., for the Manitoba Court of Appeal, commented that the kicking of an eight-year old child was mild compared to "the discipline I received in my home."[11] Recently, a Newfoundland Trial Division Justice expressed a personal view that "the use of a belt in disciplining is always unreasonable," but felt compelled to follow precedents in which discipline with a belt has been protected under s.43.[12] One Ontario judge, commenting about the standard to be applied in determining the reasonableness of the force, stated:

> Exactly what is needed to establish, or what legal test demonstrates that the force exceeds what is reasonable, is a matter of some variance across this nation. For some trial courts, the act speaks for itself, especially if there is bodily harm or an injury which may endanger life, limbs or health. Other courts pay lip service to the necessity of having a view to community standards, although just how that is established through evidence remains unclear: [in *R. v. Halcrow*[13]] the Appeal Court noted that the defendant had called no evidence suggesting the treatment of the foster children was in accordance with community standards, a burden our Court of Appeal has decided falls upon the Crown). Other trial courts have rejected the notion that a judge can take notice of community standards. Yet another trial court says it is the trier of fact's responsibility to reflect community standards, as a jury would. And still another court was of the view that section 43 does not deal with the concept of a community standard of tolerance at all [citations omitted].[14]

8. A recent study of police charging practices in three Canadian centres – Toronto, Timmins and Winnipeg – discloses significant community variation in respect of the enforcement of assault charges in the corporal punishment context. Overall, charges were infrequently laid: "in Toronto, police laid charges in 40 percent of cases, while police in both Timmins and Winnipeg laid charges in fewer than 10 percent of the cases."[15] Thus, the application of section 43 may also depend upon where the victim and perpetrator live.

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[10] *R. v. Wheeler*, [1990] Y.J. No. 191 at 3 (Terr. Ct.) (QL) [Tab 72].
[11] *R. v. K.(M.)*, [1992] M.J. No. 334 at 2 (C.A.) (QL) [Tab 48].
[12] *R. v. C. (G.C.)*, [2001] N.J. No. 290 at para. 44 (T.D.) (QL) [Tab 27].
[13] *R. v. Halcrow* (1993), 80 C.C.C. (3d) 320 (B.C.C.A.) (QL) [Tab 40].
[14] *R. v. James*, [1998] O.J. No. 1438 at para. 8 (Prov. Div.) (QL) [*James*] [Tab 45].
[15] Landau Affidavit at paras. 20-22, Appellant's Record at 1292-93.

(b) Physical Punishment Harms Children

Government's Position

9. The Court of Appeal found that the government of Canada had "clearly and *properly* determined that [the physical punishment of children] is bad" [emphasis added].[16] It is the published position of the Canadian government, through Health Canada, that "it is never okay to spank children; it is a bad idea and it doesn't work".[17] This position was developed after consultation between federal, provincial and territorial government representatives, child development experts and non-governmental parent/child organizations.

Social Science Evidence

10. The uncontradicted expert evidence in this case is that the physical punishment of children, including mild spanking, produces *no* beneficial outcomes for children other than short-term compliance.[18] To the contrary, the Court of Appeal accepted that the social science evidence revealed major areas of consensus amongst the experts for both sides on the *negative* effects of corporal punishment.[19]

Causal Conclusions

11. The Court of Appeal stated that the question in this case was not whether physical punishment is a good or bad thing. In fact, the answer to this question was conceded by the government and is consistent with the weight of the social science evidence. Justice McCombs found there was a growing consensus that corporal punishment of children does more harm than good. He found that "the experts generally agree that there is a significant body of "associational" evidence that corporal punishment is a risk factor linked to poor outcomes in children."[20] Justice McCombs noted that it is not possible to obtain conclusive causal evidence

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[16] Reasons for Judgment, para. 52, Appellant's Record at 58.
[17] *Behaviour* (1997), Department of Health at 20, Appellant's Record at 1542.
[18] Holden Affidavit, Appellant's Record at 694-700; Holden Supplementary Affidavit, Appellant's Record at 711-12; Straus cross-examination at 45, Appellant's Record at 1825; Durrant Affidavit at para. 28, Appellant's Record at 497; Larzelere cross-examination at 21, Appellant's Record at 1683; Roberts cross-examination at 26-27, Appellant's Record at 1811-12; Baumrind cross-examination at 33, Appellant's Record at 1600-1601 (But note that Gershoff suggests caution in accepting this favourable "association" as some studies found decreased compliance with use of corporal punishment. See *infra* note 25.).
[19] Reasons for Judgment, para. 11, Appellant's Record at 42.
[20] Reasons for Judgment, paras. 5, 19, 20, Appellant's Record at 10.

because of the "obvious" ethical impediments to experimental studies of child abuse. Such studies would require that children be caused pain in the name of research.[21]

12. Although studies cannot prove that corporal punishment is the *sole* cause of negative child outcomes in each case, most experts are certain that the strength of the associations is of such significance as to recommend against its use.[22] Professor Straus states, "there was an ever-increasing accumulation of non-definitive evidence which, together, led me to the conclusion that corporal punishment is causally related [to the harmful side effects]."[23]

13. Professor Holden confirmed that the cumulative weight of studies in the area demonstrates this causal link.[24] The research is best summarized in the meta-analysis conducted by Gershoff which concluded that parental corporal punishment was associated significantly and consistently across the entire body of literature with the following undesirable behaviours and experiences: impaired parent-child relationships (13 out of 13 studies), poorer child mental health (12 out of 12 studies), weaker moral internalization (13 out of 15 studies), higher levels of child aggression (27 out of 27 studies), and increased antisocial behaviour in childhood (11 out of 12 studies). Corporal punishment is also consistently linked to higher levels of adult aggression (4 out of 4 studies), criminal and antisocial behaviour (4 out of 5 studies), and abuse of one's child or spouse (5 out of 5 studies). Corporal punishment also places children at risk of physical injury (10 out of 10 studies). When parents physically harm their children, it is usually in the course of punishing them. Therefore, virtually the entire body of literature on corporal punishment identifies it as a risk factor in children's development.[25]

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[21] Holden cross-examination at 16, 70, Appellant's Record at 1664, 1668; Durrant cross-examination at 24, Appellant's Record at 1616. Despite the obvious reservations, Mark Roberts (a witness for the Government) conducted such "spanking experiments" (he defined spanking as two spanks to the buttocks with an open hand, and restricted its use to a backup for chair time-outs for children aged 2 to 6 years old). The children in his studies were hit an average of ten times in sessions lasting on average between 60 and 90 minutes; one child was hit as many as 50 times in one session. *He no longer recommends using spanking.* See Roberts cross-examination at 24-25, 94, Appellant's Record 1809-10, 1820.

[22] Murray A. Straus, "Corporal Punishment and its Effects on Children" in J. Gelles, ed., *Families & Violence, Abuse, & Neglect* (Minneapolis: National Council on Family Relations) at 20-21, Appellant's Record at 426-27.

[23] Straus cross-examination at 24, Appellant's Record at 1822.

[24] Holden cross-examination at 16, Appellant's Record at 1664; Holden Affidavit at paras. 17-21, Appellant's Record at 699-700.

[25] Holden Supplementary Affidavit, Ex. 1, Appellant's Record at 713; now published as Elizabeth Thompson Gershoff, "Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review" (2002) 128:4 *Psychological Bulletin* 539 at 544 [Gershoff, "Corporal Punishment"] [Tab 93].

14. Professor James Garbarino stated that the use of physical force on children dramatically increases the likelihood of developmental problems in children and the likelihood of perpetuated child abuse.[26] Although a simple cause and effect relationship between maltreatment of children and impaired development cannot be proved, he has concluded that the evidence is incontrovertible that assault against children is fundamentally not in the human best interest.[27]

15. The weight of this evidence is such that parenting experts including Penelope Leach and Dr. Benjamin Spock, as well as popular parenting magazines (*Parents, Today's Parent)* recommend against spanking.[28] The American Academy of Pediatrics recommends against spanking and advises its members to discourage parents from using corporal punishment.[29]

(c) Impact of Section 43 on Enforcement and Child Protection: Perpetuating Abuse and Violence

16. Section 43 interferes with child protection work. It makes child abuse investigations more difficult and raises the threshold of violence that will attract police intervention to an unacceptably abusive standard.[30] It is inconsistent with child welfare laws and sends the wrong message to parents.[31]

17. The low substantiation rate of child maltreatment investigations in Ontario is attributable to the difficulty in distinguishing between reasonable force and physical abuse. Section 43 inevitably leads to under reporting of child abuse.[32] A 1996 Statistics Canada report found that the majority (61%) of child victims of physical assault by family members experienced some

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[26] Gershoff found a strong association between parental corporal punishment and parental physical abuse of these same children which she states, "confirm[s] fears of many researchers that corporal punishment and physical abuse are closely linked." *Ibid.* at 550 [Tab 93].

[27] Garbarino Affidavit at paras. 12, 16, 18, 20, Appellant's Record at 824-27.

[28] Benjamin Spock and Michael Rothenberg, *Dr. Spock's Baby and Child Care*, 6th ed. (New York: Dutton, 1992) at 437, Appellant's Record at 671; Penelope Leach, *Your Baby & Child: From Birth to Age Five*, 3rd ed. (New York: Alfred A.Knopf. 1997) at 378, 490-91, 533-34, Appellant's Record at 672-80; Nancy Samalin and Catherine Whitney, "Spanking", *Parents*, August 1998 at 68-72, Appellant's Record at 682-85; Holly Bennett, "A good spanking or a bad habit?", *Today's Parent*, June/July 1997 at 43-51, Appellant's Record at 688-93.

[29] American Academy of Pediatrics, *Policy Statement: Guidance for Effective Discipline* (1998) at 6-7, Appellant's Record at 1608-09.

[30] Kirsh Affidavit at paras. 16-29, 35, 36, Appellant's Record at 1249-53, 1255.

