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Submission to Senate Standing Committee on  
Legal and Constitutional Affairs

Re: Bill S-21 to Repeal Section 43 of the *Criminal Code*

**Presented by:**

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Justice for Children and Youth is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. The clinic provides select legal representation to youth aged 17 and under in the areas of income maintenance, education, criminal law, family law, mental health law, health law, constitutional law and human rights.

The Foundation prepares policy/law reform positions on issues relating to the legal practice of the clinic based on the needs and experience of its clients. The Foundation also conducts test case litigation, through interventions and applications, on specific issues related to the rights of children and youth. The organization also provides public legal education to youth and youth-serving agencies.

The Foundation was the applicant in the constitutional challenge to section 43 of the *Criminal Code*: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

**RECOMMENDATION: SECTION 43 OF THE *CRIMINAL CODE* OF CANADA SHOULD BE REPEALED.**

**Introduction**

The Foundation supports Bill S-21 to repeal section 43. The rationale supporting repeal is based both on Canada's international responsibility to children as well as the evidence that physical punishment of children is a degrading and harmful practice that is no longer justified and should not be defended in our *Criminal Code*. We wholeheartedly support any efforts to better support parents and educate the public about parenting and the developmental needs of children. The best way we can teach our children not to use force against others is not to use it on them. It is time for Canada to accept responsibility to provide leadership, public education and guidance on this important issue and at the same time to ensure that its laws are consistent with the public message.

***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***

In 2004, the Supreme Court of Canada, while restricting significantly the circumstances in which the section 43 defence could be relied upon, upheld the constitutionality of the provision<sup>1</sup>. The majority of the Court did so by establishing a new test and defining what is reasonable force under the section. In our view, the test is untenable for a number of reasons. First, the decision of the majority of the Court seems to suggest that the physical punishment of children is a justifiable practice from a child development perspective. This is clearly inconsistent with the social science evidence to date. Second, the long list of actions which are deemed to be unreasonable appear to be inconsistent with the lived experiences of children. For example, physical punishment of children that is motivated by anger is not to be considered reasonable; yet children know they are usually hit when their parents are angry<sup>2</sup>. As well, the gravity of the child's wrongdoing is not to be a factor, as this would invite punitive rather than corrective force. It must be noted that physical punishment

by its very definition is punitive. If the force is to be corrective and not punitive, does this mean that the majority of the Court would find that spanking a child as a punishment for a wrongful act does not come within the section 43 defence? Third, we are still left with the legal confusion between the educational message purportedly conveyed by the Government of Canada, that physical punishment is a bad idea, and the law which continues to justify it.

It is not surprising that the Foundation prefers the dissenting opinions of Justices Arbour and Deschamps to the majority of the Court. It must be noted, however, that dissenting Supreme Court opinions have at times become the law of the land through subsequent legal debate and legislative action<sup>3</sup>. Although the majority of the Court held the defence to be constitutional, the dissenting opinions point the way to principled action to better protect Canadian children. Madam Justice Arbour's analysis of the available defences, absent section 43, addresses many of the *in terrorem* arguments that suggest that the prosecution of parents for minor applications of force would be inevitable without section 43. She stated,

Absent action by Parliament, other existing common law defences, such as the defence of necessity and the "*de minimis*" defence, will suffice to ensure that parents and teachers are not branded as criminals for their trivial use of force to restrain children when appropriate.<sup>4</sup>

...

The judicial system is not plagued by a multitude of insignificant prosecutions for conduct that merely meets the technical requirements of "a crime" (e.g., theft of a penny) because prosecutorial discretion is effective and because the common law defence of *de minimis non curat lex* (the law does not care for small or trifling matters) is available to judges.<sup>5</sup>

She further suggests that a codification of that defence may cure any judicial reluctance to rely on it.

Madam Justice Deschamps' dissenting opinion displays an admirable child-focused approach and speaks to our need to move forward with legislation based upon a recognition that children are people:

However, by permitting incursions on children's bodies by their parents or teachers, s.43 appears to be a throwback to old notions of children as property. Section 43 reinforces and compounds children's vulnerability and disadvantage by withdrawing the protection of the criminal law. Moreover, because the accused is the very person most often charged with the control and trusteeship of the child, being deprived of the legal protection to which everyone else is presumptively entitled exacerbates the already vulnerable position of children. The entitlement to protection is derived by virtue of our status as persons and the status of children as persons deserves equal recognition.<sup>6</sup>

The majority decision of the Supreme Court was disappointing, not just because we were unsuccessful, but also because of its impact on the legal rights of children generally. It is hard to conceive of an equality rights case on behalf of children that would be successful in light of this decision. Canada's obligation under the United Nations *Convention on the Rights of the Child* ("UNCRC") is to do better than this. The Court's decision was that the defence was constitutional. That does not mean that it should stand for all time. Parliament has the power to decide differently.

