Criminal Code Section 43 & Classroom Physical Interactions

Examining Section 43 of the Criminal Code in the Context of Classroom Physical Interactions

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Stories of teacher physical interactions with students have been part of the waves of pressure to repeal or amend Section 43 of the Criminal Code. The Truth and Reconciliation Commission Report and Recommendations have drawn attention to abuses committed under the guise of correcting student behavior and have led to renewed calls to repeal Section 43. Section 43 is the only provision of the Code which protects teachers who have legitimate reasons to interact physically with students but is the level of protection it provides significant enough to warrant its retention? Changes need to be informed by both the stories of students at risk and the stories of teachers who are increasingly facing investigations over very incidental physical interactions.

History of Section 43

Section 43 of the *Criminal Code* permits the use of force by school teachers, parents and persons standing in the place of parents as follows:

> *43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.*

Section 43 is sometimes referred to as the "spanking law". It is known as the law which provides statutory authority for corporal punishment within homes and schools, but it is also the only *Criminal Code* provision that parents and teachers can rely on when defending the use of force to control or restrain children.

Most reform initiatives have focused on the issue of corporal punishment. Over the past few decades, there has been a growing recognition of the needs and rights of children and this has resulted in a shift in attitudes towards corporal punishment. Despite this shift, *Criminal Code* provisions still contain basically the same wording as in 1892 when Canada enacted its first criminal code.

Section 55 of the *Criminal Code* of 1892 read:

> *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.*

During a major reform of the *Criminal Code* in the mid-1950s, the reference to master and apprentice was removed.[1] The only other changes have been minor rewordings including replacing "schoolmaster" with "school teacher".

While the federal *Criminal Code* has remained largely the same, some school districts and provinces have passed policies and legislation to ban corporal punishment in public schools.

British Columbia was the first province to create a statutory prohibition on corporal punishment.[2] Legislation to ban corporal punishment in BC public schools was introduced in 1972 by Eileen Dailly, Education Minister in David Barrett's NDP government together with provisions addressing religion in schools.[3] The *School Act* currently states:

> ***Conduct***
> ***76** (1) All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.*
> *(2) The highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school.*
> *(3) The discipline of a student while attending an educational program made available by a board or a Provincial school must be similar to that of a kind, firm and judicious parent, but must not include corporal punishment.*[4]

Other provinces were surprising slow to follow suit.[5] The patchwork of policies and laws combined with the minimal regulation of private schools left many students unprotected, particularly those who attended private religious schools, including residential schools for Aboriginal students. This resulted in abusive corporal punishment of many students into and in some cases past the 1990s.

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[1] *Criminal Code,* S.C. 1953-54, c. 51.
[2] The Toronto Board of Education abolished corporal punishment in 1971. See: https://www.edcan.ca/articles/banning-the-strap-the-end-of-corporal-punishment-in-canadian-schools/
[3] http://www.geoffmeggs.ca/2015/12/26/trudeaus-ban-on-spanking-echoes-eileen-daillys-ban-of-the-strap-which-rocked-barretts-ndp-in-1972/
[4] *School Act,* RSBC 1996, c 412.
[5] https://www.edcan.ca/articles/banning-the-strap-the-end-of-corporal-punishment-in-canadian-schools/

2004 Supreme Court Decision

While Section 43 has remained in the *Criminal Code*, societal attitudes towards corporal punishment evolved in the 1980s and 1990s. Initially, courts, like provincial legislatures, were slow to recognize these changes. Judicial decisions continued to reference Section 43 in acquitting parents and teachers who engaged in shocking acts of violence against children.[6]

That changed in 2004. In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 S.C.R. 76, the Supreme Court of Canada considered whether Section 43 violates the Charter including section 7 (security of the person), section 12 (cruel and unusual punishment) and/or section 15 (equality rights). The court found that Section 43 does not violate the Charter as it only protects force that is "by way of correction" and is "reasonable under the circumstances". In considering what actions are consistent with this, the court narrowed the circumstances of when parents can use corrective force as follows:

> …must have intended it to be for educative or corrective purposes…
>
> …cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration…
>
> …child must be capable of benefiting from the correction…Force against children under two cannot be corrective…
>
> …using objects, such as rulers or belts…slaps or blows to the head…will not be reasonable.[7]

With respect to teachers, the court found:

> 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,

[6] See: http://www.repeal43.org/judicial-attitudes-to-corporal-punishment/

[7] See paragraphs 23-37.

> supported by expert evidence and Canada's treaty obligations, indicates that corporal punishment by teachers is unreasonable.[8]

As a result of this decision, Section 43 still applies as a defense to assault where teachers apply physical force to a student as long as that force is reasonable in the circumstances and does not amount to corporal punishment.

The court commented on how reasonableness should be evaluated:

> 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 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.), 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.
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> 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

[8] Paragraph 38.

