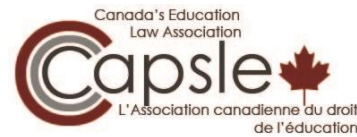


Assault on Student: A Case Study of Section 43 of the Criminal Code



Historical Notes

Section 43 of the Criminal Code of Canada states 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.” In turn, Section 265 (1) (a) and (b) of the Criminal Code of Canada state that “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 on reasonable grounds that he has, present ability to affect his purpose.”

Section 43 of the Criminal Code first appeared in Canada’s Criminal Code in 1892 and has remained virtually unchanged since that time. Given its history of protecting parents and teachers who had assaulted students, often times in a criminal manner, there have been several attempts in recent times to have section 43 removed from the Criminal Code. In 2015 the Trudeau government committed to implement all of the 94 Calls to Action from the Truth and Reconciliation Commission¹. Number 6 of the Calls to Action “calls upon the government of Canada to repeal section 43 of the Criminal Code of Canada”. Despite these frequent calls for the removal of Section 43, it still remains with us. Part of the reason for its continuance was most recently displayed in the decision of the Ontario Court of Justice in *Her Majesty the Queen and Sean Hume* (December 22, 2020)².

R v. Hume

Mr. Hume, the former principal of Chester Elementary School in East York, had been put on administrative leave since he was charged criminally in 2018. Mr. Hume was charged after his attempts to restrain a child who had behavioural challenges. According to the decision, Mr. Hume saw a grade 4 child on the playground who was angry and upset and he tried to calm him down by speaking to him. However, the child continued to scream and throw objects at Mr. Hume and others on the playground. The principal then tried to restrain the child using a method described by the child’s mother as being effective.

The crown argued that Hume’s actions were excessive, and they were neither corrective in nature nor were they reasonable. Justice Clark rejected that argument and said the force

¹ Truth and Reconciliation Commission Calls to Action, December 2015

² *R v Hume*, 2020 ONCJ 619, 2020 12 22

was reasonable under the circumstances and the child's behaviour posed a safety risk to himself, the defendant and the other students.

One can expect that many elementary principals could relate to Mr. Hume's experience. As we work to meet the challenges of making our schools inclusive for all children, the presence of students with severe behaviour difficulties is a significant component of that challenge. When these situations occur, often times action on the part of staff must be swift and immediate.

Corporal punishment in public schools in Canada has been prohibited by school boards for some time and those decisions have been reinforced by a decision of the Supreme Court of Canada (2004) which makes corporal punishment in public schools illegal³. Students are now legally protected from those historic abuses that occurred under the protection of section 43.

The resistance to the removal of section 43, one would expect is coming from those in schools who are being called upon more frequently to deal with students with severe behavior difficulties. One would think that there would be far less opposition to the removal of section 43 if the staff in our schools knew how they would be protected from being criminally charged for incidents where they needed to intervene. Principals and teachers cannot be hesitating to intervene due to a worry that they might be charged criminally.

As Mr. Justice Clark said in reaching his decision to find Mr. Hume not guilty of assault under Section 265 of the Criminal Code: "The obvious take away from this unfortunate occurrence is that an educator has a heavy and onerous responsibility to be extremely careful before imposing any form of physical contact with a student and where no other reasonable options are available. I am quite sure that the defendant has had many regrets since having been charged. He does not, however, need to also regret a criminal finding of guilt."

Conclusion

While the issue of the applicability of Section 43 remains alive, we will continue to monitor its evolution in both the political and legal spheres.

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³ *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, [2004] 1 S.C.R. 76, 2004 SCC 4