

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**

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## **INTRODUCTION**

The Canadian Teachers Federation (CTF) opposes corporal punishment.

However, the CTF also opposes Bill S-207 because this Bill proposes to delete section 43 from the *Criminal Code*. Section 43 is not solely about corporal punishment and, in fact, does not give teachers permission to engage in corporal punishment. Section 43 of the *Criminal Code* gives protection to teachers when they use a reasonable amount of force for corrective purposes, such as restraining a child or removing a child from the classroom. Teachers who use a mild or moderate amount of force for these purposes should not be subject to criminal sanction. Repealing section 43 of the *Criminal Code* leaves open the criminalization of reasonable and moderate use of force by teachers for corrective purpose, and for that reason the CTF opposes the complete repeal of section 43 of the *Criminal Code*.

In this brief, the CTF proposes to do three things:

1. Explain the current scope of section 43 of the *Criminal Code*, including the unequivocal prohibition of corporal punishment by teachers;
2. Explain why section 43 of the *Criminal Code* is necessary to prevent teachers from being subject to criminal liability for creating and nurturing a healthy and safe learning environment; and
3. Explain why section 43 – as it applies to teachers – is consistent with Canada’s international obligations and international human rights law.

## **SECTION 43 OF THE *CRIMINAL CODE***

Section 43 of the *Criminal Code* 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.

Section 43 of the *Criminal Code* only permits teachers to use force for “correction”, and then only such force as is “reasonable under the circumstances.”

In 2004, the Supreme Court of Canada ruled that section 43 of the *Criminal Code* did not violate the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> In that case, the Supreme Court of Canada specifically addressed what would constitute reasonable force by a teacher. The Supreme Court of Canada’s ruling concerning the use of force by teachers is as follows:

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.

. . . **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.<sup>2</sup>

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<sup>1</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 [hereinafter *CFCYL*].

<sup>2</sup> *CFCYL*, *ibid.* at paragraphs 38 and 40.

The *CFCYL* case, as it concerns the scope of section 43 for teachers, can therefore be distilled into the following propositions:

1. Section 43 **never** permits teachers to use corporal punishment.
2. Section 43 does not protect the use of force by a teacher when that force is motivated by frustration, loss of temper, or an abusive personality.
3. Section 43 protects teachers who use force reasonably under appropriate circumstances, which include, but are not limited to:
  - a. Restraining a child to secure compliance with instructions;
  - b. Removing a non-compliant child from the classroom.

Section 43 of the *Criminal Code* creates, at law, a justification for conduct that would otherwise be criminal. It is noteworthy that the *Criminal Code* makes it an offence to “apply force intentionally” to another person, regardless of whether that application of force results in bodily harm, and punishes that offence by a term of imprisonment not exceeding five years.<sup>3</sup> It is a separate offence to cause bodily harm by an intentional application of force (punishable by up to ten years imprisonment).<sup>4</sup>

## **THE NECESSITY OF SECTION 43 OF THE CRIMINAL CODE**

### ***Context: The current teaching environment***

Teachers have a unique role in caring for children, especially in the context of the public school system which is open to all learners and obligatory for most.

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<sup>3</sup> *Criminal Code*, ss. 265 and 266.

<sup>4</sup> *Criminal Code*, s. 267.

Each teacher has the responsibility of maintaining order and discipline in the classroom. This responsibility must be put in a contemporary context and be considered in light of the nature of today's classroom. Class sizes in excess of 30, and even into the high 30s, are common in many elementary, junior high and high school classrooms.<sup>5</sup> Classrooms are often overcrowded, and the diverse backgrounds of students, particularly in urban centers, creates an atmosphere of tension and, too frequently, physical friction. These difficulties are exacerbated by increasingly frequent instances of abusive conduct, physical threats, aggressive behaviour, and open defiance by students that compromise the genuine desire of most other students to learn, and the teacher's capacity to teach the prescribed curriculum. A disciplined learning environment is essential if the learning experience in the classroom is to be effective and if students are to feel safe and comfortable in the school setting. The need for class management and the maintenance of order and discipline all too often interfere with teaching in classrooms. It is becoming more difficult for teachers to maintain the order necessary for a proper learning environment. Disregard to the direction provided by teachers and school administrators is becoming more and more prevalent.