[31] *Child Care Facilities (Other than Foster Homes) Licensing Regulation*, Man. Reg. 17/99, s. 29; *Foster Homes Licensing Regulation*, Man. Reg. 18/99, s. 20; *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 70(1)(e). Throughout these proceedings, this point has been fully developed in the submissions of the intervener, the Ontario Association of Children's Aid Societies.

form of injury which was apparent to the attending police officer. Children under 6 years of age were at the greatest risk of sustaining major physical injury during assaults by family members, with 64% sustaining injuries.[33] However, a review of police incident reports in three Canadian cities showed that few cases of corporal punishment of children involving injury to the child or the use of a weapon proceed beyond a police investigation.[34]

18. Justice McCombs' conclusion that s.43 does not impede the objectives of child protection workers is contradicted by the expert evidence and by his own finding that some of the cases under s. 43 have condoned violent child abuse.[35] It is also contradicted by the most recent research in the area, the *Canadian Incidence Study of Reported Child Abuse and Neglect* sponsored by Health Canada.[36]

19. Even government expert Mark Roberts stated unequivocally that he would not teach the "spank backup" technique to a parent known or suspected to be abusive because of the potential for harm to the child. In his view, the use of corporal punishment *requires* careful monitoring by a psychologist to reduce the risk of harm to the child.[37]

20. Professors Garbarino, Straus, Durrant and Baumrind (a government witness) all agreed that corporal punishment may lead to the abuse of children.[38] Gershoff found that every study examining the association between parental corporal punishment and injuries to children demonstrated that corporal punishment places children's physical well-being at risk.[39] Garbarino states the matter succinctly:

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[32] Nico Trocmé, Debra McPhee, and Kwok Kwan Tam, "Child Abuse and Neglect in Ontario: Incidence and Characteristics" (1994) LXXIV:3 *Child Welfare* 563 at 568-69, Appellant's Record at 1263.
[33] Statistics Canada, *Assaults against Children and Youth in the Family, 1996* (Statistics Canada: Juristat, Canadian Centre for Justice Statistics, 1998) at 2, 9, Appellant's Record at 1275, 1282.
[34] Landau Affidavit at 23-24, 29, Appellant's Record at 1293-96.
[35] Reasons for Judgment, paras. 61, 94, Appellant's Record at 18, 24.
[36] Nico Trocmé, et al., *Canadian Incidence Study of Reported Child Abuse and Neglect: Final Report* (Ottawa: Minister of Public Works and Government Services Canada, 2001) at 30-31 [Tab 100].
[37] Mark W. Roberts & Scott. W. Powers, "Adjusting Chair Timeout Enforcement Procedures for Oppositional Children" (1990) 21 *Behavior Therapy* 257 at 270, Appellant's Record at 1553; Roberts cross-examination at 44, Appellant's Record at 1814.
[38] Murray A. Straus, *Beating the Devil Out of Them: Corporal Punishment in American Families* (New York: Lexington Books, 1994) at 96-97, Appellant's Record at 306 [Straus, "Beating the Devil Out of Them"]; Durrant Affidavit at paras. 35-38, Appellant's Record at 499; Baumrind cross-examination at 11-17, Appellant's Record at 1592-98; Garbarino Affidavit at paras. 15, 18, Appellant's Record at 825, 827.
[39] Gershoff, "Corporal Punishment", *supra* note 25 at 550 [Tab 93].

> By defining the world in such a way that violence seems natural as a tool in family relations, we have set up a situation in which the possibility of abuse is always there, lurking in the background, ready to happen if a parent-child encounter pushes the right button.[40]

21. Professor Straus's research shows that parents who experienced corporal punishment as children, were more likely to use it on their own children. A child's behaviour may only be a small part of the reason for using corporal punishment:

> Some parents respond to misbehaviour by spanking and others do not. Some do so frequently, and others, rarely…. [H]itting children is a socially patterned behaviour. It is used more by parents who are young, and it is used more on boys and young children, and more by white than by minority-group parents. *It is used more by parents whose own parents hit them, and whose own parents were violent toward each other. In short, for some parents, corporal punishment is part of a violent way of life.* [emphasis added][41]

(d) Section 43 Interferes with Education Efforts

22. The Court of Appeal's finding that the government sponsors "extensive educational programs"[42] to discourage the use of physical punishment is not supported by the evidence. No evidence was presented as to any distribution of a parent education program that included one small component on physical punishment. Compare this to the extensive education campaign designed to discourage smoking or drinking and driving.

23. The strongest determinant of whether parents use corporal punishment on their children is their belief that it is an appropriate disciplinary tool. Professor Holden's research shows that children begin to internalize the message that corporal punishment is appropriate from as early as age 5 years. He concludes that if corporal punishment were no longer permitted, this would lead to a change in parental beliefs and attitudes which would result in a reduction of corporal punishment.[43]

24. Professor Durrant has found that a majority of Canadian mothers studied have negative attitudes toward the use of corporal punishment – only a small percentage actually believe that

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[40] James Garbarino & John Eckenrode, *Understanding Abusive Families: An Ecological Approach to Theory and Practice* (San Francisco: Jossey-Bass Publishers, 1997) at 200, Appellant's Record at 866.
[41] Straus, "Beating the Devil Out of Them", *supra* note 38 at 65, Appellant's Record at 289.
[42] Reasons for Judgment, para. 19, Appellant's Record at 44.
[43] Holden Affidavit at paras. 9-11, 13, Appellant's Record at 697-698.

children learn anything from it.[44] Durrant, Straus, Holden, Garbarino, Kirsh and Newell all agree that the legal justification for physical punishment undermines educational efforts to discourage its use.[45]

25. Peter Newell, co-author of UNICEF's *Implementation Handbook for the Convention on the Rights of the Child*, concludes that the persisting social and legal acceptance of corporal punishment is a lingering symbol of a traditional view of children as possessions or chattels of their parents, rather than as individual human beings with fundamental human rights, including rights to respect for their human dignity and equality under the law.[46] Professor Garbarino echoes this view when he says:

> As the often grisly history of childhood makes abundantly clear, social conscience is a relatively recent invention with respect to the treatment of children in many cultures, including our own. Without a concept of the child's right to nurturance and integrity (freedom from violation), there is no way even to define abuse and neglect as a problem, let alone solve it. In that sense, then, this discussion is at once both a challenge and a hopeful conclusion. It presumes that there is a social conscience to be appealed to and that the basic right of children and youth to integrity, as we use the term, is recognized and accepted by our civilization.[47]

(e) Physical Punishment in the Schools

26. Contrary to the Court of Appeal's assertion that neither the appellant nor the Ontario Association of Children's Aid Societies advanced any arguments specific to teachers, extensive evidence and argument were tendered at both the Superior Court and the Court of Appeal.

27. There is no evidence to suggest that the use of corporal punishment in the school setting is desirable, beneficial or justified in any way – the evidence is completely to the contrary. Indeed, the Canadian Teachers' Federation is opposed to corporal punishment, and is concerned only with legal protection for the use of restraint to maintain order and discipline.[48] The Canadian School Boards Association also opposes corporal punishment and only wants provisions for "the

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[44] Durrant Affidavit at para. 17, Appellant's Record at 494.
[45] Durrant Affidavit at para. 38, Appellant's Record at 499; Straus cross-examination at 124, Appellant's Record at 1836; Newell cross-examination at 185-188, Appellant's Record at 1731-34; Garbarino cross-examination at 48-49, Appellant's Record at 1658-59; Kirsh Affidavit at para. 30, Appellant's Record at 1253; Holden cross-examination at 64-65, Appellant's Record 1665-66.
[46] Newell Affidavit at para. 118, Appellant's Record at 904; Newell cross-examination at 165, Appellant's Record at 1729.
[47] Garbarino & Eckenrode, *supra* note 40 at 197, Appellant's Record at 864.

necessary procedures to ensure a safe school environment."[49] Some provinces have explicitly prohibited corporal punishment in legislation.[50]

28. Despite this, and even when prohibited by provincial statutes, s.43 continues to be interpreted by the courts to justify the use of aggressive punitive force by teachers on students. The following cases are examples of teachers who have been acquitted in our courts despite using corporal punishment on students:

- A teacher disciplined a 12 year old by attempting to kick his behind, holding him by the neck against a wall and slapping him in the stomach – *R.* c. *Caouette*, [2002] J.Q. no. 1055 (C.Q.);
- A teacher lifted a 9 year old female student out of her seat and spanked her leaving red marks – *R. v. Graham*, [1994] N.B.J. No. 335 (Prov. Ct.);
- A teacher grabbed and shook a 14 year old student by the head and pushed him into his seat – *R. v. Harriott*, [1992] N.B.J. No. 761 (Prov. Ct.);
- A teacher slapped a 9 year old developmentally delayed child on the legs leaving marks – *R. v. Park*, [1999] N.J. No. 168 (S.C.);
- A grade 8 teacher grabbed one student out of his chair and pushed him against the blackboard and slapped another student on the head – *R. v. Plourde*, [1993] N.B.J. No. 487 (Prov. Ct.);
- A teacher, who held a brown belt in karate, performed a karate "demonstration" on four grade 10 students because they had been disruptive the previous day - *R. v. Wetmore*, [1996] N.B.J. No. 15 (Q.B.).

