Canadian Foundation for Children, Youth and the Law *Appellant*

v.

Attorney General in Right of Canada *Respondent*

and

Focus on the Family (Canada) Association, Canada Family Action Coalition, Home School Legal Defence Association of Canada and REAL Women of Canada, together forming the Coalition for Family Autonomy, Canadian Teachers' Federation, Ontario Association of Children's Aid Societies, Commission des droits de la personne et des droits de la jeunesse, on its own behalf and on behalf of Conseil canadien des organismes provinciaux de défense des droits des enfants et des jeunes, and Child Welfare League of Canada *Interveners*

Indexed as: Canadian Foundation for Children, Youth and the Law *v.* Canada (Attorney General)

Citation: [2004] 1 S.C.R. 76, 2004 SCC 4

File No.: 29113.

6 June 2003; 30 January 2004.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache and LeBel JJ. was delivered by

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

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case

may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

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

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

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

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

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

A. *Independent Procedural Rights for Children*

5 It is a principle of fundamental justice that accused persons must be accorded adequate procedural safeguards in the criminal process. By analogy, the Foundation argues that it is a principle of fundamental justice that innocent children who are alleged to have been subjected to force exempted from criminal sanction by s. 43 of the *Criminal Code* have a similar right to due process in the representation of their interests at trial. Section 43 fails to accord such process, it is argued, and therefore breaches s. 7 of the *Charter*. The implication is that for s. 43 to be constitutional, it would be necessary to provide for separate representation of the child's interests.

6 Thus far, jurisprudence has not recognized procedural rights for the alleged victims of an offence. However, I need not consider that issue. Even on the assumption that alleged child victims are constitutionally entitled to procedural safeguards, the Foundation's argument fails because s. 43provides adequate procedural safeguards to protect this interest. The child's interests are represented at trial by the Crown. The Crown's decision to prosecute and its conduct of the prosecution will necessarily reflect society's concern for the physical and mental security of the child. There is no reason to suppose that, as in other offences involving children as victims or witnesses, the Crown will not discharge that duty properly. Nor is there any reason to conclude on the arguments before us that providing separate representation for the child is either necessary or useful. I conclude that no failure of procedural safeguards has been established.

B. *The Best Interests of the Child*

7 The Foundation argues that it is a principle of fundamental justice that laws affecting children must be in their best interests, and that s. 43's exemption of reasonable corrective force from criminal sanction is not in the best interests of the child. Therefore, it argues, s. 43 violates s. 7 of the*Charter*. I disagree. While "the best interests of the child" is a recognized legal principle, this legal principle is not a principle of fundamental justice.

8 Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 113. First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of

being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.

9 The "best interests of the child" is a legal principle, thus meeting the first requirement. A legal principle contrasts with what Lamer J. (as he then was) referred to as "the realm of general public policy" (*Re B.C. Motor Vehicle Act*, *supra*, at p. 503), and Sopinka J. referred to as "broad" and "vague generalizations about what our society considers to be ethical or moral" (*Rodriguez*, *supra*, at p. 591), the use of which would transform s. 7into a vehicle for policy adjudication. The "best interests of the child" is an established legal principle in international and domestic law. Canada is a party to international conventions that treat "the best interests of the child" as a legal principle: see the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 3(1), and the *Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, Arts. 5(b) and 16(1)(d). Many Canadian statutes explicitly name the "best interests of the child" as a legal consideration: see, for example,*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 25, 28, 60, 67, 68 and 69; *Youth Criminal Justice Act*, S.C. 2002, c. 1, ss. 25(8), 27(1), 30(3) and (4); *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), ss. 16(8), (10), 17(5) and (9). Family law statutes are saturated with references to the "best interests of the child" as a legal principle of paramount importance: though not an exhaustive list, examples include: *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 24(1); *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 1(a); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 19(a). Clearly, the "best interests of the child" has achieved the status of a legal principle; the first requirement is met.

10 However, the "best interests of the child" fails to meet the second criterion for a principle of fundamental justice: consensus that the principle is vital or fundamental to our societal notion of justice. The "best interests of the child" is widely supported in legislation and social policy, and is an important factor for consideration in many contexts. It is not, however, a foundational requirement for the dispensation of justice. Article 3(1) of the *Convention on the Rights of the Child* describes it as "a primary consideration" rather than "the primary consideration" (emphasis added). Drawing on this wording, L'Heureux-Dubé J. noted in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 75:

> [T]he decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.

It follows that the legal principle of the "best interests of the child" may be subordinated to other concerns in appropriate contexts. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child's best interests. Society does not always deem it essential that the "best interests of the child" trump all other concerns in the administration of justice. The "best interests of the child", while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice.

11 The third requirement is that the alleged principle of fundamental justice be "capable of being identified with some precision" (*Rodriguez*,*supra*, at p. 591) and provide a justiciable standard. Here, too, the "best interests of the child" falls short. It functions as a factor considered along with others. Its application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield, particularly in areas of the law where it is one consideration among many, such as the criminal justice system. It does not function as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice.

12 To conclude, "the best interests of the child" is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice.

C. *Vagueness and Overbreadth*

(1) Vagueness

13 The Foundation argues that s. 43 is unconstitutional because first, it does not give sufficient notice as to what conduct is prohibited; and second, it fails to constrain discretion in enforcement. The concept of what is "reasonable under the circumstances" is simply too vague, it is argued, to pass muster as a criminal provision.

14 Applying the legal requirements for precision in a criminal statute to s. 43, I conclude that s. 43, properly construed, is not unduly vague.

(a) *The Standard for "Vagueness"*

15 A law is unconstitutionally vague if it "does not provide an adequate basis for legal debate" and "analysis"; "does not sufficiently delineate any area of risk"; or "is not intelligible". The law must offer a "grasp to the judiciary": *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 639-40. Certainty is not required.

As Gonthier J. pointed out in *Nova Scotia Pharmaceutical*, *supra*, at pp. 638-39,

> conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances. [Emphasis added.]

16 A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application": *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at p. 109.

17 *Ad hoc* discretionary decision making must be distinguished from appropriate judicial interpretation. Judicial decisions may properly add precision to a statute. Legislators can never foresee all the situations that may arise, and if they did, could not practically set them all out. It is thus in the nature of our legal system that areas of uncertainty exist and that judges clarify and augment the law on a case-by-case basis.

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

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

19 The purpose of s. 43 is to delineate a sphere of non-criminal conduct within the larger realm of common assault. It must, as we have seen, do this in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids *ad hoc* discretionary decision making by law enforcement officials. People must be able to assess when conduct approaches the boundaries of the sphere that s. 43 provides.

20 To ascertain whether s. 43 meets these requirements, we must consider its words and court decisions interpreting those words. The words of the statute must be considered in context, in their grammatical and ordinary sense, and with a view to the legislative scheme's purpose and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. Since s. 43 withdraws the protection of the criminal law in certain circumstances, it should be strictly construed: see *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173, at p. 183.

21 Section 43 delineates who may access its sphere with considerable precision. The terms "schoolteacher" and "parent" are clear. The phrase "person standing in the place of a parent" has been held by the courts to indicate an individual who has assumed "*all* the obligations of parenthood": *Ogg-Moss*, *supra*, at p. 190 (emphasis in original). These terms present no difficulty.

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

23 I turn first to the requirement that the force be "by way of correction". These words, considered in conjunction with the cases, yield two limitations on the content of the protected sphere of conduct.

24 First, the person applying the force must have intended it to be for educative or corrective purposes: *Ogg-Moss*, *supra*, at p. 193. Accordingly, s. 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour. The purpose of the force must always be the education or discipline of the child: *Ogg-Moss*, *supra*, at p. 193.

25 Second, the child must be capable of benefiting from the correction. This requires the capacity to learn and the possibility of successful correction. Force against children under two cannot be corrective, since on the evidence they are incapable of understanding why they are hit (trial decision (2000), 49 O.R. (3d) 662, at para. 17). A child

may also be incapable of learning from the application of force because of disability or some other contextual factor. In these cases, force will not be "corrective" and will not fall within the sphere of immunity provided by s. 43.

26 The second requirement of s. 43 is that the force be "reasonable under the circumstances". The Foundation argues that this term fails to sufficiently delineate the area of risk and constitutes an invitation to discretionary *ad hoc* law enforcement. It argues that police officers, prosecutors and judges too often assess the reasonableness of corrective force by reference to their personal experiences and beliefs, rendering enforcement of s. 43arbitrary and subjective. In support, it points to the decision of the Manitoba Court of Appeal in *R. v. K. (M.)* (1992), 74 C.C.C. (3d) 108, in which, at p. 109, O'Sullivan J.A. stated that "[t]he discipline administered to the boy in question in these proceedings [a kick to the rear] was mild indeed compared to the discipline I received in my home".

27 Against this argument, the law has long used reasonableness to delineate areas of risk, without incurring the dangers of vagueness. The law of negligence, which has blossomed in recent decades to govern private actions in nearly all spheres of human activity, is founded upon the presumption that individuals are capable of governing their conduct in accordance with the standard of what is "reasonable". But reasonableness as a guide to conduct is not confined to the law of negligence. The criminal law also relies on it. The *Criminal Code* expects that police officers will know what constitutes "reasonable grounds" for believing that an offence has been committed, such that an arrest can be made (s. 495); that an individual will know what constitutes "reasonable steps" to obtain consent to sexual contact (s. 273.2(*b*)); and that surgeons, in order to be exempted from criminal liability, will judge whether performing an operation is "reasonable" in "all the circumstances of the case" (s. 45). These are merely a few examples; the criminal law is thick with the notion of "reasonableness".

28 The reality is that the term "reasonable" gives varying degrees of guidance, depending upon the statutory and factual context. It does not insulate a law against a charge of vagueness. Nor, however, does it automatically mean that a law is void for vagueness. In each case, the question is whether the term, considered in light of principles of statutory interpretation and decided cases, delineates an area of risk and avoids the danger of arbitrary *ad hoc* law enforcement.

29 Is s. 43's reliance on reasonableness, considered in this way, unconstitutionally vague? Does it indicate what conduct risks criminal sanction and provide a principled basis for enforcement? While the words on their face are broad, a number of implicit limitations add precision.

30 The first limitation arises from the behaviour for which s. 43 provides an exemption, simple non-consensual application of force. Section 43does not exempt from criminal sanction conduct that causes harm or raises a reasonable prospect of harm. It can be invoked only in cases of non-consensual application of force that results neither in harm nor in the prospect of bodily harm. This limits its operation to the mildest forms of assault. People must know that if their conduct raises an apprehension of bodily harm they cannot rely on s. 43. Similarly, police officers and judges must know that the defence cannot be raised in such circumstances.

31 Within this limited area of application, further precision on what is reasonable under the circumstances may be derived from international treaty obligations. Statutes should be construed to comply with Canada's international obligations: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 137. Canada's international commitments confirm that physical correction that either harms or degrades a child is unreasonable.

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

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

Article 19(1) requires the state party to

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

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

will seek to avoid harm to the child and will never include cruel, inhuman or degrading treatment.

33 Neither the *Convention on the Rights of the Child* nor the *International Covenant on Civil and Political Rights* explicitly require state parties to ban all corporal punishment of children. In the process of monitoring compliance with the *International Covenant on Civil and Political Rights*, however, the Human Rights Committee of the United Nations has expressed the view that corporal punishment of children in schools engages Article 7's prohibition of degrading treatment or punishment: see for example, *Report of the Human Rights Committee*, vol. I, UN GAOR, Fiftieth Session, Supp. No. 40 (A/50/40) (1995), at paras. 426 and 434; *Report of the Human Rights Committee*, vol. I, UN GAOR, Fifty-fourth Session, Supp. No. 40 (A/54/40) (1999), at para. 358; *Report of the Human Rights Committee*, vol. I, UN GAOR, Fifty-fifth Session, Supp. No. 40 (A/55/40) (2000), at paras. 306 and 429. The Committee has not expressed a similar opinion regarding parental use of mild corporal punishment.

34 Section 43's ambit is further defined by the direction to consider the circumstances under which corrective force is used. National and international precedents have set out factors to be considered. Article 3 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, forbids inhuman and degrading treatment. The European Court of Human Rights, in determining whether parental treatment of a child was severe enough to fall within the scope of Article 3, held that assessment must take account of "all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim": Eur. Court H.R., *A. v. United Kingdom*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2699. These factors properly focus on the prospective effect of the corrective force upon the child, as required by s. 43.

35 By contrast, it is improper to retrospectively focus on the gravity of a child's wrongdoing, which invites a punitive rather than corrective focus. "[T]he nature of the offence calling for correction", an additional factor suggested in *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453 (Sask. C.A.), at p. 460, is thus not a relevant contextual consideration. The focus under s. 43 is on the correction of the child, not on the gravity of the precipitating event. Obviously, force employed in the absence of any behaviour requiring correction by definition cannot be corrective.

36 Determining what is "reasonable under the circumstances" in the case of child discipline is also assisted by social consensus and expert evidence on what constitutes reasonable corrective discipline. The criminal law often uses the concept of reasonableness to accommodate evolving mores and avoid successive "fine-tuning" amendments. It is implicit in this technique that current social consensus on what is reasonable may be considered. It is

wrong for caregivers or judges to apply their own subjective notions of what is reasonable; s. 43 demands an objective appraisal based on current learning and consensus. Substantial consensus, particularly when supported by expert evidence, can provide guidance and reduce the danger of arbitrary, subjective decision making.

37 Based on the evidence currently before the Court, there are significant areas of agreement among the experts on both sides of the issue (trial decision, at para. 17). Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour. Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful. Corporal punishment which involves slaps or blows to the head is harmful. These types of punishment, we may conclude, will not be reasonable.

38 Contemporary social consensus is that, while teachers may sometimes use corrective force to remove children from classrooms or secure compliance with instructions, the use of corporal punishment by teachers is not acceptable. Many school boards forbid the use of corporal punishment, and some provinces and territories have legislatively prohibited its use by teachers: see, e.g., *Schools Act, 1997*, S.N.L. 1997, c. S-12.2, s. 42; *School Act*, R.S.B.C. 1996, c. 412, s. 76(3); *Education Act*, S.N.B. 1997, c. E-1.12, s. 23; *School Act*, R.S.P.E.I. 1988, c. S-2.1, s. 73;*Education Act*, S.N.W.T. 1995, c. 28, s. 34(3); *Education Act*, S.Y. 1989-90, c. 25, s. 36. This consensus is consistent with Canada's international obligations, given the findings of the Human Rights Committee of the United Nations noted above. Section 43 will protect a teacher who uses reasonable, corrective force to restrain or remove a child in appropriate circumstances. Substantial societal consensus, supported by expert evidence and Canada's treaty obligations, indicates that corporal punishment by teachers is unreasonable.

39 Finally, judicial interpretation may assist in defining "reasonable under the circumstances" under s. 43. It must be conceded at the outset that judicial decisions on s. 43 in the past have sometimes been unclear and inconsistent, sending a muddled message as to what is and is not permitted. In many cases discussed by Arbour J., judges failed to acknowledge the evolutive nature of the standard of reasonableness, and gave undue authority to outdated conceptions of reasonable correction. On occasion, judges erroneously applied their own subjective views on what constitutes reasonable discipline — views as varied as different judges' backgrounds. In addition, charges of assaultive discipline were seldom viewed as sufficiently serious to merit in-depth research and expert evidence or the appeals which might have permitted a unified national standard to emerge. However, "[t]he fact that a particular legislative term is open to varying interpretations by the courts is not fatal": *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*

(Man.), [1990] 1 S.C.R. 1123, at p. 1157. This case, and those that build on it, may permit a more uniform approach to "reasonable under the circumstances" than has prevailed in the past. Again, the issue is not whether s. 43 has provided enough guidance in the past, but whether it expresses a standard that can be given a core meaning in tune with contemporary consensus.

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

41 The fact that borderline cases may be anticipated is not fatal. As Gonthier J. stated in *Nova Scotia Pharmaceutical*, *supra*, at p. 639, "it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective".