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 Pharmaceutical Society (Nova Scotia), 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.

Application of Section 43 to Teachers Following the 2004 Decision

Following the Supreme Court of Canada case, courts have continued to reference Section 43 in cases involving teacher physical interaction with students. It is difficult to assess, however, whether it is applied with any consistency or in a manner that provides much more protection beyond what teachers would have from common law defenses.

The following is a description of some of the cases which have involved teachers and other school staff since the 2004 decision. Generally, these cases involve using force to restrain or control children and the decisions turn on the reasonableness of the teacher's conduct given the circumstances.

In the 2004 case of *R. v. D.E.,* a physical education teacher was charged with assaulting a six-year-old girl. On one occasion, the teacher had grabbed the child by the arm and forced her to sit down. On another occasion, the teacher grabbed the student by the arm and sweater and pulled her out of the classroom. The teacher was acquitted on the basis of Section 43. The court found that there was insufficient consistent evidence to establish that the force was excessive. [9]

In the 2005 case of *R v. Foote,*[10] the accused was charged with assaulting a seven-year-old boy by kicking him on the leg. The boy, who was mildly autistic, had bolted into a room and had to

[9] [2004] J.Q. 8258
[10] [2005] O.J. 3260

be physically removed by four teachers while flailing and kicking. The court acquitted Foote finding that she did not actually kick the boy but only mimicked kicking.

In *R. v. Dubois*[11], a 2007 Quebec decision, the court found the teacher guilty of assault based on allegations that he had twisted the arms of three different students while angry and frustrated. This verdict was overturned by the Quebec Court of Appeal in 2011.[12] The Court of Appeal found that the evidence was too vague and that the trial judge failed to explain why he did not believe Dubois.

In the 2007 case of *R. v. Persaud*,[13] the accused was charged with assaulting grade 1 and 2 boys. They alleged he hit them with rulers and books and pushed them. Persaud was acquitted. He admitted to touching the children but denied the specific allegations. The court found that the evidence of unreasonable force was not reliable as the students' statements were contradictory.

R. v. Deschatelets,[14] a 2008 decision from Quebec, involved a physical education teacher. In response to a student's lack of cooperation, Deschatelets shook the student roughly and grabbed her by her sweater and hair. The court convicted Deschatelets of assault finding that the use of force was not reasonable.

R. v. *Therien*[15], another 2008 Quebec decision, involved a substitute teacher for a class of teens with learning and behavioural issues. When a student did not comply with directions not to touch a computer, Therien took the student by the arms and directed him to a back corner of the class. When the student tried to leave the corner, Therien grabbed him by the throat. Therien was convicted of assault. The court found that the initial contact in guiding the student by the arm was protected by Section 43 but grabbing the student by the throat was not.

In *R*. v. *Guilmont*,[16] students were leaving their classroom for a group photo. They were told by Guilmont to do so quietly to avoid disturbing other classes. A 14-year-old girl did not pay attention and pulled at another student while leaving. After reminding her twice to be quiet, Guilmont grabbed her by the shoulder saying "that's enough," and lead her to another room for a detention. The evidence was not conclusive with respect to the nature of the touching. Student witnesses alleged aggressive pushing by Guilmont but defence counsel was able to raise some doubt about whether this happened.

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[11] [2007] J.Q. 1921

[12] [2011] Q.J. 5212

[13] [2007] O.J. No. 1725
[14] [2008] J. Q. 10501
[15] [2008] J.Q. No. 5929
[16] [2009] J.Q No. 11213

The court relied upon Section 43 in finding the teacher not guilty of assault. The court also considered the common law defence of "*de minimus*". *De minimus* may apply for minimal incidental touching on the basis that while the touching was a technical assault, it was of a trifling character and it did not involve the kind of harm the offence is aimed at. The court's discussion suggests that *de minimus* may be difficult to apply to teachers who use some level of physical force to direct student behaviour.

In the 2009 case of *R. v. Chouinard,*[17] the accused was supervising students who were skating during a lunch break. A seven-year-old girl was skating without mittens. When she ignored Chouinard's directions to find her mittens, he grabbed her by the helmet and stated she must listen when spoken to. The student told her mother (who was watching) that this hurt her neck.

Chouinard was acquitted of assault charges. The court applied Section 43 and found that the physical contact was for the benefit of the child's security and her need to respect the rules.

R. v. *Maddison*[18] involved an educational assistant working with a seven-year-old boy with ADHD and Oppositional Defiance Disorder. The boy was very physically aggressive with teachers and other students. On a number of occasions, Maddison physically restrained and moved the boy. Other educational assistants alleged that she did so in an unreasonably rough manner. The court acquitted Maddison on the basis that Section 43 applied. The court found that there was a conflict between Maddison and her colleagues which called into question their perception of her conduct.