29. Professor MacKay described a shift in the use of corporal punishment in schools, from the formal ritual of administering punishment, toward a reactive form of physical violence. MacKay notes that this "may be worse in that it is more like the violence that teachers and school boards seek to prevent among students."[51]

30. In the United Kingdom, following decisions of the European Court of Human Rights, s. 550 of the *Education Act 1996* was amended to prohibit corporal punishment and to only permit use

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[48] Reasons for Judgment, para. 35, Appellant's Record at 13.
[49] Wilson Affidavit, paras. 7-8, Appellant's Record at 1558; Balanyk-McNeil cross-examination at 15-16, Appellant's Record at 1589-90.
[50] MacKay Affidavit at para. 26, Appellant's Record at 1339; *Corporal Punishment in the Schools* (Ontario Ministry of Education, 1981), Appellant's Record at 1437-45; *Violence-Free Schools Policy* (1994), Appellant's Record at 1472-79.
[51] MacKay Affidavit at para. 18, Appellant's Record at 1336; Watkinson, A.M., "Corporal Punishment" in *Education, Student Rights, and the Charter* (Saskatoon: Purich Publishing, 1999) [Tab 102].

of restraint in prescribed circumstances. Detailed guidelines for the use of physical restraint have been published by the U.K. Department of Education and Employment.[52]

(f) Standards in Other Countries

31. All European countries have prohibited corporal punishment in all schools and other institutions. The United States has prohibited it in public schools in 27 out of 50 states. Sweden, Norway, Denmark, Finland, Austria, Cyprus, Croatia and Latvia have existing civil laws which prohibit corporal punishment in school and at home.[53] In Italy, the use of violence for child-rearing or educational purposes is no longer lawful.[54] The Supreme Court of Israel declared in 1998 that the use of physical punishment as an educational means is prohibited.[55] And in 2000 that Court, in a decision that canvassed at length the law in Canada, determined that physical punishment of children by parents was no longer a defence to assault.[56]

32. Sweden was the first state to enact a specific prohibition of all corporal punishment in 1979. It had been preceded by an amendment to its Criminal Code in 1957 which removed the defence available for assaultive parents who caused minor injuries to children. The civil law was altered to clarify that no form of corporal punishment was acceptable. Criminal penalties apply only to corporal punishment that constitutes assault. Finland, Denmark and Norway have followed similar routes and now treat children equally to adults in assault laws and provide additional

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[52] MacKay Affidavit at para. 26, Appellant's Record at 1339; Newell Affidavit at paras. 72, 110, Appellant's Record at 890, 901; *Campbell and Cosans v. the United Kingdom* (Eur. Court H.R., 1982), Appellant's Record at 1153-74; *Costello Roberts v. the United Kingdom* (Eur. Court H.R., 1993), Appellant's Record at 1175-91; *Education Act 1996 (UK)*, 1996, c. 56, ss. 548-550, Appellant's Record at 1192-96; *School Standards and Framework Act 1998 (U.K.)*, 1998, c. 31, s. 131, Schedule 30, s. 1, Appellant's Record at 1197-1200; Circular, "Section 550A of the Education Act 1996: The Use of Force to Control or Restrain Pupils" (U.K.: Department for Education and Employment, 1998), Appellant's Record at 1201-09.

[53] Newell Affidavit at para. 35, Appellant's Record at 877-78; Susan H. Bitensky, "Spare the Rod, Embrace our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children" (1998), 31 University of Michigan Journal of Law Reform 353, Appellant's Record at 1737-98.

[54] Newell Affidavit at paras. 36, 41, Appellant's Record at 878, 880; "Summary of Legislation Prohibiting Corporal Punishment", Appellant's Record at 1135; *Cambria v. Republic of Italy* (1996), an unreported decision of the Supreme Court of Cassation, Appellant's Record at 1801.

[55] *State of Israel v. Rachael Sarah Or* (1998) unreported decision of the Supreme Court of Israel, July 20, 1998 [Tab 83].

[56] *Natalie Baku v. State of Israel* (2000), unreported decision of the Supreme Court of Israel, January 25, 2000 [*Baku v. Israel*] [Tab 20].

protections in their civil laws.[57] Professor Durrant, who has studied extensively the effect of the Swedish ban, notes that the legislative reforms in Sweden have been accompanied by substantial shifts in public attitudes and opinions. There has been a dramatic decline in the acceptance of corporal punishment as a result of the ban and the broad educational campaign that accompanied it. Corporal punishment is now rare, and serious assaults against children are uncommon and child abuse fatalities are virtually non-existent.[58]

(g) The Protection of Children under International Human Rights Law

The Convention on the Rights of the Child

33. Article 3 of the United Nations *Convention on the Rights of the Child* provides that "in all actions concerning children … *the best interests of the child shall be a primary consideration*" [emphasis added]. This is the only "primary consideration" stated in the *Convention*. Article 18, dealing with parental responsibilities, provides that "the best interests of the child will be their basic concern."

34. Article 19 specifically protects a child's equal human right to physical and personal integrity:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

35. Article 28 of the *Convention* specifically provides that "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present *Convention*."

The Committee on the Rights of the Child

36. The U.N. Committee on the Rights of the Child (the monitoring and interpreting body for the *Convention)* has consistently interpreted the *Convention* as requiring action to end any legal or

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[57] Newell Affidavit at paras. 43-50, Appellant's Record at 880-83; Peter Newell, *Children Are People Too: The Case Against Corporal Punishment* (London: Bedford Square Press, 1989), Appellant's Record at 1023-1118; Bitensky, *supra* note 53 at 364, Appellant's Record at 1743.

[58] Durrant Affidavit at paras. 12-17, Appellant's Record at 493-94; Durrant cross-examination at 58, Appellant's Record at 1617; Durrant, J.E., "Evaluating the Success of Sweden's Corporal Punishment Ban" (1999), 23:5 *Child Abuse and Neglect* 435, Appellant's Record at 518; Newell, *ibid*.

social acceptance of corporal punishment. The Committee stated in 1994 that "corporal punishment of children is incompatible with the *Convention*", and has emphasized that corporal punishment in all forms should be abolished. It has been critical of legal concepts which provide defences to punishment, such as "reasonable chastisement" and "lawful correction". The Committee has criticized the arbitrary nature of determining whether punishment administered in a particular case is "reasonable." The Committee has rejected the view that the use of some level of corporal punishment may be in the interests of children.[59]

Criticism of Canada by the Committee

37. The Committee responded to Canada's first report under the *Convention* as follows:

> The Committee suggests that the state party examine the possibility of reviewing the penal legislation allowing corporal punishment of children by parents, in schools and in institutions where they may be placed. In this regard and in the light of the provisions set out in articles 3 and 19 of the Convention, *the Committee recommends that the physical punishment of children in families be prohibited* [emphasis added].[60]

38. With respect to schools, the Committee noted that "[f]urther measures seem to be needed to effectively prevent and combat all forms of corporal punishment and ill-treatment of children in schools or in institutions where children may be placed."[61]

39. The Court of Appeal, while acknowledging the Committee's recommendations, found that the Committee did not require the extension of criminal sanctions. However, that can no longer be said to be the position of the Committee, if it ever could have been. For example, in 2002, the Committee was very specific in its criticism of the United Kingdom's failure to remove the "reasonable chastisement" defence:

> The Committee is of the opinion that governmental proposals to limit rather than to remove the "reasonable chastisement" defence do not comply with the principles and provisions of the Convention … since they constitute a serious violation of the dignity of the child. … Moreover, they suggest that some forms of corporal punishment are acceptable and therefore undermine educational measures to promote positive and non-violent discipline.

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[59] Newell Affidavit at paras. 87-88, 91-103, Appellant's Record at 894-99; Hodgkin & Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 1998), Appellant's Record at 990-995.
[60] *Convention on the Rights of the Child, First Report of Canada*, May 1994, Appellant's Record at 1210-1231, see especially 1225; "Concluding Observations: Canada", in *Report of the Committee on the Rights of the Child* (New York: United Nations, 1996) at para. 574, Appellant's Record at 1238 ["Concluding Observations"].
[61] "Concluding Observations", *ibid*. at para. 563, Appellant's Record at 1236.

The Committee recommends that the State party:

a) with urgency adopt legislation throughout the State party to remove the "reasonable chastisement" defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation;
b) promote positive, participatory and non-violent forms of discipline and respect for children's equal right to human dignity and physical integrity, engaging with children and parents and all those who work with and for them, and carry out public education programmes on the negative consequences of corporal punishment [emphasis in original].[62]

Other International Instruments and Bodies

40. Other United Nations' human rights treaty bodies, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee Against Torture, have expressed concern at the continued use of corporal punishment on children and have recommended its prohibition. The UN Rules and Guidelines on Juvenile Justice condemn the use of corporal punishment.[63]

41. The European Court of Human Rights has been critical of the use of corporal punishment with particular regard to the *Convention on the Rights of the Child*.[64] The Council of Europe has condemned corporal punishment.[65] Most recently, in 2002, the European Committee on Social Rights, in interpreting the Revised European Social Charter, explicitly condemned the corporal punishment of children and stated that the Charter requires that contracting parties provide adequate *penal and civil* sanctions for the practice.[66]

PART II - QUESTIONS IN ISSUE

42. Does s.43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under sections 7, 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

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[62] Committee on the Rights of the Child, thirty-first session, CRC/C/15/Add.188 [Tab 88].
[63] Newell Affidavit at para. 104, Appellant's Record at 899.
[64] In *A. v. U.K.* (1998), the European Court held the U.K. government legally responsible for damages to a child who was beaten repeatedly by his stepfather with a garden cane. The Court held that the defence of "reasonable chastisement" under English criminal law (not unlike s.43), which had led to the stepfather's acquittal, insufficiently protected the child.
[65] Newell Affidavit at para. 117, Appellant's Record at 903-904; United Nations, *Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman, or degrading treatment or punishment*, 2 July 2002, A/57/173, paras. 46-53 [Tab 101].
[66] European Committee on Social Rights, "Observations on compliance with article 17 and legality of corporal punishment" (2001), Conclusions XV 2 – Volume 1, General Introduction. [Tab 90]

43. If s. 43 of the *Criminal Code* infringes sections 7, 12 or 15 of the *Canadian Charter of Rights and Freedoms*, is s.43 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s.1 of the *Charter*?