42 Section 43 achieves this objective. It sets real boundaries and delineates a risk zone for criminal sanction. The prudent parent or teacher will refrain from conduct that approaches those boundaries, while law enforcement officers and judges will proceed with them in mind. It does not violate the principle of fundamental justice that laws must not be vague or arbitrary.

43 My colleague, Arbour J., by contrast, takes the view that s. 43 is unconstitutionally vague, a point of view also expressed by Deschamps J. Arbour J. argues first that the foregoing analysis amounts to an impermissible reading down of s. 43. This contention is answered by the evidence in this case, which established a solid core of meaning for s. 43; to construe terms like "reasonable under the circumstances" by reference to evidence and argument is a common and accepted function of courts interpreting the

criminal law. To interpret "reasonable" in light of the evidence is not judicial amendment, but judicial interpretation. It is a common practice, given the number of criminal offences conditioned by the term "reasonable". If "it is the function of the appellate courts to rein in overly elastic interpretations" (Binnie J., at para. 122), it is equally their function to define the scope of criminal defences.

44 Arbour J. also argues that unconstitutional vagueness is established by the fact that courts in the past have applied s. 43 inconsistently. Again, the inference does not follow. Vagueness is not argued on the basis of whether a provision has been interpreted consistently in the past, but whether it is capable of providing guidance for the future. Inconsistent and erroneous applications are not uncommon in criminal law, where many provisions admit of difficulty; we do not say that this makes them unconstitutional. Rather, we rely on appellate courts to clarify the meaning so that future application may be more consistent. I agree with Arbour J. that Canadians would find the decisions in many of the past cases on s. 43 to be seriously objectionable. However, the discomfort of Canadians in the face of such unwarranted acts of violence toward children merely demonstrates that it is possible to define what corrective force is reasonable in the circumstances. Finally, Arbour J. argues that parents who face criminal charges as a result of corrective force will be able to rely on the defences of necessity and "*de minimis*". The defence of necessity, I agree, is available, but only in situations where corrective force is not in issue, like saving a child from imminent danger. As for the defence of *de minimis*, it is equally or more vague and difficult in application than the reasonableness defence offered by s. 43.

(2) Overbreadth

45 Section 43 of the *Criminal Code* refers to corrective force against children generally. The Foundation argues that this is overbroad because children under the age of two are not capable of correction and children over the age of 12 will only be harmed by corrective force. These classes of children, it is argued, should have been excluded.

46 This concern is addressed by Parliament's decision to confine the exemption to reasonable correction, discussed above. Experts consistently indicate that force applied to a child too young to be capable of learning from physical correction is not corrective force. Similarly, current expert consensus indicates that corporal punishment of teenagers creates a serious risk of psychological harm: employing it would thus be unreasonable. There may however be instances in which a parent or school teacher reasonably uses corrective force to restrain or remove an adolescent from a particular situation, falling short of corporal punishment. Section 43 does not permit force that cannot correct or is unreasonable. It follows that it is not overbroad.

II. Does Section 43 of the *Criminal Code* Offend Section 12 of the *Charter*?

47 Section 12 of the *Charter* guarantees "the right not to be subjected to any cruel and unusual treatment or punishment". The Foundation argues that s. 43 offends s.12 by authorizing the use of corrective force against children. In order to engage s. 12, the Foundation must show both (a) that s. 43 involves some treatment or punishment by the state (*Rodriguez*, *supra*, at pp. 608-9), and (b) that such treatment is "cruel and unusual". These conditions are not met in this case.

48 Section 43 exculpates corrective force by parents or teachers. Corrective force by parents in the family setting is not treatment by the state. Teachers, however, may be employed by the state, raising the question of whether their use of corrective force constitutes "treatment" by the state.

49 It is unnecessary to answer this question since the conduct permitted by s. 43 does not in any event rise to the level of being "cruel and unusual", or "so excessive as to outrage standards of decency": *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 34. Section 43 permits only corrective force that is reasonable. Conduct cannot be at once both reasonable and an outrage to standards of decency. Corrective force that might rise to the level of "cruel and unusual" remains subject to criminal prosecution.

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

50 Section 43 permits conduct toward children that would be criminal in the case of adult victims. The Foundation argues that this distinction violates s. 15 of the *Charter*, which provides that "[e]very individual is equal before and under the law" without discrimination. More particularly, the Foundation argues that this decriminalization discriminates against children by sending the message that a child is "less capable, or less worthy of recognition or value as a human being or as a member of Canadian society": *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 51. This, it argues, offends the purpose of s. 15, to "prevent the violation of essential human dignity and freedom": *Law*, *supra*, at para. 51. Equality can be assured, in the Foundation's submission, only if the criminal law treats simple assaults on children in the disciplinary context the same as it treats simple assaults on adults.

51 The difficulty with this argument, as we shall see, is that it equates equal treatment with identical treatment, a proposition which our jurisprudence has consistently

rejected. In fact, declining to bring the blunt hand of the criminal law down on minor disciplinary contacts of the nature described in the previous section reflects the resultant impact this would have on the interests of the child and on family and school relationships. Parliament's choice not to criminalize this conduct does not devalue or discriminate against children, but responds to the reality of their lives by addressing their need for safety and security in an age-appropriate manner.

A. *The Appropriate Perspective*

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

53 Before turning to whether s. 43 is discriminatory, it is necessary to discuss the matter of perspective. The test is whether a reasonable person possessing the claimant's attributes and in the claimant's circumstances would conclude that the law marginalizes the claimant or treats her as less worthy on the basis of irrelevant characteristics: *Law*, *supra.* Applied to a child claimant, this test may well confront us with the fiction of the reasonable, fully apprised preschool-aged child. The best we can do is to adopt the perspective of the reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs. To say this, however, is not to minimize the subjective component; a court assessing an equality claim involving children must do its best to take into account the subjective viewpoint of the child, which will often include a sense of relative disempowerment and vulnerability.

B. *Is Discrimination Made Out in This Case?*

54 Against this backdrop, the question may be put as follows: viewed from the perspective of the reasonable person identified above, does Parliament's choice not to criminalize reasonable use of corrective force against children offend their human dignity and freedom, by marginalizing them or treating them as less worthy without regard to their actual circumstances?

55 In *Law*, *supra*, Iacobucci J. listed four factors helpful in answering this question: (1) pre-existing disadvantage; (2) correspondence between the distinction and the claimant's characteristics or circumstances; (3) the existence of ameliorative purposes or effects; and (4) the nature of the interest affected.

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

57 This factor acknowledges that a law that "properly accommodates the claimant's needs, capacities, and circumstances" will not generally offend s. 15(1): *Law*, *supra*, at para. 70. "By contrast, a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory": *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, at para. 37. The question in this case is whether lack of correspondence, in this sense, exists.

58 Children need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield children from psychological and physical harm. In so acting, the government responds to the critical need of all children for a safe environment. Yet this is not the only need of children. Children also depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process.

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

60 This decision, far from ignoring the reality of children's lives, is grounded in their lived experience. The criminal law is the most powerful tool at Parliament's

disposal. Yet it is a blunt instrument whose power can also be destructive of family and educational relationships. As the Ouimet Report explained:

> To designate certain conduct as criminal in an attempt to control anti-social behaviour should be a last step. Criminal law traditionally, and perhaps inherently, has involved the imposition of a sanction. This sanction, whether in the form of arrest, summons, trial, conviction, punishment or publicity is, in the view of the Committee, to be employed only as an unavoidable necessity. Men and women may have their lives, public and private, destroyed; families may be broken up; the state may be put to considerable expense: all these consequences are to be taken into account when determining whether a particular kind of conduct is so obnoxious to social values that it is to be included in the catalogue of crimes. If there is any other course open to society when threatened, then that course is to be preferred. The deliberate infliction of punishment or any other state interference with human freedom is to be justified only where manifest evil would result from failure to interfere. [Emphasis added.]
>
> (Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (1969), at pp. 12-13)

Concluding that s. 43 should not be repealed, the Law Reform Commission of Canada pointed out that repeal "could have unfortunate consequences, consequences worse than those ensuing from retention of the section", and which would "expose the family to the incursion of state law enforcement for every trivial slap or spanking". "[I]s this", it asked, "the sort of society in which we would want to live?" (Law Reform Commission of Canada, Working Paper 38, *Assault* (1984), at p. 44)

61 The trial judge in this case found that experts on both sides were agreed that only abusive physical conduct should be criminalized and that extending the criminal law to all disciplinary force "would have a negative impact upon families and hinder parental and teacher efforts to nurture children" (trial judge, at para. 17).

62 The reality is that without s. 43, Canada's broad assault law would criminalize force falling far short of what we think of as corporal punishment, like placing an unwilling child in a chair for a five-minute "time-out". The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families — a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.

63 The Foundation argues that these harms could be effectively avoided by the exercise of prosecutorial discretion. However, as the Foundation asserts in its argument on vagueness, our goal should be the rule of law, not the rule of individual

discretion. Moreover, if it is contrary to s. 15(1) for legislation to deny children the benefit of the criminal law on the basis of their age and consequent circumstances, it is equally discriminatory for a state agent (e.g., a police officer or prosecutor) to choose not to charge or prosecute on the same basis.

64 The Foundation argues that this is not the original purpose of the law and does not reflect its actual effects. In the Foundation's view, s. 43was intended, and continues, to promote the view that the use of corrective force against children is not simply permitted for the purposes of the criminal law, but laudable because it is "good for children". In making this argument, the Foundation relies upon s. 43's statement that parents and teachers are "justified" in the use of reasonable corrective force. Considering "justification" in *Ogg-Moss*, *supra*, Dickson J. (as he then was) stated that s. 43 exculpates force in the correction of the child "because it considers such an action not a wrongful, but a *rightful*, one" (p.193 (emphasis in original)). The Foundation submits that as a "justification", s. 43 necessarily identifies praise-worthy conduct.

65 In my view, this position is overstated. We cannot conclude that Parliament intended to endorse using force against children from a single word, without also considering the history and context of the provision. In our first *Criminal Code*, enacted in 1892 (S.C. 1892, c. 29), Parliament used "lawful" instead of "justified" in the analogous provision:

> **55.** It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances.

It did so even though the term "justified" appeared in other defences such as the use of force to prevent the commission of a major offence (s. 44) and self-defence (s. 45) — defences that we classically associate with moral approval. So at this time, it is clear that Parliament was not asserting the exempted force was moral or good. It was not until the 1953-54 re-enactment of the *Criminal Code* (S.C. 1953-54, c. 51) that Parliament replaced "it is lawful" with "justified". We do not know why it did so. We do know that the change was not discussed in Parliament, and that there is no indication that Parliament suddenly felt that the reasonable force in the correction of children now demanded the state's explicit moral approval. Finally, we know that the government has adopted a program designed to educate parents and caregivers on the potentially negative effects of using corporal punishment against children. Viewing s. 43 in light of its history and the larger legislative and policy context, it is difficult to conclude that Parliament intended by using the word "justify" to send the message that using force against children is "right" or "good". The essence of s. 43 is not Parliament's endorsement of the use of force against children; it is the exemption from criminal sanction for their parents and teachers in the course of reasonable correction.

66 My colleague, Binnie J., suggests that the negative impact of criminalizing minor corrective force is irrelevant to the s. 15 equality analysis and should only be considered at the stage of justifying a breach of s. 15 under s. 1 of the *Charter* (paras. 74 and 85). More particularly, he argues, at para. 100, that "[s]ection 43 protects parents and teachers, not children" (emphasis added), and therefore inquiry into the impugned laws precludes correspondence to children's needs, capacities and circumstances in the s. 15 analysis. With respect, I cannot agree. The claimants here are children. The *Law* analysis requires that the Court consider whether the limited exemption from criminal sanction for parents and teachers corresponds to the needs of children. This is a necessary step in determining whether the distinction demeans children and treats them as less worthy. We should not artificially truncate the s. 15 equality analysis because similar considerations may be relevant to justification in the event a breach of s. 15 is established.

67 Some argue that, even if the overall effect of s. 43 is salutary, for some children the effects of s. 43 will turn out to be more detrimental than beneficial. To this, two responses lie. First, where reasonable corrective force slips into harmful, degrading or abusive conduct, the criminal law remains ready to respond. Secondly, as Iacobucci J. stated in *Law*, *supra*, compliance with s. 15(1) of the *Charter* does not require "that legislation must always correspond perfectly with social reality" (para. 105). Rather,

> [n]o matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected . . .
>
> (*Gosselin*, *supra*, at para. 55)

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

IV. Conclusion

69 I would dismiss the appeal. The Canadian Foundation for Children, Youth and the Law has, on behalf of children, brought an important issue of constitutional and criminal law that was not otherwise capable of coming before the Court. This justifies deviating from the normal costs rule and supports an order that both parties bear their own costs throughout.

70 I would answer the constitutional questions as follows:

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

Answer: No.

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

Answer: It is unnecessary to decide this question.

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

Answer: No.

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

Answer: It is unnecessary to decide this question.

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

Answer: No.

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

Answer: It is unnecessary to decide this question.

The following are the reasons delivered by

71 BINNIE J. (dissenting in part) — A child is guaranteed "equal protection and equal benefit of the law" by s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Section 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, denies children the protection of the criminal law against the infliction of physical "force" that would be a criminal assault if used against an adult. The sole reason for children being placed in this inferior position is that they are children.

72 Notwithstanding these facts, my colleague, the Chief Justice, is of the view that the equality rights of the child are not infringed by s. 43because "a reasonable person acting on behalf of a child . . . would not conclude that the child's dignity has been offended in the manner contemplated by s. 15(1)" (para. 68). With all due respect to the majority of my colleagues, there can be few things that more effectively designate children as second-class citizens than stripping them of the ordinary protection of the assault provisions of the *Criminal Code*. Such stripping of protection is destructive of dignity from any perspective, including that of a child. Protection of physical integrity against the use of unlawful force is a fundamental value that is applicable to all. The "dignity" requirement, which gathered full force in this Court's judgment in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, provides a useful and important insight into the purpose ofs. 15(1), but it should not become an unpredictable side-wind powerful enough to single-handedly blow away the protection that the *Criminal Code*would otherwise provide.

73 I therefore agree with my colleague Deschamps J., albeit for somewhat different reasons, that there has been a *prima facie* infringement of children's equality rights guaranteed by s. 15(1). I would dismiss the challenges brought by the appellant under s. 7 and s. 12. "Reasonableness" is not a standard that is unconstitutionally vague (s. 7), nor would s. 43 condone corrective force that is "cruel and unusual" (s. 12).

74 My respectful disagreement with the majority opinion is not only with the narrowed scope of s. 15(1) protection, but with the technique by which this narrowing is accomplished, namely by moving into s. 15(1) a range of considerations that, in my view, ought properly to be left to government justification under s. 1. The Chief Justice states, for example, that there are good reasons for "declining to bring the blunt hand of the criminal law down on minor disciplinary contacts of the nature described in the previous section [with] the resultant impact this would have on the interests of the child and on family and school relationships" (para. 51), and that families should be protected from "the incursion of state law enforcement for every trivial slap or spanking" (para. 60). These are important matters but they are not matters that relate to equality. They relate to a justification to deny equality. These are arguments that say that in light of broader social considerations related to

the values of privacy in family life, and*despite* the infringement of the child's equality rights, a degree of parental immunity is nevertheless a reasonable limit demonstrably justified in a free and democratic society.

75 As will be seen, I would uphold s. 43 in relation to parents or those who stand in the place of parents, and in that respect dismiss the appeal. While the equality rights of the children (i.e., persons under 18 years old) are *prima facie* infringed by s. 43, I conclude that in balancing the needs of the claimants against the legitimate needs of our collective social existence, the infringement is a reasonable limit that has been justified unders. 1.

76 On the other hand, the s. 1 justification for extending parent-like protection to teachers is not convincing. In my view, the references to "schoolteacher" and "pupil" should be struck out of s. 43 and declared to be null and void.