R. v. *Jonkman*[19], a 2010 Alberta case, concerned a substitute teacher who was called in to teach a grade 6 class. A number of students were behaving rudely. Jonkman was charged and convicted of assault for grabbing a student by his arm and pulling him from his desk. The court found that the behaviour was motivated by anger and frustration. The court rejected both the Section 43 defence as well as the defence of "*de minimus*".

R. v. *Burtis*[20] also involved a substitute teacher. Burtis was working in a kindergarten class. She was charged with assault in relation to her interactions with a five-year-old boy who had severe autism. After the boy repeatedly touched the ears of other students, Burtis pinched his ears multiple times and asked "how would you like it if your friends did that to you?" In convicting her of assault, the court did not accept her denial of the allegations and found that her behaviour showed a loss of control.

[17] [2009] J.Q. 8648
[18] [2009] N.S.J. No. 183
[19] [2010] Alberta Provincial Court
[20] [2012] ABPC 12

In *Dubois v. R*[21] the Quebec Court of Appeal overturned a trial court decision convicting a special education teacher of assaulting three boys. The court states that the trial judge failed to consider the context which involved working with students whose behavior occasionally required physical interventions to ensure safety. The court relied on Section 43 in finding that the prosecution did not establish that the use of physical force was unreasonable.

> 64 The appellant's work was difficult. All the evidence, including the testimony of the teacher Archambault, amply demonstrates it. Intervention measures of a physical nature were accepted, depending on the circumstances. The intervention protocol and the ITCA authorize this type of intervention, when required. The appellant, whose testimony was not contradicted in this regard, learned to act as he did in this case and did so in another center. In short, the circumstances of the case suggest a situation that is in no way comparable to that of a regular class, and this must be taken into consideration when assessing the reasonableness of the appellant's conduct and his actions.[22]

Aside from the context and rationale for physical interactions, the level of force involved seems to be the most significant factor in determining the outcome. Courts are more inclined to convict teachers of assault where the force is sufficient to cause visible harm. In the 2014 case of *R. v. Dumas*[23], an 11-year-old student was left with a bruise on his arm and a mark on his thorax which he alleged were caused when Dumas grabbed him. The court found that Dumas's denial of the allegations was not credible.

These cases show that while Section 43 still has protective value for teachers, this value may be becoming more limited. The progression of cases shows that Section 43 is now only accepted as a defence in cases where the teacher's conduct was well-intentioned and the physical interaction was very limited.

The number of cases where Section 43 is cited has decreased to the point where it is difficult to find any very recent reported cases. This may reflect a changing culture with respect to physical interactions with students. Even very low level physical interactions often result in investigation

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[21] [2011] J.Q. no 5212

[22] Unofficial English translation above. Original French: *Le travail de l'appelant était difficile. Toute la preuve, notamment le témoignage de l'enseignante Archambault, le démontre amplement. Les mesures d'intervention de nature physique étaient acceptées, selon les circonstances. Le protocole d'intervention et l'ITCA autorisent ce type d'intervention, lorsque cela est requis. L'appelant, dont le témoignage n'a pas été contredit à ce sujet, a appris à agir comme il l'a fait en l'espèce et agissait de la sorte dans un autre centre. Bref, les circonstances de l'affaire laissent entrevoir une situation qui ne se compare aucunement à celle d'une classe régulière et il faut prendre cela en considération lorsque vient le moment d'évaluer le caractère raisonnable du comportement de l'appelant et de ses interventions.*

[23] [2014] J.Q. No. 12422. The defense did not rely on Section 43 as Dumas denied that physical interactions occurred.

and discipline by the employer. Teachers may now be erring on the side of avoiding using physical intervention to manage students' conduct.

In addition to acting as a defense once the matter is in court, Section 43 may also play a role in decisions by police to charge teachers with assault as well as whether Crown Counsel takes those charges ahead to trial. These exercises of discretion are not as visible, making it difficult to gauge the extent to which Section 43 is a factor. Our experience in British Columbia is that police and Crown decisions are based on the extent to which the teacher's behavior is consistent with what is generally seen as reasonable as opposed to any consideration of Section 43.

Discretionary decisions by police and prosecutors may also be influenced by the growing role of professional regulators. In British Columbia and Ontario, where there are well-established teacher regulation bodies, teachers face harsh discipline for even relatively minor physical interactions with students. This may make complainants less likely to push for criminal proceedings as they have other forums to pursue their concerns. When police and prosecutors see that teacher conduct is being addressed by regulators, they may feel that there is not a public interest in criminal investigations or charges.