PART III - ARGUMENT

(a) Context of Constitutional Analysis

Children have Constitutional Rights

44. "Children's rights, and attention to their interests" are recognized in Canada as "central humanitarian and compassionate values".[67] The historical treatment of children as "second class citizens" is no longer valid. Any rights parents have in relation to their children must be exercised in children's best interests. As Iacobucci and Major JJ. have stated:

> The rights enumerated in the *Charter* are individual rights to which children are clearly entitled in their relationships with the state and all persons – regardless of their status as strangers, friends, relatives, guardians or parents.[68]

45. The constitutional analysis of s. 43 must be premised on the fact that children hold rights as individuals in and of themselves, not at the discretion, or through the benevolence, of their parents.[69] As L'Heureux-Dubé, Gonthier and Bastarache, JJ. stated in *Sharpe*, "Canadian society has always recognized that children are deserving of a heightened form of protection. This protection rests on the best interests of the child."[70]

Parent-Child Context

46. The Court of Appeal's finding that "[t]he family, and particularly the parent-child relationship, provides the principal social context for this case"[71], led it to give inadequate weight to children's rights. Rather than taking a child-focused point of view, the Court of Appeal took a an adult-centric approach that failed to acknowledge the child as an individual in the family. It

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[67] *Baker v. Canada*, [1999] 1 S.C.R. 817 at para. 67 [Tab 5].
[68] *B.(R.) v. Children's Aid*, [1995] 1 S.C.R. 315 at 432 [Tab 2].
[69] M.D.A. Freeman (1997), *The Moral Status of Children: Essays on the Rights of the Child*, The Netherlands: Martinus Nijhoff Publishers at 37 [Tab 91]; Anne McGillivray, "Why do children have equal rights: in reply to Laura Purdy" (1994), 2 *International Journal of Children's Rights* 243 [McGillivray, "Why do children have equal rights?"] [Tab 95].
[70] *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 170 [*Sharpe*] [Tab 66].
[71] Reasons for Judgment, para. 18, Appellant's Record at 43.

emphasized the need for parental autonomy to the detriment of the child. As Sopinka J. stated in *Eaton*, the child's perspective must be central:

> We cannot forget, however, that for a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. *For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view* ***as opposed to that of the adults in his or her life*** [emphasis added].[72]

47. Section 43 has been portrayed by the government as a shield protecting families from state intervention and providing them with autonomy to make their own choices regarding child-rearing. But insofar as it applies to teachers and persons standing in the place of parents, s.43 may serve to impede, rather than preserve, parental autonomy. So long as the section is in place, parents cannot protect their children from physical punishment at the hands of teachers, babysitters or other caregivers. In this sense, s.43 deprives parents of the choice to raise their children in a violence-free environment.

48. The reality is that families can be both nurturing and dangerous places. A Statistics Canada report shows that family members were responsible for a vast majority of physical assaults against young children in particular.[73] Children's vulnerability requires that they be given greater protection. As this Court stated in *Winnipeg Child and Family Services v. K.L.W.*:

> It must also be recognized that children are vulnerable and depend on their parents or other caregivers for the necessities of life, as well as for their physical, emotional and intellectual development and well-being. Thus, protecting children from harm has become a universally accepted goal: see the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, now ratified by 191 states, including Canada.
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> Although Canada does not yet have a national database for child protection statistics, it is clear that the family does not always provide a safe environment for children: see Statistics Canada, *Family Violence in Canada: A Statistical Profile 2000*, at pp. 31 ff; H. L. MacMillan et al., "Prevalence of Child Physical and Sexual Abuse in the Community: Results From the Ontario Health Supplement" (1997), 278 *JAMA*, 131.[74]

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[72] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at 277-78 [*Eaton*] [Tab 9].
[73] Statistics Canada, *supra* note 33 at 4, Appellant's Record at 1277.
[74] *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 at paras. 73, 74 [*Winnipeg Child and Family Services*] [Tab 85].

Criminal Law Context

Justification versus Excuse

49. In *Ogg-Moss* (a pre-*Charter* case), this Court confirmed the view held for centuries that s. 43 provides a *justification* for the use of force "in the correction of a child, because it considers such an action not a wrongful, but a *rightful*, one." [emphasis in original][75] In *Perka*, this Court described justifications as actions for which "people are often praised, as motivated by some great or noble object."[76] The government's stated aim to discourage corporal punishment through education while legally justifying it in the *Criminal Code* is inherently contradictory and unsupportable.

Interpretation of the Defence

50. This Court in *Ogg-Moss* emphasized that s. 43 must be interpreted narrowly. As Dickson J. stated for the unanimous court, at page 183:

> 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*. Where the effect of such a purported derogation is to deprive a specific individual or group of the *equal protection* we normally assume is offered by the criminal law, I think it appropriate to view the proferred definition with suspicion and to insist on a demonstration of the logic and *rationale* of the interpretation [emphasis added].

51. The evidence in this case demonstrates no logic or rationale for any interpretation of s.43. Attempts to narrow its interpretation have been largely unsuccessful. Courts have struggled to give the accused the benefit of the defence while acknowledging its unsavouriness. Judges have felt compelled to follow precedents to acquit which do not accord with their concepts of reasonableness or with community standards.[77]

52. Despite reported cases that demonstrate the breadth of the concept of "reasonable force", the Court of Appeal somehow found that the section "decriminalizes only non-abusive physical

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[75] *Ogg-Moss*, *supra* note 3 at 193 [Tab 21].
[76] *R. v. Perka*, [1984] 2 S.C.R. 232 at 246 [*Perka*] [Tab 59].
[77] *R. v. C.(G.C.)*, [2001] N.J. No. 290 (Nfld. T.D.) at para. 47 (QL) [Tab 27]; *James*, *supra* note 14 at para. 19 [Tab 45].

punishment where the intention is to correct and correction is possible."[78] This is wishful thinking. By simply dismissing cases in which violent child abuse was justified as "varying judicial interpretations", the Court failed to narrow the defence to prevent such "wrongly decided" cases from recurring. In any event, the criminal law context ensures that even the factual findings in the courts below as to what the experts in this case agreed are the limits to physical punishment can be wholly rejected as inapplicable to the particular circumstances.[79]

53. Justice McCombs found that courts have applied divergent standards in interpreting s.43, that some judges have imposed their own personal views rather than an objective standard, and that some of the cases have sanctioned violent child abuse. Section 43 continues to *legitimize* aggressive assaultive behaviour against children.[80] The uncontradicted evidence is that section 43 has been applied in recent years to permit assaults against children which all the experts agree are unreasonable, have no beneficial effects and constitute violent child abuse. The Court of Appeal asserted that some of these cases were "wrongly decided"[81] but failed to articulate a workable test beyond that set out in *R.v. Dupperon*.

54. The only clear aspect of the "*Dupperon* test" is that punishment that causes the child to suffer "injuries which may endanger life, limbs or health [or disfigurement]" is not reasonable.[82] Application of the *Dupperon* test has led to acquittals of parents and teachers who have physically injured children, slapped and punched teenagers, and used implements to punish. Although *Dupperon* suggests one consider the age of the child and the nature of the force used, it does not stand for the rule that hitting a child in the head, such as face slapping and/or punching, is unreasonable, or that hitting a teenager or infant is also unreasonable. Yet the uncontradicted evidence accepted by the trial judge and the Court of Appeal is that such hitting is not only unreasonable, but harmful.

(b) Section 43 is Inconsistent with Section 15(1) of the Charter

[78] Reasons for Judgment, para. 29, Appellant's Record at 49.
[79] *R. v. Poulin*, [2002] P.E.I.J. No. 88 (S.C. (T.D.)) at para. 21 (QL) [Tab 62].
[80] Noonan describes s. 43 as "a haunting licence to embark upon conduct which at one end of the spectrum embraces authoritarianism, and at the other shades murkily into abuse". Sheila Noonan, "Annotation to *Ogg-Moss v. The Queen*" (1984), 41 C.R. (3d) 297 at 298-299 [Tab 97].
[81] Reasons for Judgment, para. 49, Appellant's Record at 56.
[82] *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453 (Sask. C.A.) at 460 (QL) [*Dupperon*] [Tab 31].

55. Section 43 of the *Criminal Code* violates, clearly and seriously, the rights of children under s. 15(1) of the *Charter*. It permits differential treatment of children on the basis that children are less worthy of recognition or value as members of Canadian society. This Court recognized as much in *Ogg-Moss v. The Queen* when it rejected an extension of section 43 to mentally retarded persons: "I cannot believe that it is the intention of the *Criminal Code* to create such a category of permanent *second-class citizens* on the basis of a mental or physical handicap." [emphasis added] Although in *Ogg-Moss* Dickson J. noted that "chronological childhood is a transitory phase", the section nevertheless constitutes a violation of an individual's "right to *dignity* and physical security" by treating children as "second-class citizens" who may be physically punished by adults [emphasis added].[83] The emphasis on dignity is, of course, a core value of s. 15(1) of the *Charter*. As this Court stated in *Law*:

> It may be said that the purpose of s.15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.[84]

56. The Supreme Court of Israel addressed the issue of the loss of a child's dignity resulting from corporal punishment, noting that:

> … punishment that causes pain and humiliation, is liable to injure not only the minor's body, but his psyche as well. In place of encouraging the child's personal discipline, it is liable to cause him considerable psychological damage: the child will feel put down, his self-image will be damaged, and it is likely to be formed by him into intensified anxiety and anger…. [I]t violates the basic right of dignity, and harms the physical and mental well-being, of a multitude of children in our society.[85]

57. Similarly, in a 1998 UNICEF report, Peter Newell stated:

> Persisting legal and social acceptance of corporal punishment challenges two central pillars of human rights – respect for human dignity and equality before the law. Few if any other issues are more symbolic of children's persisting status as less than people.

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[83] *Ogg-Moss, supra* note 3 at 187 [Tab 21].
[84] *Law v. Canada*, [1999] 1 S.C.R. 497 at 529 [*Law*] [Tab 15].
[85] *Baku v. Israel, supra* note 56 at 32-33 of the judgment of Beinish J. [Tab 20].