77 I propose to organize my reasons for these conclusions under the following headings:

1. The proper interpretation of s. 43 of the *Criminal Code*;
2. The scope of s. 15(1) of the *Charter*;
3. The meaning of discrimination and the "correspondence" factor;
4. Resurgence of the "relevance" factor;
5. The violation of human dignity;
6. The s. 1 justification
   (a) in relation to parents or persons standing in the place of parents;
   (b) in relation to teachers.

1. The Proper Interpretation of Section 43 of the *Criminal Code*

78 Section 43 reads as follows:

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

79 In *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173, the Court held that the section applied in the case of force applied to "a child" which was held to mean "a person chronologically younger than the age of majority" (p. 186) which, in Ontario, pursuant to the *Age of Majority and Accountability Act*, R.S.O. 1990, c. A.7, s. 1, is 18 years.

80 As will be discussed, the assault provisions of the *Criminal Code* are extremely broad. In addition to the obvious purpose of maintaining public order, the prohibition of assault and battery has been considered since the time of Blackstone to protect the "sacred" right of everyone to physical inviolability:

> . . . the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.
>
> (W. Blackstone, *Commentaries on the Laws of England*, Book III, 1768, at p. 120)

More recently, it was stated in this Court:

> Clearly, the purpose of the assault scheme is much broader than just the protection of persons from serious physical harm. The assault scheme is aimed more generally at protecting people's physical integrity.
>
> (*R. v. Cuerrier*, [1998] 2 S.C.R. 371, L'Heureux-Dubé J. concurring, at para. 11)

81 The majority read significant limitations into the scope of s. 43 protection, concluding that it provides no defence or justification where force is used (i) against children under two, or (ii) against children of any age suffering a disability, or (iii) that "causes harm or raises a reasonable prospect of harm" to children of two years or older, or (iv) that is degrading to children two years or older, or (v) that constitutes corporal punishment of teenagers, or (vi) that includes the use of objects such as a belt on any child of whatever age, or (vii) which involves slaps or blows to the head. Such an interpretive exercise, gearing itself off the references in s. 43 to "correction" and "reasonable under the circumstances", introduces a series of classifications and sub-classifications which are helpful to the protection of children, but do not relieve a court from the statutory direction to consider what is reasonable in all the circumstances. The accused, too, is entitled to receive the full protection that the s. 43 defence, fairly interpreted, allows. Moreover, my colleagues' differentiation between the type of protection given to teachers from that given to parents,

and the confinement of protection of teachers to matters affecting order in the schools as opposed to more general "correction", could be seen as going beyond a definition of "the scope of criminal defences" (reasons of the Chief Justice, at para. 43) and pushing the boundary between judicial interpretation and judicial amendment.

82 Nevertheless, as my disagreement with the majority relates to the interpretation of s. 15(1) of the *Charter*, rather than statutory interpretation, these reasons will focus on s. 15(1) and its relationship to s. 1. The interpretation of s. 43 offered by the Chief Justice still leaves considerable scope for "corporal punishment" of children between 2 and 12, including "sober, reasoned uses of force" (para. 24) and "corrective force to restrain or remove an adolescent [i.e., 12 to 18 years old] from a particular situation, falling short of corporal punishment" (para. 46). Section 43, thus interpreted, still withholds from children protection of their physical integrity in circumstances where the amount of force used would be criminal if used against an adult.

2. The Scope of Section 15(1) of the *Charter*

83 The legislative history of s. 15 is of some interest here. As originally proposed, what is now s. 15(1) was more tightly circumscribed. The original draft provided:

> *Non-discrimination Rights*
>
> Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.
>
> (*The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada* (1980), at p. 20)

84 As a result of the deliberations of the Special Joint Committee of the Senate and of the House of Commons on the Constitution, s. 15(1)as recommended and ultimately adopted had blossomed into a full equality rights clause:

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

The addition of the words "and, in particular" was seemingly designed to bifurcate the section, thereby liberating the first branch (the broad equality right) from the confines of the second branch (the traditional grounds of prohibited discrimination). Thus there were some early judicial efforts to measure legislative classifications against the principles of equal protection and equal benefit of the law even where the ground of distinction did notrelate to an enumerated or analogous ground: see, e.g., *Streng v. Township of Winchester*, (1986), 31 D.L.R. (4th) 734 (Ont. H.C.);*Jones v. Ontario (Attorney General)*, (1988), 65 O.R. (2d) 737 (H.C.); and *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373 (Nfld. S.C. (T.D.)). This Court, in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, concluded that a narrower view of s. 15(1) would best fulfill its purpose. McIntyre J. identified differential treatment on the basis of the listed or analogous personal characteristics as an essential condition precedent to s. 15(1) relief. However wise that interpretation, based as much as anything on the judiciary's reluctance to accept an invitation to second-guess Parliament on every legislative classification, irrespective of the ground giving rise to the distinction, *Andrews* nevertheless had the effect of narrowing the potential constituency ofs. 15(1) claimants. Complainants who argued generally about unequal treatment were held not to be covered. A claimant had to identify a particular basis for the unequal treatment and show that the basis thus identified resided in a personal characteristic, either listed in s. 15(1) or analogous to those that were listed.

85 We should be careful in this case not to additionally circumscribe s. 15(1) protection by burdening those who still remain within its coverage with making proof of matters (sometimes proof of a negative) that ought to be dealt with by governments by way of justification under s. 1.

3. The Meaning of Discrimination and the "Correspondence" Factor

86 In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 110, a majority of the Court summarized the approach to s. 15(1) claims as follows:

> It is now clearly established that the [equality] analysis proceeds in three stages with close regard to context. At the first stage the claimant must show that the law, program or activity imposes differential treatment between the claimant and others with whom the claimant may fairly claim equality. The second stage requires the claimant to demonstrate that this differentiation is based on one or more of the enumerated or analogous grounds. The third stage requires the claimant to establish that the differentiation amounts to a form of discrimination that has the effect of demeaning the claimant's human dignity. The "dignity" aspect of the test is designed to weed out trivial or other complaints that do not engage the purpose of the equality provision.

See also *Law*, *supra*, at para. 39, and *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, at para. 17.

87 The Crown concedes that a formal distinction is made in s. 43 on the basis of age, viz., an enumerated ground. However, as the cases have held, distinctions made on enumerated or analogous grounds do not necessarily amount to discrimination. The debate, therefore, shifts to whether the distinction made in s. 43 amounts, in law, to discrimination.

88 The nature of the children's interest, physical integrity, clearly warrants constitutional protection.

89 There is no doubt, in my view, that s. 43 is caught by the definition of discrimination given by McIntyre J. in *Andrews*, *supra*, at pp. 174-75:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Applying this definition to s. 43, it cannot be disputed that s. 43 intentionally withholds from children the benefit available to everyone else (i.e., adults) of the protection of the assault provisions of the *Criminal Code* in the circumstances therein contemplated, and that the only reason for this withholding is that they are children. Protection of the *Criminal Code* is an advantage. Applying the *Andrews* test as originally laid down, therefore, I believe the claimant has established a *prima facie* breach of s. 15(1).

90 In *Law*, this Court, speaking through Iacobucci J., expressly endorsed the *Andrews* test (paras. 22 and 26), but also went on to synthesize the subsequent case law into a series of propositions designed to add structure to the s. 15(1) analysis. This included the identification of four contextual factors as markers for distinctions that amount to discrimination, "although", as Iacobucci J. pointed out, "there are undoubtedly others, and not all four factors will necessarily be relevant in every case" (para. 62). The purpose of the contextual factors is to focus attention on the impact of the impugned law — how "severe and localized the . . . consequences [are] on the affected group" (see *Gosselin*, *supra*, at para. 63, citing *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 63).

91 The Chief Justice agrees that three of these four contextual factors point to discrimination in this case, including (i) the pre-existing disadvantage, vulnerability, stereotyping or prejudice directed at children, (ii) the nature and scope of the children's interests affected, namely their physical integrity, and (iii) the fact that s. 43 does not have an ameliorative purpose or effect for a more disadvantaged group. In my colleague's view, these markers of discrimination are outweighed by the importance of the fourth "contextual factor", i.e., the alleged correspondence between the actual needs and circumstances of children and the diminished protection they enjoy under s. 43. In her view, the objective of substantive equality (as distinguished from formal equality) justifies the differential treatment of children.

92 I agree with my colleague that the first three "contextual factors" support a finding of discrimination. I also agree with Iacobucci J. in *Law*that not every factor is relevant in every case. Not every "contextual factor" will point in the same direction, and judgment is required to weigh up the importance of different elements of the context in a particular case.

93 The factor of "correspondence" presents special difficulty because of its potential overlap with s. 1. It was described by Iacobucci J. in*Law*, at para. 70, as follows:

> . . . it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances. [Emphasis added.]

To some extent, the "correspondence" factor was also anticipated in *Andrews* by McIntyre J. when he said, at p. 169:

> [T]he accommodation of differences . . . is the essence of true equality. . . .

94 The "correspondence" factor was also considered in *Eaton v. Brant County Board of Education*, [1997] 1S.C.R. 241, where a disabled child was placed, against her parents' wishes, in a special education class. The Court declined to find that special classes for persons with special disabilities amounted to discrimination. There was a reasonable match between the differential treatment (special classes) and the ground of alleged discrimination (disability), even though special classes undermined achievement of the

objective of inclusion. This was outweighed in the circumstances by the fact the special classes were in purpose and effect ameliorative of the young girl's condition.

95 The "correspondence" between grounds and the claimant group's characteristics or circumstances was also a factor supporting the Court's decision in *Gosselin*, *supra*, that use of a training component in a welfare scheme for recipients under 30 was not discriminatory. The majority held that, "[p]erfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required" to comply with the *Charter* (para. 55). The "polycentric" balancing inherent in formulation of social benefit schemes appears to have played some role in*Gosselin* as it did in the earlier case of *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1S.C.R. 703, 2000 SCC 28. More recently, in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2S.C.R. 504, 2003 SCC 54, the Court struck down the separate legislative treatment of injured workers suffering from chronic pain who were denied the regular benefits provided to other disabled workers, but instead were provided a four-week Functional Restoration Program, beyond which no further benefits were available. Gonthier J., writing for the Court, held at para. 91 that "in my view, the gravamen of the appellants' s. 15 claim is the lack of correspondence between the differential treatment imposed by the [*Workers' Compensation Act*] and the true needs and circumstances of chronic pain sufferers" (referring to *Law*, *supra*, at paras. 64-65).

96 In these cases, it seems to me, the "correspondence" factor was appropriately used to determine if the legislative distinction reflected equal consideration of people even though, at the end of the day, equal consideration resulted in unequal treatment.

4. Resurgence of the "Relevance" Factor

97 Care must be taken, however, to ensure that the "correspondence" factor is kept to its original purpose as a marker for discrimination and not allowed to become a sort of Trojan horse to bring into s. 15(1) matters that are more properly regarded as "reasonable limits . . . demonstrably justified in a free and democratic society" (s. 1).

98 In particular, there is a danger that the "correspondence" factor will revive the "relevance" debate of the 1990s in which it was contended by some members of the Court that a s. 15(1) rights claimant could be defeated if it were shown that the ground of complaint was "relevant" to achievement of a legitimate legislative objective. This position was advanced by Gonthier J., dissenting, in *Miron v. Trudel*, [1995] 2 S.C.R. 418, where he suggested, at para. 15:

> This third step thus comprises two aspects: determining the personal characteristic shared by a group and then assessing its relevancy having regard to the functional values underlying the legislation. [Emphasis added.]

The issue in that case was whether common law spouses should be treated the same as married spouses for insurance purposes. In effect, as the onus of proof of an infringement of s. 15(1) lies on the claimants, they were put in the position of having to show that marriage was irrelevant to achievement of the legislative objective. In Gonthier J.'s view, that objective was to promote the benefits of marriage, and achievement of this objective was "relevant" to its denial of the rights of unmarried couples, and s. 15(1) was not therefore infringed. McLachlin J. (as she then was) in her majority reasons, gave the "relevance" point short shrift (at para. 137):

> Relevance as the ultimate indicator of non-discrimination suffers from the disadvantage that it may validate distinctions which violate the purpose of s. 15(1). A second problem is that it may lead to enquiries better pursued under s. 1.

99 In my view, the same answer should be given to the argument here that, because children have certain vulnerabilities that "correspond" to (or are relevant to) s. 43's denial of ordinary *Criminal Code* protection, then no discrimination is made out.

100 While the child needs the family, the protection of s. 43 is given not to the child but to the parent or teacher who is using "reasonable" force for "correction". Section 43 protects parents and teachers, not children. A child "needs" no less protection under the *Criminal Code* than an adult does. That is why, in my view, the social justification for the immunity of parents and teachers should be dealt with under s. 1.

101 The majority view denies equality relief to persons under 18 years old in this case because of the role and importance of family life in our society. However, to proceed in this way, it seems to me, just incorporates the "legitimate objective" element from the s. 1 *Oakes* test into s. 15, while incidentally switching the onus to the rights claimant to show the legislative objective is not legitimate, and relieving the government of the onus of demonstrating proportionality, including minimal impairment (*R. v. Oakes*, [1986] 1 S.C.R. 103). One of the stated objectives of *Andrews* was to keep s. 15(1) and s. 1 analytically distinct. Use of the "correspondence" factor in the wrong circumstances risks breaching that divide.

102 I do not accept that the use of force against a child (that in the absence of s. 43 would result in a criminal conviction) can be said to "correspond" to a child's "needs, capacities and circumstances" from the vantage point identified by the Chief Justice, namely, that of a "reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs" (para. 53 (emphasis added)). I have difficulty with the proposition that a child "needs" correction through conduct that, but for s. 43, amounts to a criminal assault that exceeds the *de minimis* threshold. (If the use of force falls below the *de minimis* standard, then, as Arbour J. points out, there is an alternative defence available to the accused and no need to resort to s. 43.)

103 As to tailoring the distinction to fit a child's "capacities and circumstances", the words "pupil or child" embrace the whole range of human development from birth to 18 years of age. It is difficult to generalize about the "capacities and circumstances" of such a disparate group of people. A 2-year-old and a 12-year-old (let alone a 17-year-old) do not share the same needs, have enormously different capacities and deal with the world in very different circumstances. The fact the Chief Justice finds it necessary to undertake an interpretive exercise that reads into s. 43 multiple sub-classifications of children (according to age) and assaultive behaviour (according to type) shows that a "one size fits all" approach to the "needs, capacities and circumstances" of children does not fit reality. Such an extensive "reading in" exercise, if appropriate, should take place only after an infringement of s. 15(1) is acknowledged, and the Court turns to the issue of the s. 1 justification and the appropriate remedy.

104 In short, I disagree with the view of the majority that s. 43 is "firmly grounded in the actual needs and circumstances of children" (para. 68). I believe the error in this approach is evident, with respect, from the following excerpts from the judgment of the Chief Justice, at paras. 58-60:

> Children . . . depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process.
>
> . . . Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them. . . .
>
> . . . The criminal law . . . is a blunt instrument whose power can also be destructive of family and educational relationships. . . .

105 Accelerating these societal considerations into the s. 15(1) analysis, instead of requiring the government to establish such matters as "reasonable limits" under s. 1, inappropriately denies children the protection of their right to equal treatment.

5. The Violation of Human Dignity

106 The Court has repeatedly stated 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.
>
> (*Law*, *supra*, at para. 51, and *Gosselin*, *supra*, at para. 20)

The concept of "human dignity" is somewhat elusive, but nevertheless expresses an essential part of the purpose of s. 15(1). It seeks to avoid the mechanical application of the s. 15 analysis to distinctions that do not, appropriately viewed, raise a compelling human rights dimension. This is illustrated, as mentioned earlier, by the Canada Pension Plan cases. The state is required to value each of its citizens equally, but equal *consideration* of the personal characteristics and strengths of each individual may, in the circumstances of government benefit programs, dictate differential *treatment*. This is hardly the case here. Few things are more demeaning and disrespectful of fundamental values than to withdraw the full protection of the *Criminal Code* against deliberate, forcible, unwanted violation of an individual's physical integrity.