### **Canada's International Obligations to Children**

Canada's international obligation to children pursuant to Article 19 of the UNCRC, as interpreted and recommended by the United Nations Committee on the Rights of the Child, is as follows:

The Committee recommends that the State party adopt legislation to remove the existing authorization of the use of "reasonable force" in disciplining children and explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed.<sup>7</sup>

It cannot be stated in plainer language that Canada must repeal section 43 in order to be in compliance with the UNCRC. This last legal vestige of children as property, deserving of less respect and human dignity than other human beings, is a significant symbol of our attitude toward the rights of children in Canadian society. The majority decision of the Supreme Court disregarded entirely the strong statements made in two successive reports from the Committee on the Rights of the Child demanding repeal.

International sanction can be a powerful motivator in this type of legislative reform. The changes to the United Kingdom's law in respect of corporal punishment within schools was largely the result of complaints taken to the European Court of Human Rights in Strasbourg.<sup>8</sup> The complaints were based upon the *European Convention on Human Rights* to which the United Kingdom became a party. Canada is not a party to this Convention but is one of five countries with observer status in the Council of Europe. Karen Kraft-Sloan, the representative of Canada on June 23, 2004, submitted the following statement to the Parliamentary Assembly of the Council of Europe when it adopted a recommendation against the corporal punishment of children:

I strongly agree with the rapporteur that "corporal punishment of children is in breach of their fundamental right to dignity and physical integrity."

The protection of human rights will be regarded as only a partial achievement unless we understand that these rights must be extended to all members of the human community – wherever human beings live on planet earth. If it is illegal to strike a human being, then it must be illegal to strike all humans. This protection cannot merely be relegated to adult humans.

A ban on corporal punishment of children is in and of itself the prime objective. However, the ban can and must provide opportunities to educate parents, care-givers, teachers and others who supervise children or who are in close association with them to use non-violent forms of child rearing. Additionally, public awareness programmes on the rights of children can be undertaken for the wider population.

Children themselves must play a central role in advancing their rights. They must, as the Prime Minister of Norway said earlier today, be made aware of their rights and the important obligations that states must adhere to as signatories under the United Nations Convention on the Rights of the Child. Additionally, children need to be involved in processes within states and international institutions to advance, protect and promote their rights.

Materials used to communicate rights to children and to consult with children need to be designed and produced in ways that are developmentally appropriate for children. Rights-based information must be equally accessible for all children regardless of the economic condition of children and their parents, of place of residence – the city or the countryside – of race, of ability, of gender, or of being cared for by the state (through foster care or incarceration) or cared for by their families.

While Canada has not instituted a country-wide ban on corporal punishment of children there are provinces that are working toward this end. Section 43 of the Canadian criminal code allows for force to be used to correct a child by a parent or another in care of the child provided that the force used is reasonable in all of the circumstances. I am sorry to say that in a recent Supreme Court decision the court found that Section 43 was not unconstitutional.

It is clear that the Canadian Parliament must either repeal or amend Section 43 of the criminal code to bring it in closer alignment with models within Europe, for example the Swedish Parents Code.

You are to be heartily commended for your vision of a Europe that respects and honours children – and for your trail-blazing work in pushing the boundaries of the human rights agenda. The many organisations and individuals in Canada dedicated to this cause will watch your initiative to make Europe a corporal punishment-free zone for children with great anticipation. Your success will lend support for similar initiatives in Canada.

We must be ever vigilant if we are to create a world that truly respects the dignity and worth of all human beings, particularly of our children.<sup>9</sup>

Community standards today are being defined within an increasingly international context. The examples set by many of the Western European countries cannot be ignored. European Union institutions now appear to be moving unanimously towards a position opposing any form of corporal punishment and requiring member states to take steps to outlaw it.