> *Just as challenging routine violence in the home has been fundamental to women's struggle for equality, so it is with children. And it is shaming for all of us that children have had to wait until last for recognition of their equal right to physical integrity and respect for their human dignity* [emphasis added].[86]

Application of Section 15(1) Criteria

58. In *Gosselin,* the Chief Justice summarized the test in *Law* as follows:

> To establish a violation of s.15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds.[87]

59. This Court reiterated that the purpose of s.15 "is to ensure that governments respect the innate and equal dignity of every individual without discrimination", noting that "section 15's purpose of protecting equal membership and full participation in Canadian society runs like a leitmotif through our s.15 jurisprudence." Accordingly, the contextual approach requires that the analysis focus on the individual whose right has been infringed. As Chief Justice McLachlin stated in *Gosselin*:

> The issue, as my colleagues and I all agree, is whether "a reasonable person *in circumstances similar to those of the claimant* would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity" having regard to the individual's or group's traits, history, and circumstances [emphasis added].[88]

60. The "effects of the scheme [under review] are critical". While legislative purpose should be considered under s.15(1), the purpose must not be "uncritically" accepted and, indeed, "is relevant only insofar as it relates to whether or not a reasonable person *in the claimant's position* would feel that a challenged distinction harmed her dignity" [emphasis added].[89]

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[86] "Encouraging Legislation to End All Corporal Punishment of Children Worldwide", Exhibit 9, Affidavit of P. Newell; Brian Rock, ed., *Spirals of Suffering* (Pretoria: Human Sciences Research Council, 1997) at 150-51, Appellant's Record at 1014.
[87] *Gosselin v. Quebec (Attorney General)*, 2002 S.C.C. 84 at para. 17 [*Gosselin*] [Tab 10].
[88] *Gosselin*, *ibid*. at paras. 20, 23 and 25 [Tab 10].
[89] *Ibid.* at paras. 26-27 [Tab 10].

61. The Court of Appeal engaged in *no* discussion or consideration of s. 15 and the impact of corporal punishment on the dignity of children.[90] It looked at the case entirely from the perspective of parents and teachers, and never weighed the entirely speculative harm that *might* result to some parents and teachers if s.43 were removed, against the clear, certain and tangible harm to children's dignity that is caused by the infliction of violence on them.

Section 43 Imposes Differential Treatment

62. Section 43 clearly draws a distinction between persons based on age. It denies children the benefit and protection accorded to adults by permitting them to be assaulted. The provision draws a formal distinction between children and all other Canadians by justifying the use of "reasonable force" against one group (children) and no other group. As Dickson J. stated in *Ogg-Moss*, section 43 "exculpates the use of what would otherwise be criminal force by one group of persons against another."[91]

Section 43 Draws a Distinction on the Basis of an Enumerated Ground

63. Section 43 only applies to children, *i.e.*, all individuals under the age of 18. It makes a distinction based on the enumerated ground of age in s.15(1) of the *Charter*.

[90] See *R. v. M. (W.F.)*, [1995] A.J. No. 754 at para. 44 (C.A.) [Tab 52] for a dramatic illustration of the impact on a child's dignity in the description of a step-father's "bare-bottomed" spanking of a 12 year old girl ruled reasonable by the majority of the Court.
[91] *Ogg-Moss*, *supra* note 3 at 183 [Tab 21].

Section 43 Discriminates

64. In *Gosselin*, the Chief Justice stated that "[a] key marker of discrimination and denial of human dignity under s.15(1) is whether the affected individual or group has suffered from "pre-existing disadvantage, vulnerability, stereotyping, or prejudice"."[92] This marker is clearly present in this case. Justice McCombs' finding that s.43 is an "appropriate response to the unique circumstances of children's psychological development and limitations, in light of their needs and capabilities"[93] suggests that children are less entitled to exercise rights they hold equally with adults because of their dependent status. Justice McCombs and the Court of Appeal ignored the evidence of harm to children caused by corporal punishment and the obvious risks to vulnerable members of society. The assertion that s.43 does not increase the vulnerability of children is contradicted by the evidence and common-sense.

65. The Court of Appeal, in raising the spectre of criminalizing parents, took an unacceptable parent/adult-centred approach.[94] If the dependent status of children disentitles them to rights to equal protection of the law then this would apply to adult dependents as well – a concept considered offensive in today's society. This falls squarely within the rejected interpretation of s.43 argued in *Ogg-Moss*:

> If mentally retarded adults are to be considered "children" solely on the basis of their dependency on a "parenting" figure, it is difficult to see how the category of "children" would be limited to the mentally retarded. Essentially the same argument could be made with regard to the functional relationship between sufferers from senility or other cognitive disorder, or perhaps even stroke victims or other invalids, and those who take care of them.[95]

66. Section 43 offends the dignity and security of children. It permits and perpetuates the notion that hitting a child is not only acceptable but beneficial. This is emphasized by the explicit language of s.43 which permits force "by way of correction". It perpetuates the notion that children are less worthy of protection, that their right to be free of physical harm is devalued, because they need to be taught a lesson "for the benefit of [their] education."[96] As the report of the Quebec Commission des droits de la personne et des droits de la jeunesse states, "[c]orporal

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[92] *Gosselin*, *supra* note 87 at para. 30 [Tab 10].
[93] Reasons for Judgment, para. 130, Appellant's Record at 31.
[94] As Kate Federle notes, "powerful elites decide which, if any, of the claims made by children they will recognize." in Freeman, *supra* note 69 at 11 [Tab 91].
[95] *Ogg-Moss*, *supra* note 3 at 187 [Tab 21].

punishment violates the child's dignity, partly due to the humiliation he or she is likely to feel, but mainly due to the lack of respect inherent in the act."[97]

67. The overwhelming evidence is that hitting children does not have beneficial effects. The Government's own educational literature emphasizes that hitting a child is wrong. The expert evidence filed by both sides in this case is *consistent* that punishing by hitting has *negative effects*. Indeed, taking the Government's own expert evidence at its highest, non-physical punishment is *more* effective than physical punishment in obtaining compliance from a disobedient child.[98] None of the Government's experts recommend the physical punishment of children and all specifically say it is harmful for infants and teenagers. Accordingly, s.43 cannot even be said to be "closely tailored to the reality of the affected group."[99]

68. Section 43 is based upon the stereotypical assumption that children need to be hit in order to learn. It "has the effect of perpetuating or promoting the view that the individual [child] is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society."[100]

69. This case, therefore, cannot be said to be "one of the rare cases contemplated in *Andrews* … in which differential treatment based on one or more of the enumerated or analogous grounds in s. 15(1) is not discriminatory."[101] Rather, applying the contextual analysis, s.43 is discriminatory on many levels. It uniquely and precisely allows significant, often gross disrespect for children's human dignity. This must inform any remaining analysis under s.1.

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[96] *Ibid.* at 193 [Tab 21].
[97] *Corporal Punishment as a Means of Correcting Children* (Québec: Commission des droits de la personne et des droits de la jeunesse, 1998) at 8, Appellant's Record at 1458.
[98] Larzelere, R.E. et al., "Punishment Enhances Reasoning's Effectiveness as a Disciplinary Response to Toddlers", *Journal of Marriage and the Family* 60 (May, 1998) 388-403, Appellant's Record at 1533.
[99] *Gosselin*, *supra* note 87 at para. 37 [Tab 10].
[100] *Law*, *supra* note 84 at 529 [Tab 15].
[101] *Ibid.* at 569 [Tab 15].

(c) Section 43 Is Inconsistent with Section 7 of the Charter

Violation of Security of Person

70. In the Court of Appeal, the respondent conceded that s.43 infringes a child's right to security of the person.[102] This Court acknowledged as much in *Ogg-Moss*, that s. 43 is a derogation from "one of the key rights in our society", namely, "the individual's right to be free from unconsented invasions on his or her physical *security* or dignity". [emphasis added][103]

Section 43 violates the principles of fundamental justice contained in s.7 of the Charter

Section 43 Violates a "Basic Tenet" of Our Legal System

71. The principles of fundamental justice are found in the "basic tenets of our legal system" not in "the realm of general public policy but in the inherent domain of the judiciary".[104] Those tenets include the *parens patriae* obligation of the courts,[105] the legal test of the best interests of the child and, as Dickson J. noted in *Ogg-Moss*, the "essential purpose of the criminal law to protect members of society from such invasions"[106] (referring to assaults). Yet s. 43, rather than protecting children, aggravates their vulnerability by contradicting all of these tenets. As L'Heureux-Dube, J. recently stated:

> Because children are vulnerable and cannot exercise their rights independently, particularly at a young age, and because child abuse and neglect have long-term effects that impact negatively both on the individual child and on society, the state has assumed both the duty and the power to intervene to protect children's welfare. This responsibility finds expression in the *parens patriae* jurisdiction of the common law courts. [107]

72. One must also look to international law as evidence of the principles of fundamental justice.[108] As stated in *Suresh*:

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[102] *R. v. Morgentaler, Smoling and Scott*, [1988] 1 S.C.R. 30 at 162 [Tab 54]; Peter Hogg, *Constitutional Law of Canada, 4th ed.* (Toronto: Carswell, 1997) at 1072-1073 [Tab 94]*; Mills v. The Queen*, [1986] 1 S.C.R. 863 at 920 [Tab 17]*; Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1177-78 [Tab 74]; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at 482-83 [Tab 57]; *Singh v. M.E.I.*, [1985] 1 S.C.R. 177 at 207 [Tab 81].
[103] *Ogg-Moss*, *supra* note 3 at 183 [Tab 21].
[104] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J No. 3. at para. 45 (QL) [*Suresh*] [Tab 84].
[105] *E.(Mrs.) v. Eve*, [1986] 2 S.C.R. 388 at 407-415, 423-431, 434 [Tab 8].
[106] *Ogg-Moss*, *supra* note 3 at 183.
[107] *Winnipeg Child and Family Services*, *supra* note 74 at 564; *Sharpe*, *supra* note 70 at para. 174 [Tab 66].
[108] *Suresh*, *supra* note 104 at para. 60 [Tab 84].

