



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

June 4, 2008

The Honourable Senator Joan Fraser
Chair, Senate Committee on Legal and Constitutional Affairs
Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Fraser,

Re: Bill S-209 – *Criminal Code* amendments (protection of children)

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill S-209, *Criminal Code* amendments (protection of children). The CBA Section includes prosecutors, defence counsel and academics from every province and territory in Canada. While we recognize that Bill S-209 is intended to better protect children, which is certainly a priority shared by the CBA Section, we do not support passage of the Bill.

Bill S-209 would repeal section 43 of the *Criminal Code*, which provides a defence to parents, teachers and like individuals to use force to correct a pupil or child. Repeal of section 43, which has been part of the Code for over a century,¹ would represent a major shift in criminal law policy. The change would dramatically expand the reach of the criminal law in a wide range of circumstances, and give rise to an almost certain risk of undesirable consequences. Further, we believe it would not capture conduct that truly jeopardizes the health and well being of young people.

Medical, scientific and social research could be found to support virtually all possible perspectives in regard to repeal or retention of this provision. The scope of the debate reflects the difficulty of balancing individual autonomy with larger societal parenting and teaching functions. The section was also subjected to close constitutional scrutiny by a full panel of the Supreme Court of Canada in 2004.² That case attracted the attention of a wide range of intervening parties from across the country.

¹ It dates back to at least the 1892 edition of the *Criminal Code* of Canada.

² *Canadian Foundation for Children Youth and the Law v. Canada (Attorney General)*, [2004] SCC 4, 180 CCC (3d) 353.

The Bill's sponsor has suggested that section 43 permits almost any form of corrective force,³ leading to the conclusion that the section must be repealed. However, the Senator's comments appear based mainly on the dissenting judgement in the leading case interpreting the constitutionality of section 43.⁴ Yet in upholding the constitutionality of section 43, the majority clarifies that it permits only a small amount of minor corrective force of a "transitory and trifling nature". Chief Justice McLachlin wrote:

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. [emphasis added]⁵

The recent decision in *R. v. Swan*⁶ provides a clear and compelling example of the danger of over-criminalization if section 43 were to be repealed. There, a parent was dealing with his 15 year old daughter who appeared on a path of rebellious and destructive behaviour. Assistance from community and child protection authorities had failed to assist the family. On the night in question, the daughter defied her parents and was intent on attending a party with her violent, drug addicted boyfriend. Seeing his daughter at a telephone booth, the father stopped and took physical control of his daughter by grabbing her by the arm and placing her in the truck to take her home. Mr. Swan was convicted of assaulting his daughter. On summary conviction appeal the conviction was overturned and an acquittal entered.

The judgment of Madam Justice Robertson in that case demonstrates the difficulties that arise in dealing with "out of control" youth who, because of their age, lack maturity and have a diminished capacity to fully understand the consequences of their own behaviour. In our view, the judgment strikes the appropriate balance in such difficult circumstances:

The Supreme Court of Canada found s. 43 to be constitutional in *Canadian Foundations* and reviewed the use of corrective force on children within the provision of s. 43. The overall theme of the case is that while conflict between children and authority figures is normal, violence is not an acceptable response. Section 43 protects children from abuse yet allows authority figures, including parents, to carry out corrective duties to children. *It is meant to ensure that minor matters do not result in criminalized parenting*. Section 43 should not to be used as a shield to legitimize child abuse or to sanitize violence against children. [emphasis added]

³ Senate *Debates*, December 2004.

⁴ 2004 SCC 4, 180 CCC (3d) 353.

⁵ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4 at para. 40.

⁶ 2008 CanLII 10389 (Ont. SC).

The judgment is also important for its review of other cases where section 43 has been used to exempt either parents or teachers from conviction for behaviour at the lesser end of the spectrum. For example, Madam Justice Robertson cited:⁷

In *R. v. Persaud*, [2007] O.J. No. 1752 (S.C.J.), the court noted:

41. The case confirmed 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. While the assault provision of the *Code* prohibits intentional, non-consensual application of force to another, the court found that s. 43 legitimately excludes reasonable physical correction of children by their parents and teachers...
45. *Ultimately, the court in Canadian Foundation agreed with the Law Reform Commission of Canada that s. 43 was necessary to exempt non-criminal behaviour by caregivers and avoid harmful family disruptions. The section prevented the criminalization of such innocuous behaviour as "placing an unwilling child in a chair for a five-minute 'time-out'" (pages 290-91)...[emphasis added]*⁸

In our view, repeal of section 43 of the *Code* would result in an unwarranted expansion of criminal liability, over-criminalizing behaviour of parents, teachers and authorities attempting to deal with troubled children in extremely difficult circumstances. By prohibiting the use of reasonable force by a responsible adult who might step in where it would be otherwise reasonable to do so, it might actually represent an increased risk to children, either from their own behaviour or from the unrestrained behaviour of other children.

In summary, repeal of section 43 would certainly have at least three undesirable consequences:

- it would grant immunity to children and teenagers for unruly, dangerous or destructive behaviour;
- it would hinder parents, teachers, or other persons in authority from appropriately restraining a child or teenager whose behaviour endangers or is disruptive to others; and
- it would have no impact on actual assaults on young people by parents and authority figures.

We thank you for this opportunity to comment on Bill S-209, and trust that our comments will be helpful to your deliberations.

Yours truly,

(Original signed by Greg DelBigio)

Greg DelBigio,
Chair, National Criminal Justice Section

cc.

The Honourable Senator Céline Hervieux-Payette, P.C.
The Honourable Rob Nicholson, P.C., M.P., Minister of Justice

⁷ *Ibid.*, at paras. 25-27.

⁸ *Supra*, note 6 at paras. 41, 45.