107 I agree entirely with the conclusion of the author of a report entitled "Corporal Punishment as a Means of Correcting Children" (November 1998) by the Quebec Commission des droits de la personne et des droits de la jeunesse (at p. 8):

> Corporal 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.

108 Reference should also be made to the analysis of Peter Newell, a witness for the appellants and the author of *Children Are People Too: The Case Against Physical Punishment* (1989), who wrote, at pp. 2 and 4:

> Childhood, too, is an institution. Society, even in those areas like education which are supposedly for the benefit of children, remains unsympathetic to

> them. All too often children are treated as objects, with no provision made for hearing their views or recognising them as fellow human beings. Children — seen but not heard — face the double jeopardy of discrimination on grounds of age, and discrimination on all the other grounds as well. Giving legal sanction to hitting children confirms and reflects their low status.
>
> . . .
>
> The basic argument is that children are people, and hitting people is wrong.

109 Everyone in society is entitled to respect for their person, and to protection against physical force. To deny this protection to children at the hands of their parents, parent-substitutes and teachers is not only disrespectful of a child's dignity but turns the child, for the purpose of the *Criminal Code*, into a "second-class citizen" (*Ogg-Moss*, at p. 187). As Iacobucci J. noted in *Law*, at para. 53:

> Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

110 It should not be suggested that because, as Peter Newell notes, a child may not enjoy much dignity anyway in the home or classroom, he or she can be whacked with impunity "by way of correction".

111 I therefore agree with my colleague, Deschamps J., that s. 43 discriminates against children and infringes their equality rights. The onus falls on the government to justify it.

6. The Section 1 Justification

112 Parents and teachers play very different roles in a child's life and there is no reason why they should be treated on the same legal plane for the purposes of the criminal assault provisions of the *Criminal Code*.

(a) *In Relation to Parents or Persons Standing in the Place of Parents*

113 While s. 43 infringes a child's s. 15 equality rights by making a distinction that discriminates on the basis of age, it is nonetheless evident that the effect of giving the *Criminal Code* a larger role in the home would be profound. The heavy machinery of the criminal courts is not designed to deal with domestic disputes of the type envisaged in s. 43. The definition of assault in s. 265 is extremely broad. Parliament could reasonably conclude that the intervention of the police or criminal courts in a child's home in respect of "reasonable" correction would inhibit rather than encourage the resolution of problems within families. Such an outcome could be judged unacceptable, not because the child's equality rights are without importance, but because the intervention of the criminal law in the home in the limited circumstances set out in s. 43 comes at too high a cost.

114 It is scarcely necessary to cite authority for the importance of the family in Canadian law. In *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para. 72, L'Heureux-Dubé J. noted that parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 76, Lamer C.J. pointed out that parents are presumed to act in their child's best interests: "Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship."

115 These affirmations of the importance of family relationships need to be considered in light of the sweeping definition of assault in s. 265 of the *Criminal Code* which makes it an offence for a person, without the consent of another person, to apply "force intentionally to that other person, directly or indirectly", or even to *threaten* to do so if he or she has a "present ability to effect his purpose". The s. 1 justification for the "spanking defence" is very much a function of the immense breadth of the definition of criminal assault. One need only pause to reflect on the type of threats routinely issued by Canadian parents to their children in the heat of family altercations. Adolescent or pre-adolescent behaviour occasionally results in physical touching by the parent, unwanted by the child, or the threat thereof, and where reasonable and for the purpose of correction, this type of "assault" could justifiably be seen by Parliament as outside the appropriate sphere of criminal prosecution.

116 Section 265 is very broad on its face and it has been interpreted broadly, because, as pointed out in Blackstone, *supra*, at p. 120, it has always been considered unworkable to draw a principled distinction between "degrees of violence". Professor Ashworth adds:

> Is it right that the criminal law should extend to mere touchings, however trivial? The traditional justification is that there is no other sensible dividing line,

> and that this at least declares the law's regard for the physical integrity of citizens.
>
> (A. Ashworth, *Principles of Criminal Law* (4th ed. 2003), at p. 319)

117 This near-zero tolerance (i.e., subject to the *de minimis* principle) for physical intervention continues to be the law, although in *R. v. Jobidon*, [1991] 2 S.C.R. 714, Gonthier J. suggested that, in the family context, the law of assault should have a more nuanced application. Otherwise, he said, at pp. 743-44:

> . . . a father would assault his daughter if he attempted to place a scarf around her neck to protect her from the cold but she did not consent to that touching, thinking the scarf ugly or undesirable. . . . That absurd consequence could not have been intended by Parliament.

118 We are not asked in this case to establish the threshold for a criminal "assault" in the family context, or whether the unwanted touching in Gonthier J.'s example could be said to be "by way of correction". Section 43 presupposes the existence of conduct that does amount to a criminal assault. Section 265 would clearly be triggered by much of the non-violent physical contact that is not out of place growing up in a robust family environment. The appellant points to some other jurisdictions like Sweden, which do without a parental defence provision equivalent to s. 43; but Sweden, at least, has a very different criminal law regime applicable to physical assaults.

119 Section 1 requires a government to show that the objective of the legislation is pressing and substantial. Government must also establish that the means chosen to attain the end are reasonable; this requires showing that: (i) the rights violation is rationally connected to the aim of the legislation, (ii) the impugned provision minimally impairs the *Charter* guarantee, and (iii) there is proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right (*Egan*, *supra*, at para. 182; *Oakes*, *supra*). In addition, the deleterious effects of the measure must not outweigh its benefits: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878.

120 I agree with Goudge J.A. ((2002), 57 O.R. (3d) 511, at para. 59) that the objective of the legislation is pressing and substantial insofar as it permits parents or persons standing in the place of parents

> to apply strictly limited corrective force to children without criminal sanctions so that they can carry out their important responsibilities to train and nurture

> children without the harm that such sanctions would bring to them, to their tasks and to the families concerned.

However, I do not agree with Goudge J.A. that this justification extends to teachers as well.

121 Providing a defence to a criminal prosecution in the circumstances stated in s. 43 is rationally connected to the objective of limiting the intrusion of the *Criminal Code* into family life.

122 As to minimal impairment, the wording of s. 43 not only permits calibration of the immunity to different circumstances and children of different ages, but it allows for adjustment over time. In this respect, the Crown's expert, Nicholas Bala, stated:

> In the past, the use of belts, straps, rulers, sticks and other similar objects to deliver a punishment was commonly accepted, both by society and the courts, as reasonable in the chastisement of children. Today, most courts hold that, in most circumstances, the use of these objects is excessive. As well, previously, courts have considered punishment causing temporary pain lasting a few days, but without permanent injury, to be reasonable. Today's courts scrutinize the level of pain, bruises, red marks and other signs of temporary harm carefully. In most cases, when they find that a child has suffered some injury, the teacher, parent or person taking the place of a parent is convicted of assault.

In the past, as Arbour J. demonstrates in her reasons, the elasticity of s. 43 has led to acquittals in some quite shocking circumstances. However, in my view, it is the function of the appellate courts to rein in overly elastic interpretations that undermine the limited purpose of s. 43, which is what the interpretive guidance offered by the Chief Justice is designed to do, provided the courts stop short of judicial amendment.

123 Once the legislative objective is found to be pressing and substantial, I think the proportionality requirements are met by Parliament's limitation of the s. 43 defence to circumstances where: (i) the force is for corrective purposes, and (ii) the measure of force is shown to be reasonable under the circumstances. What is reasonable in relation to achievement of the legitimate legislative objective will not, by definition, be disproportionate to such achievement. Moreover, the salutary effects of s. 43 exceed its potential deleterious effects when one considers that the assault provisions of the *Criminal Code* are just a part, and perhaps a less important part, of the overall protections afforded to children by child welfare legislation. I note, for example, the testimony of Allan Simpson, a Sergeant with the Toronto Police Service, that:

> Whether in any particular circumstance a charge is laid *or not*, the Children's Aid Society is normally contacted, when they have not been the first to investigate the circumstances. The primary consideration is always the safety and well-being of the child. [Emphasis in original.]

124 To deny children the ability to have their parents, or persons standing in their parents' place, to be successfully prosecuted for reasonable corrective force under the *Criminal Code* does not leave them without effective recourse. It just helps to keep the family out of the criminal courts. In my view, s. 43 in relation to parents and persons standing in their place is justified on this basis.

(b) *The Application of Section 1 in Relation to Teachers*

125 The extension of s. 43 protection to teachers has not been justified under the s. 1 test. It is argued that the legislative objective in the case of teachers echoes the policy reasons applicable to parents, but the logic for keeping criminal sanctions out of the schools is much less compelling than for keeping them out of the home. Compared with a family, a teacher's commitment to a particular child is typically of a different order and for a more limited period of time. While at one time teachers were regarded as parent-type figures, s. 43 itself draws a distinction between a "person standing in the place of a parent" and a teacher. Less harm may flow from discipline inflicted by a parent who typically shares a loving relationship with the child. The pupil-teacher relationship is closer to the master-apprentice relationship for which s. 43 protection was abolished by Parliament in 1955 (see S.C. 1953-54, c. 51, s. 43).

126 The evidence is that most teachers do not favour the use of force in schools for "correction". Their point is that there is a need to maintain order in schools, and keeping order may involve unwanted touching, such as "sitting" down an obstreperous child, or marching belligerents off to the principal's office.

127 The question is whether the undoubted need to keep order in schools justifies the s. 43 exemption of teachers from the assault provisions of the *Criminal Code*. The Law Reform Commission of Canada recommended the repeal of the s. 43 defence for school teachers, stating that the ultimate sanction should be the removal of a child from school, not corporal punishment: Law Reform Commission of Canada, Working Paper 38,*Assault* (1984), at p. 44. A number of countries have abolished or modified similar legislative immunities for teachers: see, e.g., s. 47 of the British*Education (No. 2) Act 1986* (U.K.), 1986, c. 61; s. 59 of the New Zealand *Crimes Act 1961* (N.Z.), 1961, No. 43; and s. 139A of the New Zealand *Education Act 1989* (N.Z.), 1989, No. 80.

128 While I accept that order in the schools is a legitimate objective, I do not think that giving non-family members an immunity for the criminal assault of children "by way of correction" is a reasonable or proportionate legislative response to that problem. The attempt to save the constitutionality of s. 43 by rewriting it to distinguish between parents and teachers and carving out school order from the more general subject matter of "correction" is, in my view, a job for Parliament. In short, s. 43 does not minimally impair the child's equality right, and is not a proportionate response to the problem of order in the schools.

7. Disposition

129 I would therefore uphold the validity of s. 43 in relation to parents and persons standing in the place of a parent, but declare it unconstitutional insofar as it extends to teachers. To that extent, the appeal should be allowed.

130 I would answer the constitutional questions as follows:

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

Answer: No.

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

Answer: It is unnecessary to decide this question.

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

Answer: No.

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

Answer: It is unnecessary to decide this question.

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

Answer: Yes.

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

Answer: Yes in relation to parents and persons standing in the place of parents. No in relation to teachers.

The following are the reasons delivered by

ARBOUR J. (dissenting) —

I. Introduction

131 This appeal raises the constitutional validity of s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, which justifies the reasonable use of force by way of correction by parents and teachers against children in their care. Although I come to a conclusion which may not be very different from that reached by the Chief Justice, I do so for very different reasons. The Chief Justice significantly curtails the scope of the defence of s. 43 of the*Code*, partly on the basis that s. 43 should be strictly construed since it withdraws the protection of the criminal law in certain circumstances. According to her analysis, s. 43 can only be raised as a defence to a charge of simple (common) assault; it applies only to corrective force, used against children older than two but not against teenagers; it cannot involve the use of objects, and should not consist of blows to the head; and it should not relate to the "gravity" of the conduct attracting correction.

132 With respect, in my opinion, such a restrictive interpretation of a statutory defence is inconsistent with the role of courts *vis-à-vis* criminal defences, both statutory and common law defences. Furthermore, this restrictive interpretation can only be arrived at if dictated by constitutional imperatives. Canadian courts have not thus far understood the concept of reasonable force to mean the "minor corrective force" advocated by the Chief Justice. In my view, the defence contained in s. 43 of the *Code*, interpreted and applied inconsistently by the courts in Canada, violates the constitutional rights of children to safety and security and must be struck down. Absent action by Parliament, other existing common law defences, such as the defence of necessity and the "*de minimis*" defence, will suffice to ensure that parents and teachers are not branded as criminals for their trivial use of force to restrain children when appropriate.

133 Section 43 of the *Code* justifies the use of force by parents and teachers by way of correction. The force that is justified is force that is "reasonable under the circumstances". The section does not say that forcible correction is a defence only to common assault. Nor has it been understood to be so restrictive: see *R. v. Pickard*, [1995] B.C.J. No. 2861 (QL) (Prov. Ct.); *R. v. G.C.C.* (2001), 206 Nfld. & P.E.I.R. 231 (Nfld. S.C.

(T.D.)); *R. v. Fritz*, (1987), 55 Sask. R. 302 (Q.B.); *R. v. Bell*, [2001] O.J. No. 1820 (QL) (S.C.J.); and *R. v. N.S.*, [1999] O.J. No. 320 (QL) (Gen. Div.), where s. 43 was successfully raised as a defence against charges of assault with a weapon and/or assault causing bodily harm.

134 In the *Code*, the justifiable use of force may be advanced as a defence against a wide range of offences that have at their origin the application of force. These offences range from common assault, to assault causing bodily harm and eventually to manslaughter. Where, for example, a civilian performs a lawful arrest, the force used may be justified (see *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3, 2003 SCC 38, at para. 34) even though it causes "hurt or injury . . . that is more than merely transient or trifling in nature" (s. 2 of the *Code*), thereby exonerating the accused from what would otherwise be an assault causing bodily harm.

135 In the case at bar, the critical inquiry turns on the meaning of the phrases "force by way of correction" and "reasonable under the circumstances" (s. 43 of the *Code*). To say, as the Chief Justice does, that this defence cannot be used to justify any criminal charge beyond simple assault, that the section cannot justify the use of corrective force against a child under 2 or against a teenager, and that force is never reasonable if an object is used, is a laudable effort to take the law where it ought to be. However, s. 43 can only be so interpreted if the law, as it stands, offends the Constitution and must therefore be curtailed. Absent such constitutional constraints, it is neither the historic nor the proper role of courts to enlarge criminal responsibility by limiting defences enacted by Parliament. In fact, the role of the courts is precisely the opposite.

136 Setting aside any constitutional considerations for the moment, courts are expressly prohibited by s. 9 of the *Code* from creating new common law offences. All criminal offences must be enacted by statute. On the other hand, the courts have been and continue to be the guardians of common law defences. This reflects the role of courts as enforcers of fundamental principles of criminal responsibility including, in particular, the fundamental concept of fault which can only be reduced or displaced by statute.

137 Our recent decision in *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 SCC 24, exemplifies this classical and sound approach. *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173, can be considered an exception because it curtailed a statutory defence, yet, as I will attempt to demonstrate below, it still failed to achieve a constitutionally acceptable result.

138 In this case, we have been asked to either curtail or abolish altogether a defence created by Parliament. If we are to do this, as I believe we must, it should be for higher constitutional imperatives. Absent a finding of a constitutional violation by Parliament, the reading down of a statutory defence as is done by the Chief Justice amounts to, in my respectful opinion, an abandonment by the courts of their proper role in the criminal process.

139 Courts, including this Court, have until now properly focussed on what constitutes force that is "reasonable under the circumstances". No pre-emptive barriers have been erected. Nothing in the words of the statute, properly construed, suggests that Parliament intended that some conduct be excluded at the outset from the scope of s. 43's protection. This is the law as we must take it in order to assess its constitutionality. To essentially rewrite it before validating its constitutionality is to hide the constitutional imperative.