The expanding scope of professional regulatory bodies may cause police and prosecutors not to proceed with charges, particularly were allegations are minor. This approach may have both positive and negative consequences for teachers. No teacher wants to be the subject of a criminal investigation; however, the criminal law includes protections that do not exist in regulatory proceedings. In regulatory proceedings, there is no right to remain silent, and the burden of proof is based on the civil standard of a balance of probabilities. Procedurally, there are limited disclosure rights, and few checks on investigative powers. Criminal proceedings are narrowly limited to clear allegations of breaches of the *Criminal Code*. Professional misconduct is a broad concept that allows regulators to allege a range of concerns, often grouping physical allegations together with other types of issues. This can result in formal public discipline for minor physical interactions that might not support a finding of professional misconduct if not grouped with other types of incidents.

Examples of Professional Regulatory Cases Involving Physical Interactions with Students

In 2018, the BC Teacher Regulation Branch ("TRB") reported six Consent Resolution Agreements ("CRA") where teachers were held to have used physical force against students.

Assigbe[24] involved a teacher with 10 years of experience. Three students were off task during class when the teacher ordered the students out of the classroom. In so doing, he used his hands on each of the students' back or shoulders to physically direct them out of the classroom. The

[24] *The Commissioner, appointed under the Teachers Act* v *Gadagboe Koffi Assigbe*, August, 2018, online: TRB https://www.bcteacherregulation.ca/.

teacher in this case had also made an inappropriate comment to a student. The TRB issued a three-day suspension of the teacher's certificate and a requirement to complete a course "Reinforcing Respectful Professional Boundaries".

In *Bourne*[25], a teacher with 29 years of experience grabbed a student's arm, causing the student to cry, after the student didn't follow the teacher's direction to leave other students alone. The TRB issued a reprimand.

In *Caswell*[26], a teacher with 6 years of experience approached a student from behind and put her hand over the student's mouth and nose area while telling the student to shut up. The TRB issued a two-day suspension and a requirement to complete a course "Creating a Positive Learning Environment".

In *Lee*[27], a teacher with 13 years of experience grabbed a student's hand while she was typing because she was not following his instructions. In other incidents, the teacher tackled a student during a no-contact game of handball, grabbed a boy's finger and pointed it towards the desk when the student seemed confused about an assignment, and grabbed a student's head during a safety demonstration about cycling. The teacher also threw erasers, masking tape and balls at students as a form of punishment. In addition, the teacher made inappropriate comments to students, yelled and demonstrated anger towards students. The TRB issued a four-month suspension of his certificate.

In *Ouellette*[28], a teacher with 2 years of experience responded to screaming in the locker room by asking the student to leave and escorting the student out of the room by gripping the back of his neck. The student reported some discomfort. The TRB issued a 1-day certificate suspension.

In *Zhang*[29], a teacher with 10 years of experience grabbed a student tightly by the arm and pulled him off from a riser, causing the student's foot to be caught between two risers. The teacher then pushed the student out of the classroom. The TRB issued a two-day suspension of his certificate and the completion of the course "The Mindful Educator in Managing Conflict".

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[25] *The Commissioner, appointed under the Teachers Act v Debbie Lynne Bourne*, September 2018, online: TRB https://www.bcteacherregulation.ca/.
[26] *The Commissioner, appointed under the Teachers Act v Millicent Caswell*, August 2018, online: TRB https://www.bcteacherregulation.ca/.
[27] *The Commissioner*, *appointed under the Teachers Act v Daniel Lee*, July 2018, online: TRB https://www.bcteacherregulation.ca/.
[28] *The Commissioner*, *appointed under the Teachers Act v Olivier Simon Adrien Guy Ouellette*, November 2018, online: TRB https://www.bcteacherregulation.ca/.
[29] *The Commissioner*, *appointed under the Teachers Act* and *Xishuang Zhang*, May 2018, online: TRB https://www.bcteacherregulation.ca/.

The Ontario College of Teachers

Comparatively, Ontario's teachers are regulated by the Ontario College of Teachers (the "College"). In 2018, the College issued 9 decisions that involved a teacher's use of physical force against a student.

In *Hutton*[30], a teacher with 42 years of experience grabbed a student's leg, causing him to fall, after the student ran at the teacher. The teacher had also made inappropriate comments to students. The Children's Aid Society of Hamilton (the "CAS") investigated this matter and found a risk of physical and emotional harm. The member received a reprimand and a requirement to complete a course on classroom instruction.

In *Mate*[31], a teacher pushed a student out of the classroom and made inappropriate comments to students. The College issued a reprimand, a six-month suspension and the completion of an anger management course prior to returning to teaching. The teacher resigned from the Board.