This reality is even more pronounced for occasional teachers. Occasional teachers are often tested by students who make a sport of seeing how much misbehaviour will be tolerated by the newcomer. By virtue of their inexperience with each class, occasional teachers are particularly vulnerable to challenges to their authority.

Misbehaviour can be a contagious force in the classroom. Disruptive behaviour by a student can, unless swiftly arrested, produce a synergistic effect whereby other students engage in similar disruptive behaviour.

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<sup>5</sup> For example, in British Columbia there are over 800 classes in grades 4-7 with 30 students or more in 2006, and over 9000 classes in grades 8-12 with 30 students or more: *Overview of Class Size and Composition in BC Public Schools 2006/2007*. In Ontario, eight percent of classes between grades 4 and 8 have 31 students or more: *Class sizes in Ontario schools*, March 2007. Finally, in Manitoba, 1.9 of classrooms for students between Kindergarten and Grade 6 have more than 30 students, and 6.7 of classrooms for students in Grade 7 or above have more than 30 students: *Commission on Class Size and Composition*, April 2002.

Classrooms today also frequently contain many students with special needs. Approximately 2.3% of Canadian children have a reported mild or moderate disability, and 1.7% of Canadian children have a reported disability that is severe or very severe. However, 59% of disabled students between the ages of 5 and 14 are in “regular” classrooms as opposed to special education classes.<sup>6</sup> Many of these students’ conditions (including, for instance, autism, severe behaviour disorders and attention deficit/hyperactivity syndromes) affect the students’ behaviour in the school. More and more students who have severe behavioural management problems are being integrated into the regular classroom.

Teachers whose responsibilities include the care of students suffering from multiple disabilities or severe behavioural problems are routinely put into a position requiring them to exercise some form of physical restraint in a correctional context and, as a result, are particularly vulnerable to allegations of physical assault. Some severely disabled students occasionally act out with such violence that teachers have no choice but to intervene physically. In some instances, physical restraint procedures have been put in place to address just such circumstances.

Outside the classroom, teachers remain responsible for supervising students and maintaining order immediately before classes begin, during recess and lunch periods, during the loading and unloading of school buses, on school playgrounds, in cafeterias, during large assemblies in auditoriums, and other similar loosely controlled circumstances. Teachers, on an everyday basis, are required to deal with unruly students in all such situations.

### ***Situations in which teachers may reasonably be expected to use force***

There are a number of examples of situations where teachers may – and the Canadian public would expect them to – use force. As explained above, it is a criminal offence to

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<sup>6</sup> Dafna Kohen, Sharanjit Uppal, Anne Guevremont, and Fernando Cartwright, *Children with disabilities and the educational system – a provincial perspective* (Statistics Canada: 2006).

intentionally use force, regardless of whether any bodily harm has resulted. A person may commit an assault even if he or she exerts no degree of strength or power when touching the victim.<sup>7</sup> Therefore, without the protection of section 43 of the *Criminal Code*, a teacher would be committing a criminal offence by:

1. Separating a bully from the classmates he is taunting;
2. Dealing with young children in teaching and play situations, such as guiding a child by the shoulders to line up in a row;
3. Directing a student to cease misbehaving and return to a school line-up;
4. Removing a student who refused to leave the classroom or the school itself;
5. Removing a student from a school bus where the student is causing a serious disruption, refuses to take his seat, and refuses to leave the school bus when asked;
6. Guiding or leading a student to the principal's office;
7. Exerting minor force to guide the child into his or her seat, where the child has refused to abide by the teacher's instructions to sit down;
8. Placing a primary school student on the bus in a situation where the student has been on a field trip and refuses to leave;
9. Restraining, controlling, or calming an emotional or angry student;
10. Gaining or retaining a student's attention to what the teacher is saying during the course of a verbal reprimand; and
11. Restraining a cognitively impaired student who has attempted to lash out in the classroom, and then guiding that student to a "quiet room" in order to calm him down.