140 The role of the courts when applying defences must be contrasted with the role of courts when they are called upon to examine the constitutional validity of criminal offences. In such cases, it is entirely appropriate for the courts to interpret the provisions that proscribe conduct in a manner that least restricts "the liberty of the subject", consistent with the wording of the statute and the intent of Parliament. This is what was done in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, for example. But such a technique cannot be employed to restrict the scope of statutory defences without the courts compromising the core of their interplay with Parliament in the orderly development and application of the criminal law.

141 In the end, I will conclude, not unlike the Chief Justice, that the use of corrective force by parents and teachers against children under their care is only permitted when the force is minimal and insignificant. I so conclude not because this is what the *Code* currently provides but because it is what the Constitution requires.

II. Analysis

142 Before turning to the constitutional challenge brought before us by the Canadian Foundation for Children, Youth and the Law (the "Foundation"), we must expose the current state of the law in Canada on the use of force against children by way of correction. Section 43 of the*Code*, under the heading "Protection of Persons in Authority", provides that:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case

may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

143 Section 43 is situated among many other sections of the *Code* which justify the use of force in a variety of circumstances: s. 27 justifies the use of reasonable force to prevent the commission of an offence; s. 30 justifies the reasonable use of force to prevent a breach of the peace; s. 32 justifies the use of reasonable force to suppress a riot; s. 34 justifies the use of force in self-defence against an unprovoked assault; s. 35 justifies the use of force in self-defence in the case of aggression; s. 37 justifies the use of force in defence of oneself to prevent assault; s. 39 justifies the use of force in defence of personal property with a claim of right; s. 40 justifies the use of force in preventing any person from forcibly breaking into a dwelling-house; and s. 41 justifies the use of force in preventing any person from trespassing on a dwelling-house or real property.

144 As I indicated earlier, s. 43 may be relied on in defence of any charge which stems from the use of force. Section 265(1) of the *Code*defines assault in the following terms:

> **265.** (1) A person commits an assault when
>
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
>
> (*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

The application of the assault provision reads:

> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

145 This definition becomes the foundation for the prohibition of a range of offences that have as their central feature the non-consensual use of force, with aggravating circumstances or consequences. For example, assault with a weapon or assault causing bodily harm (which includes psychological harm — *per* Cory J. in *R. v. McCraw*, [1991] 3 S.C.R. 72, at p. 81) is defined under s. 267 of the *Code* as:

> **267.** Every one who, in committing an assault,
> (*a*) carries, uses or threatens to use a weapon or an imitation thereof, or
>
> (*b*) causes bodily harm to the complainant,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Section 2 of the *Code* defines bodily harm as: "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". Eventually, the application of non-consensual force can lead to homicide: murder, if accompanied by an intention to kill, or manslaughter if death is caused by an unlawful act such as an assault.

146 In many instances Parliament has explicitly foreclosed the application of certain defences to certain charges. This is so, for example, with respect to the defence of provocation in s. 232 of the *Code*. Provocation is only available as a defence to murder and not to any other offence (*R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.). By contrast, Parliament has not explicitly limited the defence under s. 43 to certain offences. Therefore the use of corrective force against children by parents and teachers is justified, even though it may cause bodily harm, as defined in s. 2 of the*Code*, if it is reasonable under the circumstances.

147 It was noted in *Pickard*, *supra*, at para. 16, that "it is at least theoretically possible to cause bodily harm with reasonable force". Indeeds. 43 has been raised successfully in defence of more than mere common assault (see para. 133).

148 Parliament has not dictated *a priori* that uses of force will never be reasonable in any circumstances. The statutory framework is one that leaves the appreciation of reasonableness to the courts to develop on a case-by-case basis as the myriad of live circumstances are brought before the courts or are screened out by prosecutorial discretion. This is not a novel approach either in the law generally or within the criminal law context where reasonableness often plays a crucial part in the determination of criminal responsibility. Appellate courts review findings of reasonableness, or the lack thereof, while remaining generally attuned to the reality that reasonableness is intensely fact-specific. This is reflected in the broad expression "reasonable under the circumstances" which has precluded, until today, the demarcation, at the outset, of some sets of circumstances as unreasonable in all cases (e.g., "use of objects or blows or slaps to the head" as described by the Chief Justice, at para. 40).

149 In light of the framework established by Parliament for the s. 43 defence, we must now examine its application by the courts to date.

150 Two cases have been heralded as the most important in establishing parameters for the interpretation of s. 43. This Court in *Ogg-Moss*,*supra*, at p. 183, has stated that s. 43 must be strictly construed because it has the effect of depriving individuals or groups of equal protection under the criminal law, specifically the right to be free from unconsented invasions of physical security or dignity. In *Ogg-Moss*, *supra*, the Court provided additional guidance with regard to one of the two key definitional aspects of s. 43, the requirement that force be used "by way of correction". In Dickson J.'s view (as he then was), force administered "by way of correction" requires that the person applying the force intends it for corrective purposes and that the child at whom the force is directed is capable of learning.

151 The scope of the second key aspect of the provision, "reasonable under the circumstances", is much more difficult to determine. Indeed, the Saskatchewan Court of Appeal's attempt at interpreting this phrase in *R. v. Dupperon* , (1984), 16 C.C.C. (3d) 453, is perhaps the most frequently cited case on the parameters of reasonableness under s. 43. In *Dupperon*, at p. 460, the Court of Appeal set out some factors to guide the determination of whether force exceeds what is reasonable under the circumstances. The factors, which are to be considered from both an objective and subjective standpoint, are:

- the nature of the offence calling for correction;
- the age and character of the child;
- the likely effect of the punishment on this particular child;
- the degree of gravity of the punishment;
- the circumstances under which the punishment was inflicted; and
- the injuries, if any, suffered.

The Court of Appeal added that if the child suffered injuries which may endanger life, limbs or health or if the child was disfigured, that alone would be sufficient to find that the punishment was unreasonable.

(1) *Applications of the Section 43 Test Post-Dupperon*

152 The following provides some recent examples of cases decided after the judicial interpretation in *Ogg-Moss*, *supra*, and *Dupperon*,*supra*, in which more severe physical discipline, including discipline involving blows to the face and discipline with an implement, has been found to be reasonable.

(a) Acquittals of Teachers Using Force

153 In *R. v. Wetmore*, (1996), 172 N.B.R. (2d) 224 (Q.B. (T.D.)), a high school teacher, who did not believe in suspension as a sanction, applied his training in karate to discipline four students in his grade 10 class. He demonstrated his karate skills on the students, striking them about the shoulders and hitting one student's face and the hands of another student which were covering the student's face. The judge noted that there were no injuries, that the force used was "minimal" and that the obnoxious behaviour of the students was effectively controlled (para. 13). It was reasonable for the teacher to use physical force to instill fear in the high school students to gain their respect. The judge noted that "[w]hile the punishment rendered might be unorthodox, it was not unreasonable" (para. 22).

154 In *R. v. Graham*, (1995), 160 N.B.R. (2d) 306 (Q.B. (T.D.)), a school principal lifted an 8 or 9-year-old girl out of her desk and struck her buttocks. A red mark remained on her buttocks for 24 hours. The child was being inattentive and disruptive in class. She was not doing her work and was bothering other children. The judge followed older cases in which it was held that a slight wound was not determinative given that corporal punishment must be severe enough to take effect lest it encourages "indifference", "independence and defiance" (para. 11).

155 In *R. v. Plourde*, (1993), 140 N.B.R. (2d) 273 (Prov. Ct.), a grade 8 teacher faced with undisciplined behaviour in the classroom picked up one of the students to remove him from the classroom and banged his back on the chalkboard, causing a red mark on his back and red marks on his forearm. When the teacher returned, he confronted another student who began to stand up. The teacher slapped him on the head while grabbing him by the shoulders to make him sit down. A girl called the teacher crazy. The teacher grabbed her arm and pulled her to the intercom where he called the principal. The judge said that this teacher, facing "insolent behaviour", must ensure respect for authority (para. 8). It had not been shown that the force was unreasonable under the circumstances.

156 For other instances of acquittals of teachers see: *R. v. Caouette*, [2002] Q.J. No. 1055 (QL) (C.Q.), where a teacher grabbed a 12-year-old student by the throat with both hands, then gave him a "cuff" in the stomach with an open hand; *R. v. Skidmore*, Ont. C.J., No. 8414/99, June 27, 2000, *per* Nosanchuk J., where a teacher grabbed a 13-year-old boy by the arm and throat and pushed him up against a wall; *R. v. Gallant*, (1993), 110 Nfld. & P.E.I.R. 174 (P.E.I. Prov. Ct.), where a teacher struck an 11-year-old boy in the face with an open hand; and *R. v. Fonder*, [1993] Q.J. No. 238 (QL) (C.A.), where a teacher hit a 14-year-old on the head with a book.

(b) Acquittals Involving Use of Force to the Face or Head

157 In *R. v. James*, [1998] O.J. No. 1438 (QL) (Prov. Div.), a father hit his 11-year-old son in the face with an open hand during an argument in which the child swore. The father testified that his purpose in smacking his son was to "stamp out" the son's foul language and "attitude" right there and then. When the child went to school that afternoon, a teacher noticed finger marks on the boy's cheek.

158 In *R. v. Wood* (1995), 176 A.R. 223 (Prov. Ct.), a father slapped his 4-year-old child on the face when he refused to stop yelling during the course of his lunch. The boy was suffering from an ear infection at the time and attended at a hospital that same day for treatment. The first thing that the attending physician noticed upon examination of the child were marks on the side of his face opposite to that side which involved the draining ear. "[A]n actual imprint of a hand was visible on the child's face" (para. 5). Citing several examples, the judge noted that "the administration of a slap to the head of a child is not per se excessive force constituting an assault" (para. 14).

159 In *R. v. Vivian*, [1992] B.C.J. No. 2190 (QL) (S.C.), a stepfather grabbed his stepdaughter by the hair and pushed her head against a cupboard during a disagreement. Despite the fact that the provincial court judge described the stepfather as "more angry than he is now prepared to admit", Leggatt J. found that the force used was minimal.

160 For other acquittals involving use of force to the face or head see: *Fonder*, *supra*; *Plourde*, *supra*; *Wetmore*, *supra*; and *Gallant*,*supra*.

161 For other acquittals involving serious infliction of injury on children see: *R. v. Murphy*, (1996), 108 C.C.C. (3d) 414 (B.C.C.A.), where the accused used electrical tape to restrain the 3-year-old nephew of his common-law wife in a chair; *R. v. K. (M.)*, (1992), 74 C.C.C. (3d) 108 (Man. C.A.), where a father kicked his 8-year-old son for having spilled a packet of sunflower seeds on the floor after being asked not to open the packet; *R. v. Goforth*, (1991), 98 Sask. R. 26 (Q.B.), where a father disciplined his 8-year-old son causing marks of bruising and discolouration; and *R. v. Wheeler*, [1990] Y.J. No. 191 (QL) (Terr. Ct.), where a foster mother slapped a 7-year-old on the hand and wrist approximately 12 times causing bruising.

(c) Acquittals Involving Use of Force Against Teenagers

162 In *G.C.C.*, *supra*, a father struck his 14-year-old daughter with a belt three to four times across the top of the back of her legs, leaving welts and bruises. He was charged with assault with a weapon *per* s. 245.1(1)(*a*) of the *Code*. Despite expressing the personal view that the use of a belt in disciplining is always unreasonable, the judge, citing several authorities as examples, noted that there are occasions when the law recognizes such behaviour as not criminal (para. 44). He concluded that the force used was not unreasonable in the circumstances.

163 In *Pickard*, *supra*, a father, seeking to forcibly remove his 15-year-old son from a room in order to show him "who was boss" (para. 10), was charged with assault causing bodily harm. The father punched his son and knocked him down. This resulted in scratches and a bruise on the son's forehead and caused him "considerable pain and discomfort" (para. 13) for several days. The court acquitted the father of assault on the grounds that he and his son were physically almost evenly matched and "[a]nything less than a hard blow to [the son's] body would have failed to evoke a submissive response" (para. 19).

164 In *R. v. V.L.*, [1995] O.J. No. 3346 (QL) (Prov. Div.), a stepfather, in response to offensive comments from his stepson, struck the 13-year-old boy in the mouth with an open hand causing a swollen lip. While noting that a "parent delivering a blow to the head area of a child is definitely entering dangerous waters" (para. 24), the court found that in the circumstances the force was reasonable as the boy's behaviour warranted corrective action on the part of the parent. The court also noted that the "fact that an injury results from the punishment of a child does not in and of itself prove that the force was excessive" (para. 23).

165 For other acquittals involving the use of force on teenagers see: *Fritz*, *supra*, where an aunt and uncle of two teenaged girls (13 and 14) were charged with assault with a weapon. The uncle told his nieces to strip to their bra and panties and strapped them with a plastic belt across the buttocks and thighs; *R. v. Holmes*, [2001] Q.J. No. 7640 (QL) (Sup. Ct.), where a teacher lifted a 13-year-old boy from the floor using a wrestling hold to the back of the head and under the chin; and *R. v. Harriott*, (1992), 128 N.B.R. (2d) 155 (Prov. Ct.), where a teacher grabbed and shook a 14-year-old by the head and pushed him into his seat. See also *Wetmore*, *supra*; *Plourde*, *supra*; *Fonder*, *supra*; and *Skidmore*, *supra*.

(d) Acquittals Involving Use of Force Against Children Under 2

166 In *R. v. Atkinson*, [1994] 9 W.W.R. 485 (Man. Prov. Ct.), two of the children were 2 years old and a third child was almost 3½ years of age when the foster-mother/aunt hit the children with a belt on their diapered bottoms, sometimes leaving red marks. In the

absence of evidence describing the type of belt used (i.e., what it was made of, its length, or width, or whether it had a buckle), the judge felt unable to assess whether the use of the belt was unreasonable and excessive in the circumstances (para. 22). One child was also struck in the chest with an open hand. The judge noted, at para. 23, that

> [w]hile clearly a child's chest should never be struck as a disciplining measure, there is no evidence in this case from which it could be concluded that the force used during this particular incident was excessive.

(e) Acquittals Involving the Use of Implements

167 In *Bell*, *supra*, a father was charged with assault with a weapon for striking his 11-year-old son with a belt two or three times for stealing candy and lying about it. At least one blow struck the child on his right thigh which left a bruise that matched the shape of the buckle. The judge noted, at para. 30:

> When appropriate deference is shown to the parent's value system and to their decision that they see the transgression as serious, then the infliction of some pain and a bruise that is merely transient or trifling in nature . . . cannot as a matter of law, constitute unreasonable force.

168 In *R. v. L.A.K.*, (1992), 104 Nfld. & P.E.I.R. 118 (Nfld. Prov. Ct.), the use of a belt by a father in correcting his 11-year-old daughter which resulted in some bruising was held to fall within the parameters of the s. 43 defence. Though the discipline "must have had a significant impact on [the daughter]" (para. 37), evidenced by the fact that she reported the incident to a social worker, the judge went on to find somewhat contradictorily that the injury "was of transient and perhaps trifling consequence for her" (para. 39). Interestingly, despite dismissing the charges against the father, the judge also noted, at para. 33:

> I am satisfied that if L.K. and his wife and their children, rethought the whole matter of discipline they could probably come to the conclusion that the use of force could be abandoned and other effective sanctions could be devised by them as disciplinary measures.

169 In *R. v. Robinson*, [1986] Y.J. No. 99 (QL) (Terr. Ct.), a father strapped his 12-year-old daughter about four or five times with a leather belt that was doubled over twice. She sustained bruises, which doctors predicted would disappear within seven to ten days. The court described the punishment as "an administration of short-term pain in the hope that it will have a corrective effect on the child" (para. 7). Finding that the accused's conduct was justified, the court dismissed the charges against him.