In *Campbell*[32], a teacher with 23 years of experience engaged in 9 incidents with students. The teacher lifted and tossed a student, forcefully grabbed a student's arm, pushed a student's head backwards, and poured water on a student. In addition, the teacher grabbed the back of a student's neck, held a student's hair to redirect them and held a student by the shoulders to redirect him to the ground to clean up. The teacher also pushed a student's head backwards after the student bumped into the teacher, forced a student to hold a glass of water up to his mouth while it was filled with food, and extended her arm toward a student's chest, causing him to lose his balance and fall. The College ordered a reprimand, a one-month suspension and the completion of a course on classroom management.

In *Hall*[33], the teacher held and shook a student's hand for interrupting her conversation, pushed a student out the door, held and shook a student by the shoulders, and shook a student by the shoulders while yelling at him. The teacher also allowed a student to clean up glass with his fingers, pushed a student into a desk and shook him by the shoulders, and refused to allow a student to get ice after a fall in which the student hit her head. The teacher also made inappropriate comments to students about the quality of their lunch, school work, relative's health, and overall classroom behaviour. The member also failed to intervene with students when problems were observed. The penalty phase of the disciplinary hearing is scheduled for March 2019.

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[30] *Ontario College of Teachers v Barry Norman Hutton*, November 2018, online: OCT https://www.oct.ca/ .
[31] *Ontario College of Teachers v Dinah Cherise Magdalene Mate*, November 2018, online: OCT https://www.oct.ca/.
[32] *Ontario College of Teachers v Catherine Leslie Ann Campbell*, June 2018 online: OCT https://www.oct.ca/.
[33] *Ontario College of Teachers v Gail Louise Hall*, February 2018, online: OCT https://www.oct.ca/.

In *Green-Johnson*[34], the teacher slapped a student on the head for being rude to his mother and called him an "idiot" and told him to "grow some balls". The member also swore at students and made inappropriate comments about farting, body parts and masturbation. The College issued a reprimand, a two-month suspension, and required completion of an anger management and boundaries course.

In *Mathews*[35], a teacher with 17 years of experience was attempting to supervise a student when the student fell to the floor. The teacher held the student's wrist and tried to raise him from the floor. The teacher then held the student's ankle and slid him across the floor to the administration's office. The teacher resigned from the Board 1.5 years after the incident and expressed no desire to return to teaching. At the time of the hearing, the teacher had cancelled her certificate with the College. The College imposed a reprimand against the teacher, as there was no public interest because the teacher was not a certificate-holder.

De Mare[36] involved a teacher employed as an occasional teacher. During class, the students wanted to see a broken pencil sharpener and the teacher tried to redirect the students back to their desks. In so doing, the teacher held a student's wrist and pushed the student towards his chair. The teacher also pulled another student's shirt collar and told him to sit down. The College issued a reprimand and a boundary course requirement.

In *Fils-Aime*[37], a student who was required to stay after class to complete a test stated he wasn't going to stay for the test and ran towards the teacher, who was holding the door ajar. The teacher did not move as the student ran towards him. The student pushed the member in the chest several times and the teacher held the student's arm and signaled for help. The student fell while the teacher was reaching for the intercom and the teacher helped the student to get up. A report was made to the Children's Aid Society ("CAS"), who determined that the allegations of risk of physical danger were verified. The teacher was required to complete a course in classroom management.

In *Steele*[38], the teacher threw objects in the direction of students and kicked furniture, which caused injuries to students. In addition, the teacher yelled and made inappropriate comments to students. In an unrelated incident, the teacher was charged and convicted of two counts of assault for a domestic incident. The teacher received a two-year suspension of his certificate and a course completion requirement in classroom management.

[34] *Ontario College of Teachers* v *Jennifer Elizabeth Green-Johnson*, June 2018, online: OCT https://www.oct.ca/.
[35] *Ontario College of Teachers v Jane Valerie Mathews,* November 2018, online: OCT https://www.oct.ca/.
[36] *Ontario College of Teachers v Salvatore De Mare*, December 2018, online: OCT https://www.oct.ca/.
[37] *Ontario College of Teachers v Pierre Fils-Aime*, October 2018, online: OCT https://www.oct.ca/ .
[38] *Ontario College of Teachers v Darcy Robert Steele*, January 2018, online: OCT https://www.oct.ca/.

When BC and Ontario regulatory decisions are compared with criminal cases involving teacher physical interactions with students, regulators appear more likely to find that minor physical interactions, including those which do not cause injury, are unreasonable and unacceptable. In theory, this could put teachers at risk for criminal convictions as Section 43 only permits force if "reasonable in the circumstances". It would be difficult to argue that force which has found to be misconduct by a regulator is reasonable in the circumstances. In practice, however, police and prosecutors do not seem interested in pursuing criminal charges following regulatory findings of minor physical misconduct.

The declining number of criminal cases involving teachers using force against students combined with the increasing role of professional regulators may mean that Section 43 has become less significant for teachers than it was in the past.

Should Section 43 be Abolished?