These are but eleven examples of situations where teachers may reasonably be expected to use force. But for section 43 of the *Criminal Code*, teachers could be held criminally liable for using force in these situations.

***Section 43 is necessary because other "defences" do not adequately protect teachers who use force in the situations described above***

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<sup>7</sup> *R. v. Byrne*, [1968] C.C.C. 179 (British Columbia Court of Appeal).

There are a number of defences to an accusation of assault; some of these defences are expressly set out in the *Criminal Code*, while others are “common law” defences created by judges. These defences will not protect teachers who use force in the situations described above, which is why section 43 of the *Criminal Code* is necessary. A preliminary problem with those defences is that they are complex and difficult to understand. As Professor Don Stuart has put it:

The defences of person and property in Canadian law are bedeviled by excessively complex and sometimes obtuse *Code* provisions. It is small wonder that our courts have sometimes ignored *Code* rules or been inventive in their interpretation of them.<sup>8</sup>

If Canada’s leading professor of criminal law is confused, imagine how teachers feel.

The *Criminal Code* allows the use of reasonable force: to prevent the commission of certain offences under the *Criminal Code*<sup>9</sup>, in self-defence<sup>10</sup>, and to protect property.<sup>11</sup> None of these sections would insulate a teacher from criminal liability for physically intervening in any of the eleven situations discussed above.

The defence of “necessity” is insufficient for two reasons. First, it is available only in circumstances of imminent risk where the action is taken to avoid a direct and immediate peril, and where no lawful alternative exists.<sup>12</sup> Since teachers always have the option of exercising their discretion not to intervene at all, the defence of “necessity” would rarely apply. Second, the defence of necessity is an excuse, rather than a justification for a certain act. An excuse concedes the wrongfulness of an action that is criminal in nature. In stark contrast, a justification (such as the one contained in section 43) removes both the criminal nature of the act and the stigma otherwise attached to such an action.

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<sup>8</sup> Don Stuart, *Canadian Criminal Law: A Treatise*, 3<sup>rd</sup> ed. (Scarborough: Carswell, 1995) at 440.

<sup>9</sup> *Criminal Code*, s. 27.

<sup>10</sup> *Criminal Code*, ss. 34, 35, and 37.

<sup>11</sup> *Criminal Code*, ss. 38, 39, and 41.

<sup>12</sup> *R. v. Latimer*, [2001] 1 S.C.R. 3 at paragraphs 38-40.

Opponents of section 43 of the *Criminal Code* have sometimes asserted that “prosecutorial discretion” will prevent teachers from being criminally charged for using force in the eleven situations discussed above. This particular argument is an insufficient justification for repealing section 43 for three reasons. First, the goal of codifying criminal law in Canada is to promote the rule of law, not the rule of individual discretion. Relying on the discretion of individual prosecutors is inconsistent with the promotion of the rule of law.

Second, the evidence does not suggest that prosecutors have been consistently reasonable in the exercise of their discretion to date, even with the existence of section 43 of the *Criminal Code*. Section 43 has been a factor limiting prosecutorial zeal. To provide but three examples:

*R. v. Frith*, 1998 Ontario Provincial Court: A grade 8 student “...was being openly defiant in refusing to abide by his teacher’s reasonable request to take his seat so that all students could begin their lesson. [The student] was told at least twice and perhaps three times to take his seat.” The teacher eventually gripped the student’s shirt from behind, and slid him off the counter where the student was seated. The teacher was acquitted on the basis of section 43.

*R. v. Lauzon*, 1991 Ontario Provincial Court: A teacher instructed a student to return a basketball to the cupboard in compliance with the school’s equipment sign out policy. The teacher banned the student from the gym for that day for failure to return his basketball. The student swore at the teacher on his way to the locker room. The teacher followed the student into the locker room and attempted to grab the student’s arm. The Court found that it was “...clear that [the teacher] was exerting only that force required to get [the student’s] attention.” The teacher told the student to stay away from the gym, and to report to the office. Upon leaving the locker room, the student defiantly returned to the gym. The teacher then removed the student from the gym, against the student’s

physical resistance. In all the circumstances, the court found that the teacher's physical interventions were reasonable within the meaning of section 43.