170 For another instance of an acquittal where a child was struck with a belt, see: *R. v. V.H.*, [2001] N.J. No. 307 (QL) (Prov. Ct.), at paras. 87-91, where a grandfather struck his granddaughter on her behind with a belt. For instances of acquittals involving the striking of children with other implements, see: *N.S.*, *supra*, where a father was charged with assault with a weapon causing bodily harm for punishing his two children with a horse harness leaving welts; *R. v. O.J.*, [1996] O.J. No. 647 (QL) (Prov. Div.), where a mother hit her 6-year-old on the buttocks with a plastic ruler, causing bruises and red marks; and *R. v. Dunfield*, (1990), 103 N.B.R. (2d) 172 (Q.B. (T.D.)), where a foster mother hit a 9-year-old on the arm with a ruler causing bruising and breaking the ruler. See also *Fritz*, *supra*.

171 It is this body of law that the appellant attacks as unconstitutional. Absent a constitutional challenge, the law would likely continue to evolve and would no doubt reflect changing attitudes in society regarding the merits and acceptability of the corporal punishment of children. As a society, we have in the past tolerated or even encouraged the use of corporal punishment against women, apprentices, employees, passengers on ships and prisoners. Each of these practices eventually fell into disrepute without any constitutional intervention.

172 By the time of the codification of Canadian criminal law in 1892, the right to use corporal punishment on wives and servants was no longer legally justified (see S. D. Greene, "The Unconstitutionality of Section 43 of the Criminal Code: Children's Right to be Protected from Physical Assault, Part 1" (1999), 41 *Crim. L.Q.* 288, at pp. 292-93). The physical discipline of apprentices by masters was codified in *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 55, and omitted in the 1955 version of the *Code* (S.C. 1953-54, c. 51; *Martin's Criminal Code* (1955), at p. 118; see also D. Stuart, *Canadian Criminal Law: A Treatise* (4th ed. 2001), at p. 503). Whipping as a form of criminal punishment also survived the 1892 codification of criminal law, for such offences as rape and gross indecency. The penalty was later abolished in 1973 (see A. McGillivray, "'He'll learn it on his body': Disciplining childhood in Canadian law" (1997), 5 *Int'l J. Child. Rts.* 193, at p. 199). Similarly, s. 44 added in the 1955 version of the *Code* which justified the use of force in maintaining discipline by a master or officer of a ship will be repealed when the 2001 amendments to the *Canada Shipping Act* come into force (S.C. 2001, c. 26, s. 294). As Cory J. (in dissent) noted in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 818:

> What is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity. The punishments of lashing with the cat-o-nine tails and keel-hauling were accepted forms of punishment in the 19th century in the British navy. Both of those punishments could, and not infrequently, did result in death to the recipient. By the end of the 19th century, however, it was unthinkable that such penalties would be inflicted. A more sensitive society had made such penalties abhorrent.

173 That s. 43 is rooted in an era where deploying "reasonable" violence was an accepted technique in the maintenance of hierarchies in the family and in society is of little doubt. Children remain the only group of citizens who are deprived of the protection of the criminal law in relation to the use of force (A. McGillivray, "*R. v. K. (M.)*: Legitimating Brutality" (1993), 16 C.R. (4th) 125, at pp. 129-30). Whether such policy ought to be acceptable today with respect to children is the subject of ongoing debate in society about the appropriateness and effectiveness of the use of corporal punishment by way of correction. We have not been asked to take a side in that debate. However, the issue is also the subject of the constitutional challenge brought before us by the Foundation. This legal challenge is what we must address.

174 The Foundation argues that the use of force permitted under s. 43, which exonerates a person who would otherwise be guilty of a crime, violates the constitutional rights of children and must be declared of no force or effect. I now turn to the appellant's constitutional argument under s. 7of the *Charter*.

(2) *Section 7*

175 Where an infringement of s. 7 is alleged, the analysis has three main stages: (1) determining whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests; (2) identifying and defining the relevant principle(s) of fundamental justice; and (3) determining whether the deprivation has occurred in accordance with the relevant principle(s) (*R. v. White*, [1999] 2 S.C.R. 417, at para. 38).

176 The parties agree that the first stage has been met, specifically that s. 43 engages the "security of the person" interest of children. The criminal law is the mechanism by which the state protects the liberty and security of its citizens. Where the application of the criminal law is withdrawn from a portion of the population, the state has removed the protective force of the law from this group. The absence of this protective force, and the correlative sanction by the state of what would otherwise be an assault, suffices, in my view, to amount to a deprivation of children's security of the person interest. In *Ogg-Moss*, *supra*, at p. 187, the Court noted (although not in the context of the *Charter*) that s. 43 resulted in an "attenuation of [a child's] right to dignity and physical security". I will therefore proceed on the basis that s. 43 deprives children of their security of the person interest. The question then becomes whether this deprivation of children's security of the person is in accordance with the principles of fundamental justice.

177 The appellant argues that s. 43 violates the principle of vagueness. I agree. A vague law violates the principles of fundamental justice as it offends two values that are fundamental to the legal system. First, vague laws do not provide "fair warning" to individuals as to the legality of their actions, making it more difficult to comply with the law. Second, vague laws increase the amount of discretion given to law enforcement officials in their application of the law, which may lead to arbitrary enforcement (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"), at p. 1152; see also P. W. Hogg, *Constitutional Law of Canada*(4th ed. (loose-leaf)), at pp. 44-48 to 44-50).

178 The test for finding unconstitutional vagueness was first articulated by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 639-40:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. [Emphasis added.]

This test is well known, often cited, and is generally perceived as setting the bar high before a finding of vagueness can be asserted.

179 The doctrine of vagueness does not "require that a law be absolutely certain; no law can meet that standard" (*Prostitution Reference*,*supra*, at p. 1156). However, while discretion is inevitable, a law will be too vague if "the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances" (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, *per*Dickson C.J., Lamer and Wilson JJ., at p. 983, albeit within s. 1).

180 In the *Prostitution Reference*, *supra*, at p. 1157, Lamer J. (as he then was) expressly relied on the dictum of the Court of Appeal for Ontario in *R. v. LeBeau* , (1988), 41 C.C.C. (3d) 163, at p. 173, that

> the void for vagueness doctrine is not to be applied to the bare words of the statutory provision but, rather, to the provision as interpreted and applied in judicial decisions. [Emphasis added.]

According to Lamer J. the question was

> whether the impugned sections of the *Criminal Code* can be or have been given sensible meanings by the courts. In other words is the statute so pervasively vague that it permits a "standardless sweep" allowing law enforcement officials to pursue their personal predilections?

181 In my view, the case law speaks for itself with respect to whether s. 43 delineates the appropriate boundaries of legal debate. It is wholly unpersuasive for this Court to declare today what the law is *de novo* and to assert that this now frames the legal debate: i.e., anything outside the framework was simply wrongly decided! This approach robs the test in *Nova Scotia Pharmaceutical*, *supra*, of any usefulness. There is no need to speculate about whether s. 43 is capable, in theory, of circumscribing an acceptable level of debate about the scope of its application. It demonstrably has not succeeded in doing so. Canadian courts have been unable to articulate a legal framework for s. 43 despite attempts to establish guidelines. It is important to note that all of the troubling results in the cases listed above were decided after judicial guidance in *Ogg-Moss*, *supra*, and *Dupperon*,*supra*, had been delivered.

182 Judges themselves have often referred to the lack of consensus in this area of the law, with Weagant Prov. J. in *James*, *supra*, at para. 8, for instance, noting:

> 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 (*R. v. Dupperon*, (1985), 16 C.C.C. (3d) 453 (Sask. C.A.)). 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 (*R. v. Halcrow*, (1993), 80 C.C.C. (3d) 320 ([B.C.] C.A.): 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 (*R. v. Myers*, [1995] P.E.I.J. No. 180, P.E.I. Prov. Ct., November 27, 1995, *per* Thompson, P.C.J.). Yet another trial court says it is the trier of fact's responsibility to reflect community standards, as a jury would (*R. v. R.S.D.*, [1995] O.J. No. 3341, Ontario Prov. Ct., October 30, 1995, *per* Megginson, P.J.O.). 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 (*R. v. Peterson*, [1995] O.J. No. 1366, Ontario Prov. Ct., April 26, 1995, *per*Menzies, P.J.O.).

That judges have been at a loss to appreciate the "reasonableness" referred to by Parliament is not surprising and yet is not endemic to the notion of reasonableness.

183 "Reasonableness" with respect to s. 43 is linked to public policy issues and one's own sense of parental authority. "Reasonableness" will always entail an element of subjectivity. As McCombs J. recognized in the case at bar, "[b]ecause the notion of reasonableness varies with the beholder, it is perhaps not surprising that some of the judicial decisions applying s. 43 to excuse otherwise criminal assault appear to some to be inconsistent and unreasonable" ((2000), 49 O.R. (3d) 662, at para. 4). It is clear, however, that the concept of reasonableness, so widely used in the law generally, and in the criminal law in particular, is not in and of itself unconstitutionally vague. "Reasonableness" functions as an intelligible standard in many other criminal law contexts. This Court has been clear that constitutional analysis must always be contextual (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 6). Accordingly, whether a given phrase is unconstitutionally vague must also vary with context.

184 Other instances of the words "reasonable under the circumstances" may not be overly vague because they occur in contexts in which the factors for assessing reasonableness are clear and commensurable. Some general agreement as to the standard against which to measure the "reasonableness" of conduct will assist in providing sufficient clarity to a standard of "reasonableness". For example, reasonable force in self-defence can be measured for proportionality against the assault for which one is defending oneself. Similarly, it is possible to frame a legal debate about the proper boundaries of the use of reasonable force in performing an arrest (see *Asante-Mensah*, *supra*, *per* Binnie J., at paras. 51-59). This is not so in the case of corporal punishment of children, where there is no built-in commensurability between physical punishment and bad behaviour that can be used to assess proportionality. Indeed the Chief Justice concludes, at para. 35, that the gravity of the child's conduct is not a "relevant contextual consideration" as it invites a punitive, rather than a corrective focus.

185 Corporal punishment is a controversial social issue. Conceptions of what is "reasonable" in terms of the discipline of children, whether physical or otherwise, vary widely, and often engage cultural and religious beliefs as well as political and ethical ones. Such conceptions are intertwined with how other controversial issues are understood, including the relationship between the state and the family and the relationship between the rights of the parent and the rights of the child. Whether a person considers an instance of child corporal punishment "reasonable" may depend in large part on his or her own parenting style and experiences. While it may work well in other contexts, in this one the term "reasonable force" has proven not to be a workable standard. Lack of clarity is particularly problematic here because the rights of children are engaged. This Court has confirmed that children are a particularly vulnerable group in society (*Sharpe*, *supra*, at para. 169, and *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para. 73). Vagueness in defining the terms of a defence which affects the physical integrity of children may be even more invidious than is vagueness in defining an offence or a defence in another context, and may therefore call for a stricter standard.

186 Canada's international obligations with respect to the rights of the child must also inform the degree of protection that children are entitled to under s. 7 of the *Charter*. As the Chief Justice notes (at para. 32), Canada is a party to both the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47. The Chief Justice has referred, at para. 33, to the *Report of the Human Rights Committee*, vol. I, UN GAOR, Fiftieth Session, Supp. No. 40 (A/50/40) (1995), with respect to corporal punishment of children in schools. I would also make reference to the Concluding Observations of the Committee on the Rights of the Child. Article 43(1) of the *Convention on the Rights of the Child* establishes a Committee on the Rights of the Child "[f]or the purpose of examining the progress made by State Parties in achieving the realization of the obligations undertaken" in the Convention. The Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland, which has a legal provision similar to s. 43 dealing with reasonable chastisement within the family, state:

> 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 . . . 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. [Emphasis added.]
>
> (Committee on the Rights of the Child, *Report adopted by the Committee at its 209th meeting on 27 January 1995*, Eighth Session, CRC/C/38, at para. 218)

The Committee has identified the vagueness inherent in provisions such as s. 43 in this and other Concluding Observations.

187 It is notable that the Committee has not recommended clarifying these laws so much as abolishing them entirely. The Chief Justice notes, at para. 33, that neither the *Convention on the Rights of the Child* nor the *International Covenant on Civil and Political Rights* "require state parties to ban all corporal punishment of children". However, the Committee's Concluding Observations on Canada's First Report are illustrative:

> [P]enal legislation allowing corporal punishment of children by parents, in schools and in institutions where children may be placed [, should be considered for review]. In this regard . . . physical punishment of children in families [should] be prohibited. In connection with the child's right to physical integrity . . . and in the light of the best interests of the child, . . . the possibility of introducing new legislation and follow-up mechanisms to prevent violence within the family [should be considered], and . . . educational campaigns [should] be launched with a view to changing attitudes in society on the use of physical punishment in the family and fostering the acceptance of its legal prohibition. [Emphasis added.]

(Committee on the Rights of the Child, *Report adopted by the Committee at its 233rd meeting on 9 June 1995*, Ninth Session, CRC/C/43, at para. 93)

188 In its most recent Concluding Observations, the Committee expressed "deep concern" that Canada had taken "no action to removesection 43 of the Criminal Code" and recommended the adoption of

> legislation to remove the existing authorization of the use of "reasonable force" in disciplining children and explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed.
>
> (Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention*, Thirty-fourth Session, CRC/C/15/Add. 215 (2003), at paras. 32-33)

189 I doubt that it can be said, on the basis of the existing record, that the justification of corporal punishment of children when the force used is "reasonable under the circumstances" gives adequate notice to parents and teachers as to what is and is not permissible in a criminal context. Furthermore, it neither adequately guides the decision-making power of law enforcers nor delineates, in an acceptable fashion, the boundaries of legal debate. The Chief Justice rearticulates the s. 43 defence as the delineation of a "risk zone for criminal sanction" (para. 18). I do not disagree with such a formulation of the vagueness doctrine in this context. Still, on this record, the "risk zone" for victims and offenders alike has been a moving target.

190 In the Chief Justice's reasons, it is useful to note how much work must go into making the provision constitutionally sound and sufficiently precise: (1) the word "child" must be construed as including children only over age 2 and younger than teenage years; (2) parts of the body must be excluded; (3) implements must be prohibited; (4) the nature of the offence calling for correction is deemed not a relevant contextual consideration; (5) teachers are prohibited from utilizing corporal punishment; and (6) the use of force that causes injury that is neither transient nor trifling (assault causing bodily harm) is prohibited (it seems even if the force is used by way of restraint). At some point, in an effort to give sufficient precision to provide notice and constrain discretion in enforcement, mere interpretation ends and an entirely new provision is drafted. As this Court concluded in *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 803:

> The changes which would be required to make s. 179(1)(*b*) [here, s. 43] constitutional would not constitute reading down or reading in;rather, they would amount to judicial rewriting of the legislation. [Emphasis added.]

The restrictions put forth by the Chief Justice with respect to the scope of the defence have not emerged from the existing case law. These restrictions are far from self-evident and would not have been anticipated by many parents, teachers or enforcement officials.

191 In my view, we cannot cure vagueness from the top down by declaring that a proper legal debate has taken place and that anything outside its boundaries is simply wrong and must be discarded. Too many people have been engaged in attempting to define the boundaries of that very debate for years in Canadian courtrooms to simply dismiss their conclusions because they do not conform with a norm that was never apparent to anyone until now. As demonstrated earlier, s. 43 has been subject to considerable disparity in application, some courts justifying conduct that other courts have found wholly unreasonable, despite valiant efforts by the lower courts to give intelligible content to the provision. Attempts at judicial interpretation which would structure the discretion in s. 43 have, in my opinion, failed to provide coherent or cogent guidelines that would meet the standard of notice and specificity generally required in the criminal law. Thus, despite the efforts of judges, some of whom have openly expressed their frustration with what has been described as "no clear test" and a "legal lottery" in the criminal law (McGillivray, "'He'll learn it on his body': Disciplining childhood in Canadian law", *supra*, at p. 228; *James*, *supra*, *per* Weagant Prov. J., at paras. 11-12), the ambit of the justification remains about as unclear as when it was first codified in 1892. As Lamer C.J. stated in *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 729:

> A standardless sweep does not become acceptable simply because it results from the whims of judges and justices of the peace rather than the whims of law enforcement officials. Cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice.