> The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law.… This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law -- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms".[109]

Children have no rights when s.43 is invoked

73. Section 43 exists for the sole benefit of the adult accused. It provides no substantive or procedural protections for a child victim in any prosecution for assault against an adult. It removes children's rights to defend themselves against force inflicted "by way of correction."[110] Where an adult seeks to invoke s. 43, the child cannot oppose its application. Further, once the defence is raised by the adult accused, the burden is on the prosecution to rebut the defence beyond a reasonable doubt, again favouring the adult accused over the rights of the child.[111]

74. It is not sufficient to say, as did McCombs J., that children's interests "are adequately represented by the Crown", when s. 43 operates to make *rightful* what would otherwise be wrongful conduct, supposedly in the best interests of the child. As L'Heureux-Dubé J. recently stated, albeit in the child protection context:

> Given that children are highly vulnerable members of our society, and given society's interest in protecting them from harm, fair process in the child protection context must reflect the fact that children's lives and health may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention.[112]

75. Further, what conduct (if any) merits corporal punishment will vary widely,[113] and by removing protection for children, s. 43 permits punishment of the innocent, in the same way that the B.C. Motor Vehicle Act permitted punishment of individuals without fault.[114] In *R. v. Haberstock*, for example, a teacher was acquitted for slapping a pupil on the face (chipping the child's tooth), even though the child had not done anything wrong.[115]

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[109] *Ibid.* at para. 46 [Tab 84].
[110] See *e.g. R. v. F. (J.)* (1990), 57 C.C.C. (3d) 216 (Ont. P.D.) (QL) [Tab 34]; *R. v. C. (T.)*, [1995] O.J. No. 909 at para. 15 (Prov. Div.) (QL) [Tab 28], *R. v. S. (A.J.)*, [1998] A.J. No. 1250 at para. 13 (QL) [Tab 64].
[111] *James*, *supra* note 14 [Tab 45]; *R. v. F.(J.)*, *ibid* [Tab 34].
[112] *Winnipeg Child and Family Services*, *supra* note 74 at 572 [Tab 85].
[113] *R. v. Vivian*, [1992] B.C.J. No. 2190 (S.C.) (QL) [Tab 70].
[114] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 492 [Tab 73].
[115] *R. v. Haberstock* (1970), 1 C.C.C. (2d) 433 (Sask. C.A.) [Tab 39].

The "best interests of the child" is a principle of fundamental justice infringed by s. 43

76. The Court of Appeal refused to recognize that the "best interests of the child" is a principle of fundamental justice in the "criminal law context presented here", yet the Court had earlier identified the parent-child relationship as the principal context of this case. However, this Court has recognized that the "best interests of the child" forms part of the substantive content of the principles of fundamental justice. In *Winnipeg v. K.L.W.* Arbour J. states so explicitly, while L'Heureux-Dubé J. for a majority of the Court acknowledged that, within the s. 7 analysis, a child's life and health is an interest of fundamental importance.[116] Subsequently, in *R. v. Sharpe*, L'Heureux-Dubé, Gonthier and Bastarache JJ. noted in the criminal law context of that case that "this Court has reaffirmed that any decision affecting a child must be made in his or her best interests, which include, but are not limited to, ensuring that the child is protected from harm, whether caused by others or self-inflicted, and, importantly, seeking to foster the healthy development of the child to adulthood."[117] This is consistent with Canada's obligations under Article 3 of the *Convention on the Rights of the Child*.

Children's best interests and right to security outweigh parental interests

77. The Court of Appeal, in upholding s.43, stated that the purpose of the section was to allow parents to "carry out their important responsibilities to train and nurture children without the harm that [criminal] sanctions would bring to them, to their tasks and to the families concerned."[118] This adult-centred approach does not consider the position, or rights, of children. And while this Court has recognized parents' security rights in the circumstances of state intervention to remove a child from their care,[119] Bastarache J., speaking for the majority of the Court in *Blencoe,* cautioned that this interest would encompass *only* those decisions that are of fundamental importance. The liberty interest would "protect personal rights that are inherent to the individual and *consistent with the essential values of our society* [emphasis added].[120] Such rights and values surely cannot extend to justify infliction of physical harm on children because a parent has the mistaken idea that it is somehow in the best interests of the child. The removal of

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[116] *Winnipeg Child and Family Services*, *supra* note 74 at 534, 572 [Tab 85].
[117] *Sharpe*, *supra* note 70 at para. 174 [Tab 66].
[118] Reasons for Judgment, para. 59, Appellant's Record at 60.
[119] *Winnipeg Child and Family Services*, *supra* note 74 [Tab 85].
[120] *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 at 342 [Tab 6].

s. 43 would only prevent parents from inflicting a form of punishment that is antithetical to the "essential values of our society."

78. In *B.(R) v. Children's Aid*, this Court rejected the notion that parent rights could outweigh the security rights of children. Iacobucci and Major JJ. stated at p. 433:

> Indeed, in recent years, this Court has emphasized that parental duties are to be discharged according to the "best interests" of the child: *Young v. Young*, [1993] 4 S.C.R. 3; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141. The nature of the parent-child relationship is thus not to be determined by the personal desires of the parent, yet rather by the "best interests" of the child. In *Young, supra*, at p. 47, L'Heureux-Dube J. (discussing the issue of custody in family law) commented that:
>
> *The proposition … is one of duty and obligation to the child's best interests…. One cannot stress enough that it is from the perspective of the child's interests that these powers and responsibilities must be assessed, as the "rights" of the parent are not a criterion.*
>
> The exercise of parental beliefs that grossly invades the "best interests" of the child is not activity protected by the right to "liberty" in s. 7. To hold otherwise would be to risk undermining the ability of the state to exercise its legitimate *parens patriae* jurisdiction and jeopardize the *Charter*'s goal of protecting the most vulnerable members of society. As society becomes increasingly cognizant of the fact that the family is often a very dangerous place for children, the *parens patriae* jurisdiction assumes greater importance.[emphasis added][121]

79. In *Eaton*, a parental override to a child's right to equal treatment, based upon either parental liberty rights or a presumption that parents act in their child's best interests, was rejected. The Court stated:

> I would also question the view that a presumption as to the best interests of a child is a constitutional imperative when the presumption can be automatically displaced by the decision of the child's parents. Such a result runs counter to decisions of this Court that the parents' view of their child's best interests is not dispositive of the question.[122]

80. Equality rights must also inform the balancing under s.7. In *Mills*, the equality rights of a vulnerable group required an acute sensitivity to context in determining the content of the rights of the accused.[123] By drawing the boundary of the parent's liberty rights under s.7 to permit the continued use of corporal punishment on children, McCombs J. failed to consider the equality

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[121] *B. (R.) v. Children's Aid*, [1995] 1 S.C.R. 315 [Tab 2]. LaForest J. stated, to the same effect, at 387:
"If a situation arose where it was alleged that the child's right was violated, other rights might be raised as reasonable limits, *but if the right alleged was the security of the child as in the present case, then the child's right would again prevail over a parent's right* [emphasis added]."

[122] *Eaton, supra* note 72 at 278-279 [Tab 9]. See also *Baku v. Israel, supra* note 56 at para. 26 of the judgment of Beinish J. [Tab 20], which by reference to the UN *Convention*, found that parent's freedom over their children is "limited and subordinated to the needs of the child" and to their "general obligation" to act in their best interests.

rights of children and their particular vulnerabilities. The Court of Appeal wrongly balanced the rights of children against a state interest in protecting parents, an analysis more appropriate under s. 1.

Section 43 is Unconstitutionally Void for Vagueness and Overbreadth

81. The language of Section 43 makes it impossible to set a sufficiently definable standard for the use of force. It is overly broad in permitting the use of force on any individual under 18 years of age, even though the Government experts agree that any use of force against children under the age of approximately 2, or over 12, is wrong, no matter what the reason.[124] It is unduly vague in failing to provide proper notice to persons of what is prohibited (or permitted). The lack of clear standards leads to arbitrary enforcement and application.[125] The case law demonstrates that the law fails to set "an adequate basis for legal debate", and "does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion."[126]

82. Section 43 is applied differently across Canada. There is no consensus on what conduct by children could merit the use of force "by way of correction." Justice McCombs found that judges cannot agree on whether a community standard of reasonableness applies or whether the personal experience of the judge should govern. An Ontario Court Justice agreed with Professor McGillivray's description of s. 43 as a "legal lottery and fundamentally incoherent".[127] Another Justice described the standard of reasonableness as "elusive."[128] Professor Bala agreed with these comments and supports legislative reform.[129] Professor MacKay expressed similar

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[123] *R. v. Mills*, [1993] 3 S.C.R. 668 at paras. 90-93.
[124] Taking the Crown's case at its highest, experts such as Baumrind and Larzelere only condone non-abusive, minimal physical punishment for children between certain ages. Professor Bala also stated that corporal punishment is "contraindicated for adolescents". (Bala cross-examination at 212, Appellant's Record at 1585; Baumrind cross-examination at 11 and 13, Appellant's Record at 1592 and 1594; Larzelere cross-examination at 29, Appellant's Record at 1684); Larzelere Affidavit, para. 20, Appellant's Record at 1529.
[125] Hogg, *supra* note 102 at 1102-1103 and 1106; *R. v. Heywood*, [1994] 3 S.C.R. 761 at 789–802 [*Heywood*] [Tab 42].
[126] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 639 [*Nova Scotia Pharmaceutical Society*] [Tab 55].
[127] *James*, *supra* note 14 at para. 12 [Tab 45].
[128] *R. v. O.J.*, [1996] O.J. No. 647 at para. 12 (QL) [Tab 46]; *R. v. J.O.W.*, [1996] O.J. No. 4061 at para. 5 (QL) [Tab 47].
[129] Bala cross-examination at 189-90, Appellant's Record at 1579-80.

views.[130] Even Justice McCombs agreed that s.43 should be clarified. Yet the Court of Appeal found the phrase "reasonable in the circumstances" to provide an intelligible standard, apparently on the basis that some courts adopt the "approach" in *Dupperon* which, as argued above,[131] provides no guidance except that serious injury is unreasonable!

83. Section 43, therefore, results in an arbitrary and discriminatory application of the law. It fails to meet "the requirement that a legislature establish minimal guidelines to govern law enforcement".[132] The law may "trap the innocent by not providing fair warning"[133] while permitting and condoning unlawful and violent conduct towards children.

84. Peter Newell has noted the benefits of a clear prohibition in Sweden – removing uncertainty in the law reduces family stress and enhances child protection and parenting education objectives.[134] The English law containing detailed guidelines for schools on the use of force to restrain pupils, not punish them, reassures teachers while protecting children.