*R. v. Persaud* 2007 Ontario Superior Court: A grade 1/2 teacher was charged with fourteen counts of assault and four counts of assault with a weapon (a book, pen, or ruler) against ten students. The teacher was acquitted when the Crown could not prove that he did anything more than touching his students to attract their attention. More importantly for these purposes, the trial judge criticized the police for what he considered "tunnel vision" in their investigation, and improperly investigating the teacher with a view to finding evidence to support a charge rather than actually investigating the truth of various allegations. The trial judge stated:

In addition to my earlier comments about the events leading up to the police's interviews with the children, and the manner in which they were conducted, I add a concern that the police appeared to be satisfied only when they received information about Mr. Persaud's possible misconduct. Of particular concern is the conspicuous omission of certain individuals from the investigation. The investigating officer admitted that the police only interviewed the complainants and their parents. They did not interview the many other students who were in the classroom at the time that each assault was alleged to have taken place. This decision was made in light of the knowledge that Mr. Rueter and Ms. Wray [the school principals] had conducted investigations into some of the conduct in question and had concluded that the available evidence exonerated Mr. Persaud. When asked about why others, including those who participated in the earlier investigations, were not questioned, the investigating officer's responses were, in my view, disingenuous.<sup>13</sup>

Prosecutorial discretion is clearly an insufficient and ineffective replacement for section 43 of the *Criminal Code*, as it relies too much on the good faith and good judgment of individuals. The *Criminal Code* should be based on the rule of law, not the rule of individual discretion.

Third, prosecutorial discretion will not prevent students or parents from prosecuting the matter themselves pursuant to section 504 of the *Criminal Code*.

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<sup>13</sup> *R. v. Persaud*, [2007] O.J. No. 1752 (Ont. Superior Court of Justice) at paragraph 253.

Finally, opponents of section 43 of the *Criminal Code* have sometimes also asserted that the “*de minimis*” doctrine will prevent teachers from being criminally charged for using force in the eleven situations discussed above. That principle (fully stated: *de minimis non curat lex*) states that the law does not concern itself with trifles. However, there is no judicial consensus about whether the *de minimis* defence applies in the criminal context. Further, there is considerable support for the view that the *de minimis* defence can never apply to domestic violence, even of a minor nature, because of the harm to society caused by domestic violence.<sup>14</sup> At least one judge has opined that similar logic applies to teachers: any assault on a child is *prima facie* serious so the *de minimis* would never apply.<sup>15</sup> Therefore, repealing section 43 of the *Criminal Code* would mean that teachers charged with assault could not defend their actions using the *de minimis* defence: if it is proved that they touched their students in any fashion, then they would be guilty.

***Repealing Section 43 unnecessarily stigmatizes blameless teachers who are subject to a criminal prosecution***

Repealing section 43 of the *Criminal Code* will criminalize the use of force by teachers in the eleven situations discussed above – situations where the use of force is justifiable in the eyes of the Canadian public. Even if they are not eventually convicted, the mere fact that they are charged has a significant, and deleterious, impact on them. As a matter of practice, they will be suspended from their employment pending the resolution of the criminal proceeding; even if they are acquitted or the charges dropped, teachers accused of assault are usually transferred to another job or another school. The stigma attached to a criminal charge is significant. As Justice Westman has put it:

Men and women may have their lives public and private destroyed. Families may be broken up. The state may be put to considerable expense. That I would not worry about. But the family of a defendant, the

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<sup>14</sup> *R. v. Carson*, [2004] O.J. No. 1530 (Ont. Court of Appeal) at paragraph 25.