Over the years, there have been a number of campaigns to abolish Section 43.[39]

In 2008, the Senate passed Bill S-209 to repeal Section 43 of the *Criminal Code*. Bill S-209 was set for first reading at the House of Commons on June 20, 2008 but did not get pursued further after parliament dissolved.

In 2008, teacher organizations were reluctant to support abolishment of Section 43 as it appeared that it was still being successfully relied upon as protection by teachers. Since then, however, its value as a defense has waned as there has been growing intolerance towards anything but the most minimal use of physical force by teachers.

The Truth and Reconciliation Commission

The Truth and Reconciliation Commission (the "TRC") recommendations have resulted in a reopening of discussions about Section 43. In order to redress the legacy of residential schools and advance the process of Canadian reconciliation, the Truth and Reconciliation Commission makes the following call to action:

> We call upon the Government of Canada to repeal Section 43 of the *Criminal Code of Canada*.[40]

The findings of the commissioner with respect to the historical misuse of force by teachers within the residential school system provide powerful support for the recommendation that Section 43 be abolished. The documentation of abuses that not only involved corporal

[39] See www.repeal43.org ; http://endcorporalpunishment.org
[40] The Truth and Reconciliation Commission of Canada: Calls to Action, 2015.

punishment purposes but also for wrongful restraint and control of students makes it difficult to draft alternatives to Section 43 which are responsive to concerns flowing from the TRC. Discussion around repeal of Section 43 highlights the desire to be in compliance with international treaties and the TRC, but also shows the tension that exists by situating these objectives within a framework that considers the practical conditions that teachers face on the front lines.

The issue is whether abolishing Section 43 in its entirety would leave teachers with inadequate protection from assault charges when they interact physically with students in a reasonable manner for legitimate purposes.

The assault provisions of the *Criminal Code* are very broad when compared to assault provisions in other countries. Section 265 prohibits any non-consensual application of force. Section 279 prohibits forcible confinement of another person without lawful authority. The wording of these sections creates a concern that any physical contact or restraint of a child could lead to criminal prosecution.

Consequences of Retaining Section 43 in its Current Form

Retaining Section 43 in its current form is problematic for numerous reasons. Complete opposition of abolishment of Section 43 would not be consistent with teacher union policies against corporal punishment or other policies which protect the best interests of children. While Section 43 has been read down by the courts so that it no longer permits corporal punishment by teachers, it can still be cited as a defense by parents. The current wording of Section 43 further expresses statutory approval for both parents and teachers using force as a means of correction of children's behavior. This provided a statutory framework for historical abuses which involved not only corporal punishment but also physical force to enforce instructions which were part of exploitive and abusive residential schools.

Section 43 is misleading for teachers as its permissive wording does not convey the legal restrictions on teachers' use of force.

Risks of Repealing Section 43

Abolishment of Section 43, without replacing it with any new provisions which authorize the use of force by teachers, could result in teachers being at a greater risk of conviction of assault and/or unlawful confinement charges.

Teacher organizations have expressed concern that in the absence of Section 43, teachers may not have enough protection from assault charges.[41] Assault is defined very broadly as including any non-consensual touching. This could capture situations where a teacher physically restrains or guides an uncooperative child, even if the level of force was very minimal. For example, physically carrying a resisting kindergarten child out of a classroom could be considered an assault as the child would clearly not be consenting.

Without Section 43, teachers would have to rely on narrow defenses such as consent, necessity (physical touching which is necessary to prevent immediate harm) and de minimis (where physical touching is minimal and only a technical breach of the code).

While these are valid concerns, the protective value of Section 43 for teachers has become less significant. Despite the existence of Section 43, there is a growing expectation that teachers not only refrain from using corporal punishment (as required by the *School Act*) but also refrain from interacting physically with students to manage their behaviour except to address immediate safety risks. Where physical contact may be acceptable (for example physically guiding or carrying a distraught child), in order to be considered "reasonable", teachers would likely have to be so gentle that it would be difficult to characterize the situation as a use of force. These changes are reflected in court decisions regarding Section 43. Section 43 is still frequently cited in teacher cases, but it is only accepted as a defense for a very limited range of conduct.

The caselaw suggests that repeal of Section 43 is unlikely to have a dramatic impact on teachers. When the risk to teachers is balanced against the harm which has been caused by corporal punishment and the misuse of force by parents and teachers, it may be reasonable for teacher organizations to support complete abolishment of Section 43.

If Section 43 is abolished, however, efforts may be needed to ensure that police and Crown Counsel exercise their discretion in a manner that is consistent with the legitimate role of teachers in managing student behavior and protecting children from harm. Broader social justice concerns may also arise if Section 43 is repealed, including the expansion of the criminal law and the continued overrepresentation of marginalized communities in the child welfare and criminal justice systems.

