



Senator Stanley Kutcher
Senate of Canada
Ottawa, ON K1A 0A4

April 29, 2023

Dear Senator Kutcher,

Re: Bill S-251 – Repeal of Section 43 of the *Criminal Code* of Canada

I am the Executive Director of the David Asper Centre for Constitutional Rights at the Faculty of Law, University of Toronto. I teach constitutional advocacy and children, youth and the law at the Faculty and was previously a child rights advocate at the legal clinic Justice for Children and Youth. I am writing in support of Bill S-251 to repeal section 43 of the *Criminal Code*. I was counsel to the Canadian Foundation for Children, Youth and the Law in the constitutional challenge to the section that resulted in the Supreme Court of Canada redefining the acceptable level of force used by parents and teachers to punish children. Unfortunately, this decision maintains the confusion about the application of the section and conveys the message that it is still acceptable to hit children.

The Supreme Court of Canada decision is now almost 20 years old. Since that time the research has much more clearly demonstrated the negative outcomes for children when force is used to punish them and has confirmed that there are no positive effects. The United Nations Committee on the Rights of the Child has also consistently and clearly stated that Canada must remove this defence from the *Criminal Code* if it wishes to be in compliance with the UN Convention on the Rights of the Child. Subsequent decisions of the Supreme Court respecting the interpretation of sections 7 and 15 of the *Charter of Rights and Freedoms* would also support a fresh look at their application to section 43. The current circumstances render the Supreme Court of Canada's decision obsolete.¹ Any continued justification for keeping section 43 in law cannot rest on that Court's legal reasoning or factual foundation.

It is time to place children at the centre and acknowledge that section 43 perpetuates violence against children and is an affront to their dignity as human beings. Any current justification for keeping the defence in law focuses instead on the adults who ought to behave better. It perpetuates the message that children must be controlled through force that punishes and that parents, in particular, cannot be expected to refrain from hitting their children. The majority of Canadians who no longer support physical punishment of children know better.

Those who seek to maintain the section, or redefine the use of force, no longer use the need for punishment to control children as the rationale, but rather raise concerns about other types of force needed to look after children. The worry is that parents or teachers will be criminally

¹ Canada (Attorney General) v. Bedford, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101, <<https://canlii.ca/t/g2f56>>, retrieved on 2023-04-29: The majority of the Court held that the threshold for revisiting a precedent is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence.

charged for placing a child in a car seat or breaking up a fight on the school ground. And yes, this is in part due to the fact that the definition of assault under the *Criminal Code* is extremely broad, encompassing any form of touching without consent. But the worries fail to take into account the many years of application of the assault provision to minor adult on adult touching that would never be met with a criminal charge. Common sense, prosecutorial discretion and the principle of *dominimis non curat lex* (roughly, the law does not concern itself with trifles)² have prevailed to prevent a mockery of our criminal justice system. In the absence of section 43, we can expect that those principles will be applied to situations involving children and their caregivers. In addition, courts have recognized the concept of deemed consent in situations where parents are providing nurturing care (e.g. diapering, car seat, etc.) to prevent criminal repercussions for parents.³

The *Criminal Code* also contains defences that would apply to situations where people are carrying out their legal duties (s.25), preventing harm to other people or property, self defence or preventing a crime.⁴ Proponents of section 43 say that these provisions have never be applied to parents or teachers, but in the absence of section 43 I firmly believe that they would. To date, section 43 has been the handy catch-all for any use of force by a parent or teacher. Lawyers who defend parents and teachers wish to maintain the section, because there is uncertainty without it. However, the result of its continued existence is that parents and teachers are prioritized over children. The negative outcomes for children are brushed aside as inconsequential in comparison to the possibility that adults might face consequences for hitting children. For every case cited of a parent taken to court for minor uses of force (a rare occurrence) there are many more instances where children or bullied and hit in their own homes without consequence.⁵

To balance these competing interests, it is important to have consistent messaging that is rolled out with the elimination of section 43. That messaging must include non-stigmatizing support for parents who are experiencing challenges, prosecutorial discretion in the public interest with the impact on the child as a central concern, and a clear message to all adults not to hit children. We have that clear message when it comes to all other forms of domestic violence. We need to include children in that approach. Indeed, we need to recognize that hitting children is where domestic violence often starts, as the studies have shown the strong association between being hit as a child and being a perpetrator of intimate partner violence.

The message to parents right now is confusing. Parents are told that they are justified in using reasonable force to punish their children but the elements of what are reasonable are found in a confusing and incoherent list set out in a Supreme Court of Canada judgment. The Canadian government says you should not hit children, but if you do this is how to avoid criminal sanction. Even if parents follow those rules, they still may be subjected to intervention by the state through a child protection investigation.⁶ While the Supreme Court of Canada said that reasonable force

² A recent application of this principle to a parent-child interaction can be found in *R v K.N.*, 2021 ABPC 179 (CanLII), <<https://canlii.ca/t/jgkvg>>, retrieved on 2023-04-29.

³ *R. v. A.E.*, 2000 CanLII 16823 (ON CA), <<https://canlii.ca/t/1fb9p>>, retrieved on 2023-04-29.

⁴ Criminal Code of Canada, R.S.C. 1985, as amended, c. C-46, sections 27, 34, 35.

⁵ As part of the Canadian Foundation case Professor Tammy Landau conducted research on police charging practices in respect of assaults against children by caregivers and found low rates of charges against parents even where injury or use of weapons was alleged.

⁶ Durrant, Joan E, Barbara Fallon, Rachael Lefebvre, and Kate Allan. 2017. "Defining Reasonable Force: Does It Advance Child Protection?" *Child Abuse & Neglect* 71: 32-43.

is not abuse, child protection experts look at the totality of the circumstances rather than one application of force. Instead patterns of physical punishment or the risk that the force used could escalate to more harmful forms of abuse are considered.

It is time for Canada to respect the dignity of children, honour its obligations under the UN Convention on the Rights of the Child and commit to its promise to implement all of the Calls to Action by the Truth and Reconciliation Commission which includes Call to Action #6 – repeal section 43. In 2018, Canada joined the Global Partnership to End Violence Against Children and became a Pathfinding Country⁷ with a goal to end violence against children. The repeal of section 43 must be a foundational aspect of this plan.

Yours truly,

A handwritten signature in black ink, appearing to read "Cheryl Milne". The signature is fluid and cursive, with the first name "Cheryl" being more prominent than the last name "Milne".

Cheryl Milne
Executive Director

⁷ A Pathfinding Country – Canada’s Roadmap to End Violence Against Children (2018)
<https://www.canada.ca/content/dam/phac-aspc/documents/services/publications/healthy-living/road-map-end-violence-against-children/road-map-end-violence-against-children.pdf>