At least fifteen countries have entirely abolished the use of corporal punishment on children (Sweden, 1979; Finland, 1983; Norway, 1987; Austria, 1989; Cyprus, 1994; Denmark, 1997; Latvia, 1998; Croatia, 1999;; Germany, 2000; Bulgaria, 2000, Israel, 2000, Iceland, 2003, Romania, 2004, Ukraine, 2004, and Hungary, 2004)<sup>10</sup>. In Italy and Portugal court decisions have declared all corporal punishment by parents to be unlawful. Many of these jurisdictions have accompanied the change in the law with public information campaigns and government sponsored parental education courses. Studies on the Swedish experience, in particular, have shown a dramatic decline in public acceptance of corporal punishment, in the incidence of both corporal punishment itself and serious physical abuse of children<sup>11</sup>. We would strongly support an implementation scheme which would include these types of programs. Nonetheless,

the primary objective of any government initiative should be the repeal of the section 43 defence.

## **Evidence**

Studies demonstrate that corporal punishment is an ineffective practice and is potentially harmful to children in the long term. A recent landmark analysis of the findings of 88 studies has demonstrated that researchers are consistent in their view that corporal punishment exposes children to significant negative long term consequences<sup>12</sup>. These long-term consequences include a propensity to use violence to solve problems, low self esteem, a greater propensity for spousal abuse, and slower than average intellectual and moral development<sup>13</sup>.

In addition to these undesirable side-effects of corporal punishment, concern has been expressed that corporal punishment is, in fact, an extremely ineffective teaching tool. In addition to research indicating that corporal punishment may actually increase the occurrence of undesired behaviours, serious questions have been raised regarding what exactly it is that corporal punishment teaches. Striking a child teaches them that violence is an acceptable way to solve a problem, especially when the other person refuses to listen. Corporal punishment teaches children that a particular act in a specific context is unacceptable, but fails to encourage the moral development of the child, and her ability to discern right from wrong independently.

## **Rationale for Change**

Health Canada, major health associations (including the American Academy of Pediatrics and the Canadian Paediatric Society) and the vast majority of parenting

experts now oppose the use of corporal punishment by parents under any circumstances.

If one examines the cases in which section 43 of the *Criminal Code* has been put forward by parents as a defence to assault charges, one sees a pattern of abuse which is completely unacceptable by society's standards of child care. While the Supreme Court decision declares these cases to have been wrongly decided, as recently as September 2004, an Ontario Superior Court acquitted a mother who slapped her teenage daughter in the face (thus violating two criteria of the Supreme Court's reasonableness test), declaring the force used to be reasonable under section 43<sup>14</sup>.

Public opinion is moving clearly towards support for the repeal of section 43. A 2003 Decima poll showed that a majority of Canadians support repeal.<sup>15</sup> The public is clearly beginning to listen to the impressive coalition of health, welfare and legal rights groups that oppose corporal punishment and advocate for its legal abolition. For example, a *Joint Statement on Physical Punishment of Children and Youth* was issued in 2004 to disclose the trend of research firmly supporting a prohibition on corporal punishment, to recommend that parents refrain from its use in childcare and to call strongly for Parliament to repeal section 43<sup>16</sup>. Signatories thus far total 157 organizations including the Child Welfare League of Canada, the Canadian Public Health Association, Amnesty International Canada and Canadian Pediatric Society, along with 17 distinguished Canadians including the Honourable Stephen Lewis, the Honourable Claire L'Heureux-Dubé and Dr. Fraser Mustard.

## **Conclusion**

In 1984, the Law Reform Commission tabled Working Paper 38, entitled "Assault". In this paper, the Commission devoted considerable attention to corporal punishment and section 43 of the *Criminal Code* in particular. The Commission was of

the opinion that “the law should give a clear and unblurred message to the effect that all unnecessary violence is off-limits.” They advocated the abolition of section 43, but a majority of the Commission felt that repeal should be delayed until the Government had developed educational and policy tools that would help to minimize the “interference” in family life that repeal could mean. Twenty-one years later, there has been no government action to repeal the section, and only minimal effort to educate parents on the dangers and inappropriateness of corporal punishment.

Nowhere else in Canadian law is there legal sanction of assaults on an identifiable group without their consent. The legitimization of corporal punishment has a long history in society from the perspective of parental rights. The tradition of corporal punishment is rooted in the outmoded concepts of children as the possessions of their parents or devoid of sufficient adult qualities to be considered equal or fully human. It is based on the notion that children are insufficiently rational to make reasoned decisions about their behaviour; they, like animals, must be controlled through the infliction of pain. The recognition of children's rights within Canada and internationally demonstrates that these notions are held by a shrinking minority.