(d) Section 43 is Inconsistent with Section 12 of the Charter

85. The Saskatchewan Court of Appeal noted in *Dupperon* that "there is some anomaly in the fact that corporal punishment of criminals is now prohibited while corporal punishment of children is still permitted."[135] Indeed, s.43 *justifies* treatment or punishment of children which, if inflicted on an adult, would be criminal behaviour. By exempting children from protection from assault, and saying it is *right* to hit children, the state is responsible for its infliction, contrary to s.12 of the *Charter*.[136] This "treatment" is not only at the hands of parents, but is also inflicted by the state through teachers and others who act in the place of parents.[137]

86. This Court has stated that "the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed", violates s. 12 because it is "grossly

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[130] MacKay Affidavit at para. 14, Appellant's Record at 1334.
[131] Paragraphs 53-54.
[132] *Kolender v. Lawson*, 103 S. Ct. 1855 (1983) at 1858-1859 (USSC) [Tab 14].
[133] *Grayned v. City of Rockford*, 408 U.S. 104 (1972) at 108-109 (USSC) [Tab 11].
[134] Newell cross-examination at 80, 103-104, Appellant's Record at 1719, 1724-25.
[135] *Dupperon*, *supra* note 82 at 459 [Tab 31].
[136] *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519 at 608-612 [Tab 79]; *Soenen v. Edmonton Remand Centre*, [1983] A.J. No. 709 at para. 17 (Q.B.) [Tab 82]; *Re: Mitchell and The Queen* (1983), 150 D.L.R. (3d) 449 at 470-74 (Ont. H.C.) [Tab 75].
[137] *European Convention on Human Rights*, Article 3; *Universal Declaration of Human Rights*, Article 5.

disproportionate and will always outrage our standards of decency."[138] Section 43 meets each of the tests for "cruel and unusual" established by this Court in *R. v. Smith*: (1) Assaults on children degrades their dignity; (2) Corporal punishment of children is unnecessary and harmful; and (3) Punishment purportedly imposed under s. 43 is arbitrary, inconsistent and irrational, as s. 43 fails to provide ascertained or ascertainable standards.

87. Recently, in a special report to the U.N. General Assembly, the Special Rapporteur on the Commission on Human Rights, cited both the *Convention on the Rights of the Child* and *A.v. U.K.* in reaffirming the Commission's opinion that "corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined in the Universal Declaration of Human Rights".[139]

(e) Section 43 is not Justified under Section 1 of the Charter

88. It is essential to the section 1 analysis that the full nature and scope of the infringement of the *Charter* be considered. The Court of Appeal's failure to consider section 43's impact on children's dignity and worth as human beings resulted in the minimizing of the rights and interests of children. McCombs J. did not even address s.1.

89. It bears repeating that s.43 justifies the physical punishment of children. To equate aggressive punitive force with nurturing is wrong. It wrongly gives a liberal interpretation to a section which requires a narrow one. By expanding the reach of s.43 to include putting a child to bed, or restraining the child in a car seat, the Court has ignored the historical context of the section and the explicit wording of "purpose of correction". The Court of Appeal has wrongly expanded the application of s.43 in order to justify it constitutionally.

90. There exists a common law right of parents to touch children without their consent in situations involving nurture and care - such as, say, diapering a child - which is more easily equated with the kinds of non-corrective applications of force described by the Court.[140] It may be too trite to point out that parents are not routinely prosecuted for hugging and kissing their children without their consent – touching which has no "corrective" purpose.

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[138] *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1073-74, 1097-98 [Tab 67].
[139] United Nations, *supra* note 65 [Tab 101].
[140] *R. v. E.(A.)*, [2000] O.J. No. 2984 at paras. 26-28 (C.A.) (QL) [Tab 32].

91. While the *Oakes*[141] criteria are flexible, a heavy burden must lie on the government where a law permits physical harm to children. In any event, it is rare that s.1 will be satisfied where there is a violation of s.15 or s.7. As noted in *Re B.C. Motor Vehicle Act*, s.1 "may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s.7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[142] With respect to s.15, Wilson J. stated in *Andrews*:

> Given that s.15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.[143]

92. Section 43 cannot be justified in a free and democratic society. It conflicts with Canada's international human rights obligations. As L'Heureux-Dubé, Gonthier and Bastarache JJ. stated in *Sharpe*, "the protection of children from harm is a universally accepted goal."[144] Section 43 clearly conflicts with this goal to which Canada has committed itself.

Section 43 Fails to Meet the Pressing and Substantial Objective Test

Section 43 is derived from an antiquated notion of parental authority over children (delegated to teachers in the education system) that never considered children as individual rights holders.[145] The common law right of a parent to use force against his or her child "by way of correction" was countenanced because, as Blackstone said, physical punishment is necessary "to keep the child in order and obedience" and that "this is for the benefit of his education."[146] This objective is inconsistent with the evidence that order and obedience (other than short-term compliance) is not achieved by physical punishment, and with the Canadian Teachers' Federation position opposing corporal punishment in the education setting. Even in a non-*Charter* context, Dickson J. reminds us in *Ogg-Moss* that s. 43 should be viewed "with suspicion" and we should "insist on a

[141] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-140 [Tab 56].
[142] *Re B.C. Motor Vehicle Act, supra* note 114 at 518 [Tab 73].
[143] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 154 [Tab 1].
[144] *Sharpe, supra* note 70 at para. 175 [Tab 66].
[145] McGillivray, "Disciplining Childhood" *supra* note 1.
[146] *Ogg-Moss, supra* note 3 at 185 citing *Blackstone's Commentaries on the Laws of England* [Tab 21].

demonstration of the logic and *rationale* of the interpretation".[147] This objective is now untenable ("it is never okay to spank children; it is a bad idea and it doesn't work").

93. The Court of Appeal wrongly accepted a new purpose of s.43 (which is supposed to be narrowly construed), linking it to the broader notion that parents and teachers must be given latitude in order to "train and nurture children without the harm" of criminal sanctions applicable to everyone else. But this antiquated defence for hitting children "for the benefit of their education" thereby becomes a protective shield for bad (and potentially destructive) pedagogy.

94. This expansion (or shift) in the purpose of the legislation is wrong. "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."[148] As this Court stated in *Irwin Toy*, "it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place" and that "in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available."[149] The overwhelming evidence no longer supports the original purpose of s. 43.

95. Furthermore, the new objective articulated by the Court of Appeal is not supported by the wording of s. 43, which is explicitly limited to "correction". The objective of the section cannot reasonably be broadened to protecting families from the harm caused by prosecuting parents. And if the section is about protecting families, there is no justification for including teachers.

Section 43 Fails the Proportionality Test

Section 43 is not Rationally Connected to its Objective

96. The evidence is overwhelming that s.43 is not rationally connected to its original objective. At best, physical punishment can only lead to short-term compliance with authority in limited circumstances. It does not the benefit a child's education but causes harm.

97. The Canadian Teachers' Federation opposes corporal punishment in the educational setting. A teacher should never hit or strike a pupil or engage in an aggressive act of violence. The CTF

[147] *Ibid*. at 183 [Tab 21]; *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199 at 335 [*RJR-MacDonald*] [Tab 77].
[148] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 331, 335 [Tab 23]; *R. v. Gladue*, [1999] 1 S.C.R. 688 at 704 [Tab 36].
[149] *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 at 983-985 [*Irwin Toy*] [Tab 13].

only seeks to retain s. 43 for the limited objective of having a defence in situations where a teacher needs to intervene to prevent violence or to maintain order and discipline, *i.e.*, for purposes of *restraint*. As argued below, s. 43 is not required for this purpose. Accordingly, the rational connection test is not met.[150]

98. The government alleges harm to the family (including the child) due to state interference as a necessary outcome of criminal prosecution. Then why not exempt all criminal actions by parents? Why not exempt all minor assaults within the family, including assaults between parents, as this too involves state intrusion into the home? The harm to families envisioned by the government was not demonstrated by evidence but is entirely speculative in nature. It is also based upon a presumption that parents cannot control their actions and must persist in hitting children despite the law. Further, relying on child protection legislation as an alternative to criminal sanction, simply opens up the family to more intrusive responses such as forced removal of children and permanent legal severing of the parent-child relationship.

Section 43 fails to meet the Minimal Impairment Test

99. The government's witness, Professor Bala, admitted that section 43 is overly broad in its wording, its application varies according to the judge, and it permits behaviour which is unacceptable and harmful to children.[151] However, the Court of Appeal raised the spectre that, without s.43, a whole range of non-corrective behaviours would be criminalized. This ignores the judicial interpretation of s.43 which demonstrates that corporal punishment is the pith and substance of the defence. While parents and teachers must be permitted to use restraint, this objective cannot be used to justify corporal punishment. The section is not intended to be a catch-all for all non-consensual touching of children by their parents.

100. As the case law demonstrates, the conduct justified under the section clearly goes beyond anything justifiable in the current social and historical context. The section is aimed at justifying conduct which is clearly harmful; it permits the physical punishment of teenagers, who all agree should never be hit and thus is overly broad with respect to age alone. It justifies assaults by a

[150] *RJR-MacDonald*, *supra* note 147 at 339 [Tab 77].
[151] Bala cross-examination at 47-48, 60, 65-68, 112-113, 181, 206, Appellant's Record at 1565-71, 1576-78, 1584.

wide range of people including teachers (whether or not they are *in loco parentis)*, foster parents, babysitters and in one case a bus driver.[152]

101. The apparent limitation of the defence to "reasonable" force is impermissibly vague and has the effect of permitting punishment or other infliction of pain which is not justified. One cannot say simply that the use of the term "reasonable" in the section means that it is "reasonably tailored to its objectives" or that it impairs the right "no more than reasonably necessary." [emphasis in original][153] Indeed, it would be offensive to argue that spousal assault is justified because the hitting was only at a "reasonable" level. The U.K. term "reasonable chastisement" has been criticized by the Committee on the Rights of the Child:

> The imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner. Thus, the Committee is concerned that legislative and other measures relating to the physical integrity of children do not appear to be compatible with the provisions and principles of the *Convention*, including those of its articles 3, 19 and 37.[154]

Alternative and More Effective Means of Discipline or Correction

102. There are alternative and more effective means than corporal punishment by which order, discipline and education of children can be achieved. The uncontradicted evidence is that it is *always* better to attempt to speak or reason with a child or to use other alternative non-violent forms of punishment. Larzelere's research shows that non-physical punishment can enhance the effects of reasoning.[155]

Other Defences Exist for Physical Restraint or Intervention

103. The government and the Court of Appeal were in agreement that the use of punitive force to correct a child was a bad thing. As one author notes, "the most disappointing aspect of the Court of Appeal's decision is its failure to recognize and deal with the qualitative difference between *punitive* force and *restraining or coercive* force."[156]

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[152] *R. v. Trynchy* (1970), 73 W.W.R. 165 (Y. Mag. Ct.) [Tab 69].
[153] *Sharpe, supra* note 70 at para. 96 [Tab 66].
[154] Newell Affidavit at para. 93, Appellant's Record at 896.
[155] Larzalere et al., *supra* note 98 at 402, Appellant's Record at 1533.
[156] Greg M. Dickinson, "Spanking law gets constitutional nod from Ontario Court of Appeal" 12:2 *Education & Law Journal* 257 at 269 [Tab 89].