Teacher advocates may need to encourage prosecutors to use discretion not to prosecute. Prosecutorial discretion is an essential feature of Canadian criminal law, as many *Criminal Code* provisions are worded broadly enough to capture conduct that does not warrant criminal sanction. Currently prosecutors do often decline to proceed where there is technically an assault of an adult but the incident was minor and has been dealt with adequately in other forums. With

[41] A Brief From the Canadian Teachers' Federation to the Human Rights Committee of the Senate of Canada Concerning Bill S-207, *An Act to Amend the Criminal Code*, June 4, 2007.

respect to teachers, prosecutors may be more likely to proceed with assault charges where physical contact is minimal. Teachers are held to a higher standard than the general public, as they are working with vulnerable students. Absent guidance, prosecutors may err on the side of proceeding against teachers.

Caselaw regarding healthcare workers provides some examples of the type of guidance which courts find useful. *R. v. Sheppard*[42], a case which involved a health care worker who appeared on video surveillance to push a client onto a couch. Although there is no defense in the *Criminal Code* for healthcare workers who use physical force to manage client behavior, the court found that the conduct did not constitute an assault. The court referenced provincial statutes as well as professional guidelines:

> **19** That is not the situation here; there was no medical treatment being offered and no consent given by Ms. Emberley as she was not competent to give it. However, there is some statutory authority that permits the use of restraint on a person suffering from illness or disability in some circumstances. For example, Section 21 of the *Mental Health Care and Treatment Act* provides:
>
>> ***21.*** *(1) Where a person is apprehended and conveyed to a facility for an involuntary psychiatric assessment under section 18, 19, 20 or 51,*
>> *(a) the person effecting the apprehension and detention may take reasonable measures, including the entering of premises and the use of physical restraint, to apprehend the person and to take him or her into custody; and*
>>
>> *(b) the person who is apprehended and detained shall be conveyed to a facility for a psychiatric assessment as soon as practicable and by the least intrusive means possible without compromising the safety of that person or the public.*
>
> **20** Any physical restraint under this legislation must be the least intrusive and for the purpose of protecting the person from harm. Other jurisdictions have similar legislation which for the most part apply the same principle of the least intrusive application of force or restraint. The same is true of professional guidelines for some health care professionals on the issue.

In British Columbia, a teacher's ability to use physical restraint in the classroom context is in part guided by the Ministry of Education's guidelines on the use of physical restraint and seclusion in the school context:

[42] [2017] N.J. No. 28. See also R. v. Ghuman [2015] B.C.J. No. 1870.

> *Physical restraint or seclusion is used only in exceptional circumstances where the behaviour of a student poses imminent danger of serious physical harm to self or others, including school personnel, and where less restrictive interventions have been ineffective in ending imminent danger of serious physical harm. Restraint or seclusion is discontinued once imminent danger or serious physical self-harm or harm to others has dissipated.*
>
> *Neither restraint nor seclusion are used as a punishment, discipline, or to force compliance in an educational/learning setting*.[43]

These guidelines could be relied on where teachers use physical interactions to prevent harm.

Teacher advocates may also need to push to have common law defenses applied to teachers, including the defense of necessity. Necessity generally applies where there is an imminent peril or danger, an absence of a reasonable alternative and proportionality between the harm inflicted and the harm avoided. The defence would apply to situations where a teacher physically removes a student who is hurting another student.
Cases from the healthcare sector suggest that this defense could apply in a broader range of circumstances as well. Because Section 43 does not apply to healthcare workers, courts are forced to consider common law defenses more closely. The defense of necessity has been held to apply where adult patients are restrained as part of protecting them generally, even when the immediate risk of harm is fairly limited.[44] Because courts have been able to rely on Section 43 for teachers, there has been little judicial analysis of how this defence applies to those caring for children. Courts do seem to recognize that caring for and supervising children may occasionally require use of physical force to restrain or direct children's behaviour.

Express or implied consent has also been accepted as a defense in cases involving charges of assault against health care workers.[45] These cases suggest that some level of consent may be implied from the nature of the teacher-student relationship and the school environment, even if there is resistance to the specific physical contact at issue. Express consent may be set out in individual education plans for students who may require physical restraint.

The common law defence of *de minimis* is based on the notion that the law does not concern itself with minor matters. This may apply to fleeting physical contact to get students' attention or guide their behaviour.

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[43] Provincial Guidelines – Physical Restraint and Seclusion in School Settings, British Columbia Ministry of Education June 3, 2015.
[44] R. v. Sheppard [2017] N.J. No. 28
[45] R. v. Sheppard [2017] N.J. No. 28; R v. Ghuman [2015] B.C.J. No. 1870.