In our opinion, the repeal of section 43 will not prevent the use of force against children in appropriate circumstances. Further, neither children nor ambitious child care workers will thereby be empowered to take parents to court on vexatious charges for minor assaults. The defences currently set out in the *Criminal Code* enable people to use force to prevent the commission of offenses (s.27), in self defence (s.34), to prevent assaults against others (s.37) and in the defence of property (s.38). Section 8 of the *Criminal Code* preserves the common law defences of necessity and *de minimis non curat lex*. This latter defence prevents a trivial assault from resulting in a criminal conviction<sup>17</sup>.

Section 43 is unnecessary in light of the existing defences in our law. Further, it unfairly singles out and potentially victimizes children by depriving them of basic human

rights to "security of the person" and equal protection under the law. It has been called "a dangerous anachronism" which should be eliminated from Canadian law<sup>18</sup>. At a time when governments at all levels are seriously trying to stop the violence experienced by women and children in their own homes, a repeal of section 43 essential.

Sweden, which has eliminated corporal punishment as a right of parents, can teach Canada much about implementing more humane childcare. Following Sweden's legislative measures, the government launched an information campaign aimed at changing public attitudes. We recommend that this also be done in Canada in conjunction with the change to our *Criminal Code*. Canadian parents deserve the support to learn better methods of child care and all Canadians deserve to be better informed about international human rights of children.

In our view, section 43 of the *Criminal Code* is not simply inconsistent with the spirit of the *Charter of Rights and Freedoms* and the United Nations *Convention of the Rights of the Child*, but also reflects bad public policy. In effect, section 43 is the legalization of violence against children and Parliament should repeal the provision.

## ENDNOTES

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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.

<sup>2</sup> This is consistent with the data from a sample of Canadian mothers of preschoolers 83% of whom reported that they were angry when they recently spanked their children: Ateah, C.A. and J.E. Durrant, *Maternal use of physical punishment in response to child misbehaviour: Implications for child abuse prevention*. *Child Abuse & Neglect*, 2005. 29: p. 169-185.

<sup>3</sup> For example, *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627: The Court found that the taxation of child support in the hands of the payee was not discriminatory. The decision was followed by the enactment of child support guidelines in which the support is not taxed as income of the payee.

<sup>4</sup> *Supra* at para. 132.

<sup>5</sup> *Ibid*, at para. 200.

<sup>6</sup> *Ibid*, at para. 226.

<sup>7</sup> United Nations Committee on the Rights of the Child (2003). Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Thirty-fourth Session, CRC/C/15/Add.215 (2003).

<sup>8</sup> *Campbell and Cosans v. the United Kingdom* (Eur. Court H.R., 1982); *Costello Roberts v. the United Kingdom* (Eur. Court H.R., 1982).

<sup>9</sup> Parliamentary Assembly of the Council of Europe, Report of the Debate of 23 June 2004.

<sup>10</sup> Newell, Peter (2005) *Brief to Senate Standing Committee on Legal and Constitutional Affairs*.

<sup>11</sup> Durrant, J.E. (1999) "Evaluating the success of Sweden's corporal punishment ban." *Child Abuse & Neglect*, 23(5): pp. 435-448.

<sup>12</sup> Gershoff, E.T. (2002) "Corporal punishment by parents and associated child behaviours and experiences: a meta-analytic and theoretical review." *Psychological Bulletin* 128(4): pp. 539-579.

<sup>13</sup> The social science evidence is best summarized in the *Joint Statement on Physical Punishment of Children and Youth* referenced at note 14, as well as in Durrant, J.E. (2005) *Submission to Senate Standing Committee on Legal and Constitutional Affairs*.

<sup>14</sup> *R.v. D.K.*, [2004] O.J. No. 4676 – the daughter also alleged that her mother punched her, but the Court believed the mother's statement that she only lightly slapped her. The Crown has not appealed this acquittal.

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<sup>15</sup> Decima (2003). *Survey on Spanking Law*. Toronto Public Health (the support for repeal increased significantly under certain conditions: 72% for repeal if prosecutorial guidelines in place, 72% if research showed cp ineffective and harmful, 80% if research showed it would reduce child abuse)

<sup>16</sup> Durrant, J.E., Ensom, R., and Coalition on Physical Punishment of Children and Youth (2004). *Joint Statement on Physical Punishment of Children and Youth*. Ottawa: Coalition on Physical Punishment of Children and Youth.

<sup>17</sup> *R. v. Lepage* (1984), 74 C.R. (3d) 368 (Sask. Q.B.)

<sup>18</sup> McGillivray, Anne. (1993). "R. v. K.(M.): Legitimizing Brutality", 16 C.R. (4<sup>th</sup>) 125.