104. There are defences in the *Criminal Code* and at common law to deal with situations where restraint or intervention is required to prevent harm. As this Court noted in *Ogg-Moss:*

> … section 43 is not necessary for the protection of persons using physical force in response to violent or dangerous behaviour or in the course of approved treatment. The former situations are already covered by, *inter alia*, ss. 34, 35, 37, 38, 39, and 41 of the *Criminal Code*…. Section 43 only applies to "correctional" force unrelated to treatment or to the protection of self or others.[157]

105. Although s. 43 is regularly raised as a defence where teachers use physical restraint, this is a matter of convenience. When teachers must exercise restraint or otherwise take physical charge of pupils, this is in accordance with their statutory duty to "maintain … proper order and discipline" under provincial education acts, and for which a defence would lie under the common law or under s. 25(1) of the *Criminal Code*.[158]

106. The *de minimus non curat lex* defence, which applies when the circumstances surrounding the charge are "so trifling that the law should take no notice of it",[159] is open to parents and teachers. Similarly, the defence of necessity is available in circumstances of "imminent risk where the action was taken to avoid a direct and immediate peril…." [160] Where a child is in danger of placing her hand on a hot stove top or running into a busy street, an assault would be justified. Professor Stuart points to the availability of this defence to cover difficult cases which might arise in the absence of s.43.[161]

Guidelines and Prosecutorial Discretion

107. Provincial attorneys general can develop prosecutorial guidelines for situations where it is not appropriate to prosecute a technical assault.[162] Such discretion is already applied by police

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[157] *Ogg-Moss*, *supra* note 3 at 183 [Tab 21].
[158] MacKay Affidavit at paras. 21-22, Appellant's Record at 1337-38; *Criminal Code*, R.S.C. 1985, c. C-46, s. 25; *Education Act*, R.S.O. 1990, c.E.2, s. 264, as am., 1993, c.11, s. 36; *R. v. Cartier* (1978), 43 C.C.C. (2d) 553 (Que. S.C.) [Tab 29]; *McGonegal v. Gray*, [1952] S.C.R. 274 at 282-84 [Tab 19]; *R. v. F. (J.), supra* note 110 at 220 [Tab 34].
[159] *Rex v. Peleshaty* (1949), 96 C.C.C. 147 (Man. C.A.) [Tab 76]; *R. v. Lepage*, [1989] S.J. No. 579 at 6-7 (Q.B.) (QL) [Tab 50]; *R. v. Elek*, [1994] Y.J. No. 31 at para. 18 (Terr. Ct.) (QL) [Tab 37]; *R. v. Kormos*, [1998] O.J. No. 485 at paras. 34-52 (Prov. Div.) (QL) [Tab 49].
[160] *Perka*, *supra* note 76 at 259 [Tab 59].
[161] Stuart, *Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 2001) at 506 [Tab 98]. He calls for the repeal of s.43.
[162] Bala cross-examination at 190-193, Appellant's Record at 1580-83.

and prosecutors and finds authority in s. 717 of the *Criminal Code*.[163] Guidelines have been developed in other contexts, such as domestic violence and young offenders. In the education context, helpful guidelines for teachers have been drafted in the United Kingdom following the repeal of the "reasonable chastisement" defence for teachers.[164] Indeed, this Court recognized that there are situations which, while they may constitute a technical assault, do not require the laying of charges:

> Since s. 43 does not justify the intentional application of force in a situation like the present, it follows that this use of force constitutes an assault within the meaning of s. 245(1). I make no comment on the gravity of the assault nor on the appropriateness of laying criminal charges. These questions are not before us; as in the case of any other intentional application of force they are matters for prosecutorial judgment in the discretion of the sentencing court.[165]

Lack of Proportionality between the Objective of Section 43 and its Deleterious Effects

108. There is no proportionality between the deleterious effects of s. 43 and any purported benefits of the section.[166] The uncontradicted evidence - indeed evidence supported by the Government's witnesses - is that s. 43 has significant negative effects on children. The section conflicts with child protection legislation and impedes child protection efforts. Given its impact on one of the most vulnerable groups in Canadian society, one deserving of special protections, it is up to the government to prove its beneficial effects, not just the absence of definitive proof of harm, as suggested by the Court of Appeal.

109. Harm was established by the applicant and conceded by the government. The courts below compounded their error of placing a burden on the applicant to establish harm under s.1 by setting an evidentiary burden of scientific certainty that even McCombs J. said was impossible to meet, and which flies in the face of this Court's common sense approach to social science evidence that requires only a "reasoned apprehension of harm".[167] The Court of Appeal, having found "significant associational evidence linking corporal punishment to poor outcomes

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[163] Landau Affidavit at paras. 31-34, Appellant's Record at 1296-97; Mark Carter, "Prosecutorial Discretion as a Complement to Legislative Reform", Sherbrooke, June 6, 1999 [Carter, "Prosecutorial Discretion"] [Tab 86]; *Baku v. Israel*, *supra* note 56 at 36-37 [Tab 20].
[164] See above, para. 30.
[165] *Ogg-Moss*, *supra* note 3 at 195-196 [Tab 21]; Carter, "Prosecutorial Discretion", *supra* note 163 [Tab 86]; Noonan, *supra* note 80 at 299 [Tab 97].
[166] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 889 [Tab 7].
[167] *RJR-MacDonald*, *supra* note 147 at 290-295 [Tab 77]; *R. v. Butler*, [1992] 1 S.C.R. 452 at 501-502 [Tab 24]; *Sharpe*, *supra* note 70 at para. 85 [Tab 66].

for children", made this finding irrelevant by assuming, contrary to the evidence, that s. 43 only permits "non-abusive physical punishment" (which it did not define).[168]

110. This case raises the unique situation in which the *applicant* is challenging a law that *fails* to protect children – in contrast to, say, *Sharpe* and *Butler*. The failure by the Court of Appeal to acknowledge the nature of the discrimination under s.15(1), and the clear evidence of the damage to a child's dignity that s.43 condones by justifying corporal punishment, led it to minimize the deleterious effects on children and indeed on a society that fails to condemn violence against its most vulnerable members. In contrast, the objective "to benefit the child's education" is no longer supported by the evidence, while the benefit to parents and teachers of being exempted from the criminal law is based upon speculative evidence alone and cannot outweigh the significant deleterious effects of s. 43.

(f) Remedy: Section 43 Must be Struck Down

111. Section 43 cannot be cured by a reading in of a new standard. The Court cannot correct vagueness or overbreadth (especially where the purpose is unjustified) by reading in its own test.[169] As Dickson J. stated in *Hunter v. Southam*: "it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional."[170] In *Miron v. Trudel*, McLachlin J. stated that "the remedy of "reading in" is available if the question of how far the benefit should be extended can be answered with "sufficient precision" to justify the Court in doing so.…"[171] Reading in cannot be done in this case because the Court would be rewriting the standard for a justification for assaultive behaviour. The Court's action "would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution."[172] There is a high threshold for

[168] Reasons for Judgment, para. 63, Appellant's Record at 61.
[169] *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 252 [Tab 78].
[170] *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 169 [Tab 12].
[171] *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 508 [Tab 18]; *Schachter v. Canada*, [1992] 2 S.C.R. 679 [*Schachter*] [Tab 80].
[172] *Schachter*, *ibid*. at 707 [Tab 80].

situations where it would be appropriate to "read into" a provision to maintain its validity.[173] This is manifestly not such a case.

PART IV - COSTS

112. This Court has recognized the need to order costs so that important cases can be properly litigated before it.[174] Here, the appellant has brought a specific challenge, with an extensive evidentiary record, on a legal issue involving the most vulnerable members of society. Because s. 43 is a defence, its validity could not be challenged, with the expert evidence now before the Court, in any other way. Even if s. 43 survives, the findings in this case will affect the interpretation and application of the law - findings which could not otherwise have been made. The public interest has clearly been advanced. Accordingly, it is in the public interest that such bona fide challenges (especially in the unique circumstances of this case) should not be deterred by the extraordinary expense of such litigation, and the appellant should be indemnified for its costs in this Court and in the courts below.[175]

[173] *M. v. H.*, [1999] 2 S.C.R. 3 at 84-86 [Tab 16].
[174] *Schachter*, *supra* note 171 at 726 [Tab 80]; *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1989] O.J. No. 205 at 26-27 (Dist. Ct.) (QL) [Tab 3], [1992] O.J. No. 1915 at 29 (C.A.) (QL) [Tab 4], and [1995] 1 S.C.R. 315 at 390 [Tab 2]; *M. v. H*,. *ibid*. at 88-89 [Tab 16]; L. Friedlander, "Costs and the Public Interest Litigant" (1995), 40 McGill L.J. 55 at 86 [Tab 92].
[175] Although some funding was received from the Court Challenges Program, this did little more than cover some disbursements.

PART V - ORDER REQUESTED

113. It is respectfully requested that the appeal be allowed and the Court issue a declaration that s. 43 of the *Criminal Code* and any similar common law defences preserved by s.8 of the *Criminal Code* are of no force and effect. The Court should also award costs to the Appellant in this Court and the courts below in any event of the result.

All of which is respectfully submitted this 27th day of March, 2003.

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