Proponents of abolishing Section 43 have suggested that section 25 of the *Criminal Code* could be used as a defense for parents and teachers.[46] The *Criminal Code* recognizes that police officers and others in positions of authority may need to use physical force to enforce the law. Section 25 authorizes this use of force:

> ***Protection of persons acting under authority***
>
> ☐ ***25 (1)*** *Everyone who is required or authorized by law to do anything in the administration or enforcement of the law*
>
> ***(a)*** *as a private person,*
>
> ***(b)*** *as a peace officer or public officer,*
>
> ***(c)*** *in aid of a peace officer or public officer, or*
>
> ***(d)*** *by virtue of his office,*
>
> *is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.*

There appears to be little case law to support this argument. It would be difficult to characterize the actions of parents and teachers as "administration or enforcement of the law".

While Section 25 applies irrespective of the age of the person who is subject to force, Section 25 and Section 43 read together are consistent with the expectation that children's behaviour, particularly children under 12 (minimum age for criminal responsibility), will be managed by parents and teachers rather than the police. Where force is needed to move a child or secure compliance with instructions, Section 43 operates in a similar manner as Section 25.

This poses a problem if Section 43 is removed in its entirety and not replaced with a provision authorizing use of force by parents or teachers. The result could be that only police would have express authority to use physical methods to move children without their consent. If physical interaction becomes too risky for teachers, schools may resort more to involving the police when physical management of children is needed.

Possible amendments to Section 43

Proposals to repeal Section 43 were introduced in the Senate by now retired senator Céline Hervieux-Payette at regular intervals since the mid-1990s. Bill S-209 was the first to attract a significant amount of attention. When abolishment was proposed in the Senate on October 17, 2007, Bill S-209 repealed Section 43 without replacing it with any new language. This resulted in opposition from teacher advocacy groups on the basis that teachers would be left with

[46] https://www.repeal43.org/why-we-advocate-repeal/

inadequate defenses to assault charges in situations where physical force was reasonably used to control or direct students.

In response to concerns from a wide variety of sources, the bill was amended to replace Section 43 with the following:

> *43.(1) Every schoolteacher, parent or person standing in the place of a parent is justified in using reasonable force other than corporal punishment toward a child who is under their care if the force is used only for the purpose of*
>
> > *(a) preventing or minimizing harm to the child or another person;*
> >
> > *(b) preventing the child from engaging or continuing to engage in conduct that is of a criminal nature; or*
> >
> > *(c) preventing the child from engaging or continuing to engage in excessively offensive or disruptive behaviour.*
>
> *(2) In subsection (1), "reasonable force" means an application of force that is transitory and minimal in the circumstances.*

This amended wording steers the legislation closer to the position of teacher organizations on Section 43. It is still a narrower definition of reasonable force than that set out in the Supreme Court decision. The Supreme Court recognized that teachers need to use physical force in "appropriate circumstances". The Court did not define those circumstances. Bill S-209 allowed use of force in response to only three types of circumstances: to prevent harm, to prevent criminal conduct or to prevent excessively offensive or disruptive behaviour. This short list does not include many circumstances when teachers may reasonably need to use physical force. For example, unless "harm" is interpreted in a very broad manner, Bill S-209 may not protect teachers who touch students to remove them from a classroom or secure compliance with instructions.

Ultimately Bill S-209 did not move beyond the Senate.

Recent efforts to repeal or amend Section 43

Following the Truth and Reconciliation Report, there was renewed pressure to repeal or amend Section 43. The Trudeau government committed to implementing the Truth and Reconciliation

recommendations, including the repeal of Section 43. [47]It is unclear at this point whether the current government will follow through on that promise.

Bill S-206, *An Act to Amend the Criminal Code (protection of children against standard child-rearing violence)* was given a first reading in the Senate on December 8, 2015 and a second reading on May 31, 2018. Bill S-206 removes Section 43 from the code without replacing it with any amended wording. Bill S-206 was referred to the Senate Legal Affairs Committee and does not appear to have been pursed further.

Conclusions

Given the trends with respect to societal views on physical interactions with children as well as the significance of Section 43 in the Truth and Reconciliation Commissioner recommendations, it seems likely that changes will eventually be made to Section 43. The approach most protective of teachers would be replacement of Section 43 with a new section that authorizes the use of physical force by parents and teachers where reasonably necessary. It would be difficult, however, to draft wording which adequately addresses risks to teachers without being a barrier to preventing and responding to abuse.

If Section 43 is repealed in its entirety, there are other tools that can be utilized to guide police, prosecutors and courts in their assessment of whether teacher conduct warrants criminal sanctions. Teacher advocates may need to push for the development of common understandings, whether through guidelines or judicial decisions, of what physical interactions are reasonably part of caring for and instructing children.

[47] https://www.theglobeandmail.com/news/politics/liberals-agree-to-revoke-spanking-law-in-response-to-trc-call/article27890875/