This would not only raise the already high bar set in *Nova Scotia Pharmaceutical*, *supra*; it would essentially make it unreachable.

192 As a result, I find that the phrase "reasonable under the circumstances" in s. 43 of the *Code* violates children's security of the person interest and that the deprivation is not in accordance with the relevant principle of fundamental justice, in that it is unconstitutionally vague.

(3) *Section 1*

193 In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 94-95, Sopinka J. held:

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

The requirement that a limit be prescribed by law also calls for fair notice to the citizen and limitations on the discretion of enforcement officials (*Nova Scotia Pharmaceutical*, *supra*). Because I have found that s. 43 is unconstitutionally vague, it cannot pass the "prescribed by law" or minimal impairment stage of the *R. v. Oakes*, [1986] 1 S.C.R. 103, analysis, and accordingly, cannot be saved under s. 1.

(4) *Remedy*

194 I am of the view that striking down s. 43 for vagueness is the most appropriate remedy in the case at bar. Parliament is best equipped to reconsider this vague and controversial provision. The legislature should have a chance to consider the issues in light of the *Charter*, current social norms and all of the evidence. While the record of expert testimony in this litigation is voluminous, the court process is necessarily adversarial and does not cover all of the interests that one would expect to be heard in a legislative debate, committee hearings or in the public at large. Yet parliamentary intervention may prove unnecessary.

195 It is useful to put the potential effect of striking down s. 43 of the *Code* into context. Some are concerned that striking down s. 43 will expose parents and persons standing in the place of parents to the blunt instrument of the criminal law for every minor instance of technical assault. Indeed the respondent and the Chief Justice raise (at paras. 59-61) the spectre of criminal culpability on parents for trivial and insignificant uses of force if s. 43 is repealed. While it is true that Canada's broad assault laws could be resorted to in order to incriminate parents and/or teachers for using force that falls short of corporal punishment, I am of the view that the common law defences of necessity and *de minimis* adequately protect parents and teachers from excusable and/or trivial conduct.

(5) *The Defence of Necessity*

196 The common law defence of necessity operates by virtue of s. 8(3) of the *Code* (see also *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616). The defence "rests upon a realistic assessment of human weaknesses and recognizes that there are emergency situations where the law does not hold people accountable if the ordinary human instincts overwhelmingly impel disobedience in the pursuit of either self-preservation or the preservation of others" (*Mewett & Manning on Criminal Law* (3rd ed. 1994), at p. 531). In 1984, the common law defence of necessity was clearly recognized by this Court in *Perka v. The Queen*, [1984] 2 S.C.R. 232.

197 In *R. v. Manning* (1994), 31 C.R. (4th) 54 (B.C. Prov. Ct.), at para. 23, the court rearticulated the elements of the defence of necessity as set out in *Perka*, *supra*. It stated that the defence of necessity is an excuse rather than a justification and that the moral involuntariness of the wrongful action is a criterion. The involuntariness of the action should be measured against society's expectation of appropriate and normal resistance to pressure. That the accused has been involved in criminal or immoral activity or has been negligent does not disentitle him or her to the defence. Actions or circumstances that indicate that the offence was not truly involuntary will disentitle the accused from relying on the defence. Similarly, the existence of a reasonable legal alternative will also disentitle the accused. The defence will only apply in circumstances of imminent risk, where the action was taken to avoid direct and immediate peril. Necessity will not excuse the infliction of a greater harm, so as to allow the accused to avert a lesser evil. Finally, where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

198 I see no reason why, if the above requirements are met, the defence of necessity would not be available to parents and teachers should they intervene to protect children from themselves or others. Other authors have also proposed the use of necessity for parents and teachers should thes. 43 defence be abolished (see McGillivray, "'He'll learn it on his body': Disciplining childhood in Canadian law", *supra*, at p. 240, and Stuart, *supra*, at p. 506). In *R. v. Morris*, (1981), 61 C.C.C. (2d) 163 (Alta. Q.B.), the defence of necessity succeeded in absolving a husband on a charge of common assault of his wife. The husband had restrained his inebriated wife when she tried to jump out of the truck and grab the steering wheel. The husband honestly and reasonably believed that the intervention was necessary. The judge noted, at p. 166, that:

> To have allowed his wife to get out of the truck to walk on a dark road in an intoxicated condition would have shown wanton or reckless disregard for her life or safety and could have constituted criminal negligence on his part.

199 Because the s. 43 defence only protects parents who apply force for corrective purposes (see *Ogg-Moss*, *supra*, at p. 193), the common law may have to be resorted to in any event in situations where parents forcibly restrain children incapable of learning. Indeed, even if one understands the law as per the Chief Justice (at paras. 24-25), s. 43 may be of no assistance to parents who apply some degree of force for the purpose of restraint. It is not inconceivable to think of situations where force might be applied to young children for reasons other than education or correction. For example, a 2-year-old child who struggles to cross the street at a red light will have to be forcibly held back and secured against his or her will. In my view, the force being applied to the child is not for the purpose of correction *per se*, but to ensure the child's safety. Similarly, if a parent were to forcibly restrain a child in order to ensure that the child complied with a doctor's instructions to receive a needle, s. 43 would be of no assistance to excuse the use of restraint, but the parent would, in my view, have the common law defence of necessity available to him or her should a charge of assault be pursued. The common law defence of necessity has always been available to parents in appropriate circumstances and would continue to be available if the s. 43 defence were struck down.

(6) *The Defence of De Minimis*

200 The Chief Justice is rightly unwilling to rely exclusively on prosecutorial discretion to weed out cases undeserving of prosecution and punishment. The good judgment of prosecutors in eliminating trivial cases is necessary but not sufficient to the workings of the criminal law. There must be legal protection against convictions for conduct undeserving of punishment. And indeed there is. The judicial system is not plagued by a multitude of insignificant prosecutions for conduct that merely meets the technical requirements of "a crime" (e.g., theft of a penny) because prosecutorial discretion is effective and because the common law defence of *de minimis non curat lex* (the law does not care for small or trifling matters) is available to judges.

201 The application of some force upon another does not always suggest an assault in the criminal sense. "Quite the contrary, there are many examples of incidental touching that cannot be considered criminal conduct" (*R. v. Kormos*, (1998), 14 C.R. (5th) 312 (Ont. Ct. (Prov. Div.)), at para. 34).

202 The common law concept of *de minimis non curat lex* was expressed in the English decision of *The "Reward"* (1818), 2 Dods. 265, 165 E.R. 1482, at p. 1484, in the following manner:

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

203 Admittedly, the case law on the application of the defence is limited. It may be that the defence of *de minimis* has not been used widely by courts because police and prosecutors screen all criminal charges such that only the deserving cases find their way to court. Nonetheless *de minimis* exists as a common law defence preserved by s. 8(3) of the *Code* and falls within the courts' discretion (J. Hétu, "Droit judiciaire: De minimis non curat praetor: une maxime qui a toute son importance!" (1990), 50 *R. du B*. 1065, at pp. 1065-76) to apply and develop as it sees fit. In effect, the defence is that there was only a "technical" commission of the *actus reus* and that "the conduct fell within the words of an offence description but was too trivial to fall within the range of wrongs which the description was designed to cover" (E. Colvin, *Principles of Criminal Law* (2nd ed. 1991), at p. 100). The defence of *de minimis* does not mean that the act is justified; it remains unlawful, but on account of its triviality it goes unpunished (S. A. Strauss, "Book Review of *South African Criminal Law and Procedure* by E. M. Burchell, J. S. Wylie and P. M. A. Hunt" (1970), 87 *So. Afr. L.J.* 471, at p. 483).

204 Generally, the justifications for a *de minimis* excuse are that: (1) it reserves the application of the criminal law to serious misconduct; (2) it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial conduct; and (3) it saves courts from being swamped by an enormous number of trivial cases (K. R. Hamilton, "De Minimis Non Curat Lex" (December 1991), discussion paper mentioned in the Canadian Bar Association, Criminal Recodification Task Force Report, *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada* (1992), at p. 189). In part, the theory is based on a notion that the evil to be prevented by the offence section has not actually occurred. This is consistent with the dual fundamental principle of criminal justice that there is no culpability for harmless and blameless conduct (see my opinion in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at paras. 234-35 and 244).

205 In Canadian jurisprudence, the defence of *de minimis* has been raised in drug cases that involve a tiny quantity of the drug (*R. v. Overvold* (1972), 9 C.C.C. (2d) 517 (N.W.T. Mag. Ct.), at pp. 519-21; *R. v. S.* (1974), 17 C.C.C. (2d) 181 (Man. Prov. Ct.), at p. 186; and *R. v. McBurney* (1974), 15 C.C.C. (2d) 361 (B.C.S.C.), aff'd (1975), 24 C.C.C. (2d) 44 (B.C.C.A.)), in theft cases where the value of the stolen property is very low (*R. v. Li* ,

(1984), 16 C.C.C. (3d) 382 (Ont. H.C.), at p. 384), or in assault cases where there is extremely minor or no injury (*R. v. Lepage*, (1989), 74 C.R. (3d) 368 (Sask. Q.B.); *R. v. Matsuba* (1993), 137 A.R. 34 (Prov. Ct.); and in *obiter* in *Kormos*,*supra*); see also: Department of Justice of Canada, *Reforming the General Part of the Criminal Code: A Consultation Paper* (1994), "Trivial violations", at pp. 24-25). Though the case law is somewhat unsatisfactory, the defence has succeeded on several occasions (see Stuart, *supra*, at pp. 594-99) and this Court has expressly left the existence of the defence open (see *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 21, and *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 69). In discussing the *actus reus* of the offence of "fraud on the government" under s. 121(1)(*c*) of the *Code*, L'Heureux-Dubé J. in *Hinchey*, *supra*, wrote the following, at para. 69:

> In my view, this interpretation removes the possibility that the section will trap trivial and unintended violations. Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a *Code* section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability*: Proposals for a New General Part of the Criminal Code of Canada . . . and others: see Professor Stuart, *Canadian Criminal Law: A Treatise* (3rd ed. 1995) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day. [Emphasis added.]

206 A statutory formulation of the defence was proposed in the American Law Institute's *Model Penal Code* (1985), s. 2.12 under "De Minimis Infractions" (in Stuart, *supra*, at p. 598). The C.B.A. Task Force Report reviewed the uncertain state of the law and recommended codification of a power to stay for trivial violations (see Stuart, *supra*, at p. 598). A codification of the defence may cure judicial reluctance to rely on*de minimis*; however, the common law defence of *de minimis*, as preserved under s. 8(3) of the *Code*, is sufficient to prevent parents and others from being exposed to harsh criminal sanctions for trivial infractions.

207 I am of the view that an appropriate expansion in the use of the *de minimis* defence — not unlike the development of the doctrine of abuse of process — would assist in ensuring that mere technical violations of the assault provisions of the *Code* that ought not to attract criminal sanctions are stayed. In this way, judicial resources are not wasted, and unwanted intrusions of the criminal law in the family context, which may be harmful to children, are avoided. Therefore, if s. 43 were to be struck down, and absent Parliament's re-enactment of a provision compatible with the constitutional rights of children, parents would be no more at risk of being dragged into court for a "pat on the bum" than they currently are for "tasting" a single grape in the supermarket.

208 I conclude that s. 43 of the *Criminal Code* infringes the rights of children under s. 7 of the *Charter*. The infringement cannot be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Charter*. Parents and persons standing in the place of parents will not be exposed to the criminal law unnecessarily as the common law defences of necessity and *de minimis* will protect them from excusable and/or trivial conduct.

209 In light of my conclusion on the doctrine of vagueness, it is unnecessary for me to consider the other constitutional challenges advanced by the appellant.

III. Disposition

210 For these reasons, I would allow the appeal.

211 I would answer the constitutional questions as follows:

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

Answer: Yes.

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

Answer: No.

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

Answer: It is unnecessary to decide this question.

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

Answer: It is unnecessary to decide this question.

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

Answer: It is unnecessary to decide this question.

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

Answer: It is unnecessary to decide this question.

The following are the reasons delivered by

212 DESCHAMPS J. (dissenting) — This appeal raises the question of whether s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, is constitutionally sound, in particular, with regard to ss. 7, 12, and 15 of the *Canadian Charter of Rights and Freedoms*. Section 43 creates a defence of justification for parents, school teachers and persons standing in the place of a parent, when they use force by way of correction towards a child under their care, if the force does not exceed what is reasonable under the circumstances.

213 In my opinion, the ordinary and contextual meaning of s. 43 cannot bear the restricted interpretation proposed by the majority. Section 43applies to and justifies an extensive range of conduct, including serious uses of force against children. I agree with Arbour J. that the body of case law applying s. 43 is evidence of its broad parameters and wide scope. I also agree with her analysis of the appellant's argument on s. 7 of the *Charter*, but I prefer to deal with the problem under s. 15 of the *Charter*. I find that the inferior protection s. 43 affords to children results in a violation of their constitutional equality right, which is not saved under s. 1 of the *Charter*.

I. Interpretation of Section 43

214 It is well established in this Court's jurisprudence that statutes should be interpreted contextually, according to their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (see *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, and cases cited there). The aim of statutory interpretation is to determine and apply the intention of Parliament at the time of the enactment, as evidenced by the language that was chosen, and as examined in context.

215 There does exist a general principle that if a legislative provision is capable of both a constitutional and an unconstitutional interpretation, then the former should be preferred (see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078;*R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, 1998 [1998] 1 S.C.R. 439, at para. 66). However, the application of this interpretative aid is premised on there existing two equally plausibleinterpretations on the language of the statute (see *Bell ExpressVu*, *supra*, at para. 62). Where, as here, the text of the provision does not support a severely restricted scope of conduct that would avoid constitutional disfavour, the Court cannot read the section down to create a constitutionally valid provision. Such an approach would divest the *Charter* of its power to test the validity of statutes, deprive the legislatures of their ability to enact reasonable limits, and intermingle the purpose of statutory

interpretation with the exercise of judicial review (see *Bell ExpressVu*, *supra*, at paras. 62-66).

216 In this case, the language of s. 43 does not bear a narrow interpretation which encompasses only those minor uses of force that "restrain, control or express some symbolic disapproval" (McLachlin C.J., at para. 24). The words of the provision relate to any use of force toward a pupil or child by a teacher or parent that is "by way of correction" and is "reasonable under the circumstances". To read into the text implicit exclusions based on the age of the child, the part of the body hit, the type of assault committed, and whether an implement is used, would turn the exercise of statutory interpretation into one of legislative drafting. It is the duty of the Court to determine the intent of the legislator by looking at the text, context and purpose of the provision. The Court would be substituting its own views and opinions rather than interpreting those of the legislator if it were to severely circumscribe a statutory provision and drastically limit its intended application. This is not its role.

217 While I rely for the most part on the detailed reasons of Arbour J. on the interpretation of s. 43, I would emphasize that the ordinary meaning of s. 43 does not support the restrictive interpretation proposed by the Chief Justice. As one example, the Chief Justice reads into s. 43completely different standards for teachers as opposed to parents: "Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment" (para. 40). However, this distinction is not available on the text of the provision, which plainly places teachers on par with parents. In the same vein, the prohibition on the use of objects or blows to the head is also not supported, considering that s. 43 simply applies to "uses of force". Bearing in mind that the non-consensual use of force underpins all forms of assault (s. 265(2)), this presumptively includes assault with a weapon. Nothing in s. 43 indicates that Parliament intended that the application of force with an object would be irrebuttably excluded. The same is true of creating blanket exclusions for the use of force on children under two, on teenagers, and on the head as opposed to other body parts. As noted by both the Chief Justice (at para. 28) and Arbour J. (at para.148), the assessment of reasonableness is a factually heavy and contextually specific inquiry. The choice of this standard indicates that Parliament did not intend that blanket exclusions be read intos. 43 to preemptively delineate the boundaries of its application. That choosing this standard may leave s. 43 vulnerable to constitutional challenge is to be addressed under the constitutional questions, and should not colour the statutory interpretation exercise *ex ante.*

218 On that note, I will now proceed to explain why, in my view, s. 43 does not pass constitutional muster under s. 15 of the *Charter.*

II. Infringement of Section 15

219 Section 15 is meant to catch government action that has a discriminatory purpose or effect on the basis of an enumerated or analogous ground and impairs a person's dignity. At the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable and equally deserving.