<sup>15</sup> *R. v. Persaud*, [2007] O.J. No. 1752 (Ont. Superior Court). In that case, a teacher was acquitted of assault because the Crown did not prove beyond a reasonable doubt that he did anything more than touch his students to get their attention and direct them to continue working.

emotional well being of a defendant is of concern. 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, it is powerful language, from failure to interfere.<sup>16</sup>

Even if you wanted to ban the use of force by teachers in all circumstances, the criminal justice system is not the way to go about it. The *Criminal Code* should be reserved for the most serious wrongdoing by Canadians.

Section 43 of the *Criminal Code* does not “legalize” the use of force by teachers – it only means that teachers will not be held criminally responsible when they use reasonable force for a corrective purpose. School boards and provincial governments also regulate the use of force by teachers. For example, the Ontario College of Teachers has stated that “the use of force against a student, except in extraordinary circumstances, is inappropriate and constitutes professional misconduct”<sup>17</sup> and has disciplined teachers for the most minor forms of assault. In *Joseph Fernand Jacques Yves Thérien* (Registration number: 218410), a 2006 decision, the Ontario College of Teachers reprimanded a teacher for dragging a student from the classroom by the arm. Discipline for a professional body, or from the employer, is the appropriate way to deal with minor forms of the use of force. Criminalizing the most minor uses of force is inappropriate: those situations should be dealt with, and are being dealt with, in other ways.

## **SECTION 43 – AS IT APPLIES TO TEACHERS – IS CONSISTENT WITH INTERNATIONAL LAW**

Since this Committee has been asked to examine and report upon Canada’s international obligations in regards to the rights and freedoms of children, in addition to reviewing Bill

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<sup>16</sup> *R. v. Foote*, [2005] O.J. No. 3260 at paragraph 102. The teacher accused of assault in that case was acquitted.

<sup>17</sup> Ontario College of Teachers case involving Joseph Fernand Jacques Yves Thérien.

S-207, the CTF considers it appropriate to consider section 43 of the *Criminal Code* in the context of Canada's international obligations. Canada is a party to the *Convention on the Rights of the Child*, article 19(1) of which states:

19(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental **violence**, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any person who has the care of the child.<sup>18</sup>

The *Convention on the Rights of the Child* prohibits violence against children, not all use of force with children. Specifically, the Committee on the Rights of the Child has recommended that Canada take further measures to “effectively prevent and combat all forms of **corporal punishment** and ill-treatment of children in schools or in institutions where children may be placed.”<sup>19</sup> As stated earlier, section 43 of the *Criminal Code* does not allow corporal punishment by teachers. Therefore, section 43 of the *Criminal Code* – as it applies to teachers – is consistent with Canada's international obligation to prevent violence against children.

## CONCLUDING REMARKS

The CTF opposes, and has opposed for over twenty years, the use of corporal punishment in Canadian schools. If the Senate of Canada wishes to prohibit the use of corporal punishment, it will find no more staunch supporter than the CTF.

However, the complete repeal of section 43 of the *Criminal Code* does more than prohibit corporal punishment: it would prohibit the use of force in all circumstances involving children in a school setting. Teachers who guide or direct younger students by holding their shoulder or who place a student on a school bus so they do not get left behind on a

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<sup>18</sup> *Convention on the Rights of the Child*, 20 November 1989, CAN. T.S. 1992, No. 3, art. 19(1).

<sup>19</sup> *Concluding observations of the Committee on the Rights of the Child: Canada*, CRC/C/15/Add.37 (June 20, 1995). That recommendation was repeated in 2003: *Concluding Observations of the Committee on the Rights of the Child: Canada*, CRC/C/15/Add.215 (2003).

field trip would be subject to criminal liability without section 43 of the *Criminal Code*. Bill S-207 goes further than the prohibition of corporal punishment: it would criminalize all use of force by teachers, no matter how reasonable or legitimate.

Teachers are charged with important responsibilities for the care and welfare of students, and as such are societal actors as well as educators. Teachers require the support of society in order to maintain the safety and security of schools, and to permit them to perform their societal role. Section 43, as currently interpreted, only provides teachers with the legal protection they need to maintain a safe and secure educational environment.

For these reasons, the CTF opposes Bill S-207.