220 The test for determining a s. 15(1) infringement is three-pronged (see *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 39):

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? [Emphasis omitted.]

A. *Distinction in Purpose or Differential Treatment in Effect*

221 Clearly, s. 43 on its face, as well as in its result, creates a distinction between children and others. Section 265 prohibits the non-consensual application of force to anyone and uses the weight of the criminal justice system to protect invasions of one's fundamental right to bodily integrity (see *R. v. Cuerrier*, [1998] 2 S.C.R 371, at paras. 11-12). Section 43 then withdraws this protection from a designated group of people in society: children. Parliament decided to criminalize certain conduct which is seen as sufficiently morally blameworthy as to merit the disfavour of the criminal law. It then specifically chose to lift protection for one group while leaving protection intact for all others.

B. *Based on an Enumerated Ground*

222 Equally clearly, the distinction is based on an enumerated ground: age. The respondent's argument that s. 43 is not primarily an age-based distinction but rather one based on the "relationship" between parent and child or school teacher and pupil is overly formalistic. Although s. 43 applies only in circumstances where the accused has a particular

relationship with the child, this does not alter the fact that children, as a group, are given inferior protection against criminal assault.

C. *Whether the Distinction or Differential Treatment under Section 43 is Discrimination*

223 *Law*, *supra*, identified four factors for determining whether the dignity of the group in question is being impaired, thus indicating an infringement of the s. 15 equality guarantee. Not all four factors are necessarily relevant in every case, but the entire context must be considered in determining whether, from the perspective of a reasonable person in the place of the claimant, an infringement of her or his human dignity can be found. In this case, it should be remembered that we should not focus on whether corporal punishment infringes a child's dignity or whether the legislative purpose has properly weighed competing interests, but rather, whether the distinction at issue — the government's explicit choice not to criminalize some assaults against children — violates their dignity.

(1) Nature of the Interest at Stake

224 Clearly, there is a significant interest at stake in the case at bar. The withdrawal of the protection of the criminal law for incursions on one's physical integrity would lead the reasonable claimant to believe that her or his dignity is being harmed. Section 43 sends the message that a child's physical security is less worthy of protection, even though it is seen as a fundamental right for all others.

(2) Pre-Existing Disadvantage, Vulnerability, Stereotyping or Prejudice Experienced by the Individual or Group

225 Children as a group face pre-existing disadvantage in our society. They have been recognized as a vulnerable group time and again by legislatures and courts. Historically, their vulnerability was entrenched by the traditional legal treatment of children as the property or chattel of their parents or guardians. Fortunately, this attitude has changed in modern times with a recognition that children, as individuals, have rights, including the right to have their security and safety protected by their parents, families and society at large. This recognition is illustrated by several decisions of this Court (see, e.g., *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48; *R. v. Sharpe*, [2001] 1 S.C.R.45, 2001 SCC 2), by government policy and laws (for example, specific criminal law protections, family law reforms, and child protection services), and by international legal authorities (see the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, Art. 24).

226 However, by permitting incursions on children's bodies by their parents or teachers, s. 43 appears to be a throwback to old notions of children as property. Section 43 reinforces and compounds children's vulnerability and disadvantage by withdrawing the protection of the criminal law. Moreover, because the accused is the very person most often charged with the control and trusteeship of the child, being deprived of the legal protection to which everyone else is presumptively entitled exacerbates the already vulnerable position of children. The entitlement to protection is derived by virtue of our status as persons and the status of children as persons deserves equal recognition.

(3) Proposed Ameliorative Purposes or Effects

227 This contextual factor was described in *Law*, *supra*, at para. 72, as follows:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.

In other words, this contextual factor is aimed mainly at recognizing the importance and value of affirmative government measures to ameliorate the position of already disadvantaged groups. This particular factor is a negative one: the presence of an ameliorative purpose or effect for a more disadvantaged group will mitigate against a finding of dignity infringement, but the lack of an ameliorative purpose or effect has a merely neutral effect on the dignity analysis.

228 In this case, the only other groups that could be said to be affirmatively benefiting from s. 43 are parents and teachers charged with assaulting a child and entitled to raise a s. 43 defence. It is difficult to see, however, how they, as a group, could be seen as more disadvantaged than children, as a group. Therefore, this factor does not apply and has only a neutral impact on the analysis. Arguments that s. 43 ameliorates the position of children facing family violence by avoiding conflict between the family and the criminal justice system is best considered under s. 1 as it deals with justifications for the section *vis-à-vis* the claimant group itself rather than a more disadvantaged group.

(4) Correspondence to Actual Needs, Capacities or Circumstances of the Claimant

229 The respondent argues that s. 43 is based on the inherent capacities and circumstances of childhood and thus cannot be discriminatory or harmful to human

dignity. It argues that s. 43 is an age-appropriate response to the unique circumstances of children's psychological development and limitations and their basic need to live with their parents and to be subject to the responsibility mandated to parents to make decisions for a child's education and well-being.

230 This may be true for a more circumscribed defence limited to very minor or mild uses of force, such as restraining a child from running into the road or securing her or him into a car seat. However, as discussed, s. 43 as it currently stands permits a broader range of assaults to be justified by its terms. There is a general consensus among experts that the only benefit of mild to moderate uses of force, such as spanking, is short-term compliance. Anything more serious is not only not conducive to furthering the education of children, but also potentially harmful to their development and health (trial judge, (2000), 49 O.R. (3d) 662, at para. 17). It cannot be seriously argued that children need corporal punishment to grow and learn. Indeed, their capacities and circumstances would generally point in the opposite direction — that they can learn through reason and example while feeling secure in their physical safety and bodily integrity.

231 By condoning assaults on children by their parents or teachers, s. 43 perpetuates the notion of children as property rather than human beings and sends the message that their bodily integrity and physical security are to be sacrificed to the will of their parents, however misguided. In the words of Dickson J. (as he then was) in *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173, at p. 187, s. 43 creates a category of "second-class citizens" that must suffer a "consequent attenuation of [their] right to dignity and physical security". Far from corresponding to the actual needs and circumstances of children, s. 43 compounds the pre-existing disadvantage of children as a vulnerable and often-powerless group whose access to legal redress is already restricted.

232 All of the above points to a finding of discriminatory treatment in purpose and effect. By justifying what would otherwise amount to criminal assault, s. 43 encourages a view of children as less worthy of protection and respect for their bodily integrity based on outdated notions of their inferior personhood. I will now proceed to discuss why this infringement of s. 15 is not justified as a reasonable limit under s. 1 of the *Charter*.

III. Section 1

233 The analysis under s. 1 determines whether the means chosen to fulfill a legislative objective constitutes a reasonable limit on a *Charter* right in a free and democratic society. Pursuant to the well-established *Oakes* test, this analysis consists of two broad

inquiries: the first inquires into whether the objective is sufficiently pressing and substantial, and the second examines the proportionality between the objective sought and the means chosen (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39).

A. *Pressing and Substantial Objective*

234 The trial judge determined that the legislative objective behind s. 43 was as follows (at para. 47):

> Having regard to the history of the legislation, I conclude that Parliament's purpose in maintaining s. 43 is to recognize that parents and teachers require reasonable latitude in carrying out the responsibility imposed by law to provide for their children, to nurture them, and to educate them. That responsibility, Parliament has decided, cannot be carried out unless parents and teachers have a protected sphere of authority within which to fulfill their responsibilities.

Considering the important place of the family unit, both legally and socially, I accept that this is a pressing and substantial objective. The child developmental process is unique and the state should not intrude unnecessarily into the parental or supervisory role. It is understandable for Parliament to lend parents and caregivers a measure of flexibility in the private exercise of child-rearing.

235 The respondent also asserted that a central aspect of this objective is to protect children and families from the intrusion of the criminal law and the damaging effect of criminal sanctions in respect of conduct that the evidence demonstrates is not harmful. This line of argument seeks to impermissibly shift the nature of the legislative purpose from one of parental rights to one of child protection. This is not merely a shift in the emphasis of the legislative objective but a significant reclassification of it. At the time s. 43 was passed, the objective of affording parents and teachers reasonable latitude was based in traditional notions of children as property, capable of learning through physical violence, which was left to parents and teachers to mete out at their discretion. The heading in the *Code* under which s. 43 is placed — "Protection of Persons in Authority" — confirms that this justification was aimed at protecting parents and teachers from prosecution and not to protect children from the intrusion of the criminal law. This alternate objective put forth by the respondent attempts to portray a child-centred approach to s. 43, which was clearly never the original intent of the legislator. That being said, it may be that considerations such as the negative effect of the criminal justice system and the existence of alternatives for protecting children from abuse and harm will constitute part of the context in examining whether the means chosen are proportional to the objective.

B. *Proportionality*

(1) Rational Connection Between the Means Chosen and the Objective Sought

236 There does appear to be a rational connection between the objective of giving parents and teachers reasonable latitude in caring for children and limiting the application of the criminal law in the parent-child or teacher-pupil relationship. It is logical that providing parents and teachers with a sphere of immunity from criminal sanction will increase the domain of their authority in dealing with their children or students.

(2) Minimal Impairment

237 It is well established that Parliament need not always choose the absolutely least intrusive means to attain its objectives but must come within a range of means which impair *Charter* rights as little as is reasonably possible. On the one hand, a greater degree of deference may be afforded in this assessment when, as here, there are a number of competing interests, including the equality of the child, the privacy of the family unit, and the potential liberty consequences for an accused. On the other hand, a serious infringement to such a basic right as physical integrity against a vulnerable group such as children cannot be easily justified. When faced with these circumstances, the court should not be overly deferential in its approach.

238 Here it is clear that less intrusive means were available that would have been more appropriately tailored to the legislative objective. Section 43 could have been defined in such a way as to be limited only to very minor applications of force rather than being broad enough to capture more serious assaults on a child's body. Indeed, it could have been better tailored in terms of those to whom it applies (all children, including infants), those whom it protects (e.g., teachers are given the same latitude as parents), and the scope of conduct it justifies (i.e., spanking and other assaults that can entail pain or harm to the child).

239 The respondent argues s. 43 is merely indirect in its effect and is akin to an underinclusive application of the criminal law of assault. However, I would make the following comments in response. First, we are not dealing with a legislative omission here, but rather an explicit age-based distinction withdrawing the protection of a *Code* provision. Section 43 is the only justification in the *Code* whose purpose and effect is to create a distinction on an enumerated ground. Second, because of the fundamental nature of physical integrity and bodily autonomy for all persons, including children, any derogation, especially when based on an enumerated or analogous ground, should be regarded with suspicion.

240 It was also argued that this Court should acknowledge that provincial child protection legislation and federal education initiatives are in place to protect children from abuse in a way which is less disruptive to the family unit than the criminal law. This may have been a more important consideration at this stage if we were dealing with circumstances that were less clear. If the Court had been called upon to engage in a delicate balancing exercise between competing options and values open to the government, then the existence of less intrusive, parallel alternatives may have had a significant impact on the assessment of the constitutional validity of s. 43. However, the *Charter* infringement in this case is discriminatory at a very direct and basic level. It clearly impairs the equal rights of children to bodily integrity and security in a much more intrusive way than necessary to achieve a valid legislative objective. The provincial and policy mechanisms available do not change this effect.

(3) Proportionality Between the Salutary and Deleterious Effects

241 Although not strictly necessary to proceed to this part of the *Oakes* test, I will briefly consider the salutary and deleterious effects of the application of s. 43. This assessment also supports my conclusion. The deleterious effects impact upon such a core right of children as a vulnerable group that the salutary effects must be extremely compelling to be proportional. Although there is a benefit to parents, children, teachers and families to escape the unnecessary intrusion of the criminal law into the private realm of child-rearing, when there is harm to a child this is precisely the point where the disapprobation of the criminal law becomes necessary. It may not be necessary in a given set of circumstances for the full weight of the criminal justice system to be brought down on an accused who would otherwise be protected under s. 43, and that can be determined by child protection agencies, the police and the prosecutor, taking into account the best interests of the child. However, it is the discrimination represented by s. 43 that produces the most drastic effect; it sends the message that children, as a group, are less worthy of protection of their bodies than anyone else.

IV. Remedy

242 The striking down of s. 43 is the only appropriate remedy in this case. In other words, s. 43 should be severed from the rest of the *Code*. It does not measure up to *Charter* standards and, thus, must cede to the supremacy of the Constitution to the extent of any inconsistency (*Constitution Act, 1982*, s. 52). In choosing a remedy, the Court must be guided not only by the purposes of the *Charter* but by the purposes of the legislation and considerations of the proper institutional division of labour between the courts and legislatures (see *Schachter v. Canada*, [1992] 2 S.C.R. 679; see also R. J. Sharpe, K. E. Swinton and K. Roach, *The Charter of Rights and Freedoms* (2nd ed. 2002), c. 17).

243 Although reading down s. 43, such that its scope would be similar to the "interpretation" proposed by the majority, would bring that provision in line with constitutional requirements, it is not the place of this Court to craft a new provision to replace the one intended to be created by Parliament. As noted, a restricted scope to s. 43 could have been one less intrusive means for minimally impairing the equality rights of children under this scheme. However, this is not to say that this was the only means open to Parliament nor that it would necessarily be free from all constitutional scrutiny if chosen. The balance to be struck between the number of competing interests at play requires a contextual approach be taken to the assessment of constitutional validity and the measurement of the "extent of the inconsistency". It is not the Court's role to deem where this balance must be struck. In this case, s. 43 as it stands clearly violates the *Charter* and must fall. Parliament can then choose how it wishes to respond to this result.

244 In some cases it is possible for the Court to delay the immediate effect of a declaration of invalidity. Generally, the Court should be wary of allowing or appearing to condone a continued state of affairs that violates *Charter* rights. Therefore, I would suggest temporary suspensions of invalidity should generally be confined to only those circumstances where it is required by the potential impact and consequences of an immediate declaration of invalidity. For instance, if the immediate nullification of the law could lead to chaos or serious threat to public safety, then there may be good justification for suspending the declaration (see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Swain* [1991] 1 S.C.R. 933). Similarly, it may be appropriate to temporarily suspend a declaration of invalidity where it would be less intrusive on the separation of powers to allow the legislature a stated period of time to reconsider its policy and budgetary choices in light of constitutional parameters (see, e.g., *M. v. H.*, [1999] 2 S.C.R. 3). In this case, the circumstances are not compelling enough to permit continued violations of the equality rights of children. There would be no immediate harm to the public nor budgetary consequences to the government to declare s. 43 of no force and effect.

V. Disposition

245 For these reasons, I would allow the appeal. Because I find that s. 43 violates the equality guarantees of children under s. 15(1) of the *Charter*, and it is not saved as a reasonable limit under s. 1, it is unnecessary for me to consider the other constitutional questions posed. The most appropriate and least intrusive remedy in this case is to strike down s. 43.

246 I would answer the constitutional questions as follows:

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

Answer: Because of the answers to questions 5 and 6, it is unnecessary to decide this question.

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

Answer: Because of the answers to questions 5 and 6, it is unnecessary to decide this question.

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

Answer: Because of the answers to questions 5 and 6, it is unnecessary to decide this question.

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

Answer: Because of the answers to questions 5 and 6, it is unnecessary to decide this question.

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

Answer: Yes.

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

Answer: No.