

Alternative Report to the UN Committee on the Rights of the Child regarding the Repeal of Section 43 of the Criminal Code (Canada)

State Party: Canada

Treaty: Convention on the Rights of the Child

Clusters: III General Principles (Art. 3); IV Civil Rights and Freedoms (Art. 19); VI Basic Health and Welfare (Art. 24); VI Education, Leisure and Cultural Activities (Art. 28)

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Introduction

Situational Analysis

Children are the only people in Canada without full legal protection from assault. Section 43 of Canada's *Criminal Code* states:

Every school teacher, 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 in the circumstances.

This law was codified in 1892, with roots in ancient Roman law and British common law.

Between 1976 and 1980, calls for repeal of this law were issued by the House of Commons Standing Committee on Health, Welfare and Social Affairs; the Standing Senate Committee on Health, Welfare and Science; and a Justice Canada Memorandum. By 1995, 13 government reports had called for review or repeal of Section 43.

Two years after Canada's 1991 ratification of the UNCRC, the Federal Justice Minister, Kim Campbell, prepared a bill (C-126) that would repeal section 43. However, when she left that position, her successor deemed repeal to be "too controversial" and removed it from the bill (House of Commons of Canada, 1993; McGillivray and Milne, 2011, p.102). Since then, not a single Justice Minister has declared interest in repeal.

Between 1989 and 2015, 17 Private Members' Bills were introduced in the House of Commons (8 bills) and Senate (9 bills) to repeal section 43. All were opposed by the government of the day.

Throughout that same period, the UN Committee on the Rights of the Child repeatedly called on Canada to repeal this defence and explicitly prohibit physical punishment of children.

- In its 1995 *Concluding Observations to Canada's First Periodic Report*, the Committee recommended "that the physical punishment of children in families be prohibited" (CRC/C/11/Add.3, para. 25).
- In its 2003 *Concluding Observations to Canada's Second Periodic Report*, the Committee stated that it was "deeply concerned that the State party has not enacted legislation explicitly prohibiting all forms of corporal punishment and has taken no action to remove section 43 of the Criminal Code, which allows corporal punishment" (CRC/C/83/Add.6, para. 32) and urged Canada to "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” (para. 33).

- The Committee reiterated this call in its 2012 *Concluding Observations on Canada’s Combined Third and Fourth Periodic Reports*, stating that it was “gravely concerned that corporal punishment is condoned by law in the State party under Section 43 of the Criminal Code” (CRC/C/CAN/CO/3-4 2012, para. 44).

The Constitutional Challenge to Section 43

In 1999, a legal challenge to section 43 was initiated by the Canadian Foundation for Children, Youth and the Law (the Foundation). The outcome of this challenge forms the basis of the Government of Canada’s claim that its laws protect all children from all forms of violence (<https://www.justice.gc.ca/eng/rp-pr/ci-jp/fv-vf/mcb-cce/index.html>). We adamantly disagree with this claim. As evidence of our position, we outline the history of the legal challenge below.

The Foundation initiated the challenge in the Ontario Superior Court of Justice, arguing that section 43 violates three sections of Canada’s *Charter of Rights and Freedoms*:

- Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- Section 12: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
- Section 15(1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Foundation further argued that section 43 violates four articles of the *United Nations Convention on the Rights of the Child* (UNCRC):

- Article 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
- Article 18(1): States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

- Article 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 ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
- Article 28(2): States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

Finally, the Foundation argued that: 1) the definition of 'reasonable' had been found by courts to include hitting children with belts, paddles, sticks and other objects, discouraging police from bringing charges; 2) section 43 undermines public education to reduce corporal punishment; and 3) the government itself has published materials stating that "It's never ok to spank children. It's a bad idea and it doesn't work" (McGillivray and Milne, 2011).

The Ontario Association of Children's Aid Societies, at the time comprising 53 child welfare organizations in the province of Ontario and an intervener in the case, argued that the criminal law sets the standard of acceptable behaviour and section 43: 1) contributes to the societal acceptance of violence; 2) sends a message that hitting children is acceptable; 3) undermines provincial child protection legislation; and 4) has contributed to serious harm of children. Opposing the challenge was Canada's Attorney General who argued that: 1) section 43 does not violate the Charter; 2) there is no evidence that its repeal would change public attitudes; 3) it has not been demonstrated that section 43 alone harms children; 4) and the government is carrying out public education to discourage corporal punishment.

In his decision, Justice McCombs recognized the 'growing body of evidence that even mild forms of corporal punishment do no good and may cause harm' (Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2000, para. 132) and noted that not a single expert witness on either side of the case advocated or recommended corporal punishment (para. 17.a.6). Yet he ruled that the defence does not violate Canada's *Charter of Rights and Freedoms* and dismissed the challenge. While he agreed that section 43 subjects children to different treatment from adults, this does not constitute discrimination because it does not further a pre-existing disadvantage of children, does not increase their vulnerability, and "does not represent state action based upon stereotypes about children" (para. 131).

In 2001, the Foundation filed an appeal in the Ontario Court of Appeal, arguing that the challenge was about children's rights to equal legal protection, which is particularly needed because of children's vulnerability. The Foundation also argued that section 43 denies children their rights to dignity and security of the person, exposes them to violence on the basis of archaic notions of childhood, and undermines public education and child protection efforts. Finally, they noted that the lower court decision perpetuates the idea that children are not

entitled to the same security and protection as adults. The Court ruled in January 2002 that section 43 permits “parents and teachers to apply strictly limited corrective force to children without criminal sanctions so that they can carry out their important responsibilities to train and nurture children without the harm that such sanctions would bring to them, to their tasks, and to the families concerned” (Canadian Foundation for Children, Youth, and the Law v. Canada (Attorney General), 2002, para. 30).

In June 2003, the Supreme Court of Canada heard an appeal of this decision. Before the Court rendered its judgment, the UN Committee on the Rights of the Child issued *Concluding Observations on Canada’s Second Periodic Report*, expressing “deep concern” that Canada had taken “no action to remove section 43 of the Criminal Code” (para. 32) and recommended “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” (2003, para. 33). Yet, in January 2004, in a split 6–3 decision, the Supreme Court ruled that section 43 does not violate the rights of children (Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004). The Court then set out a legal definition of “reasonable” force, “a sphere of non-criminal conduct within the larger realm of common assault” (para. 19). They defined “reasonable” force as that which is administered:

- by a parent or person in the place of a parent (teachers can no longer claim the criminal defense),
- below the child’s head,
- using the hand,
- to children between the ages of 2 and 12 years, inclusive, who are “capable of benefiting from the correction,”
- to a degree deemed “minor, transitory and trifling,”
- in a calm state of mind,
- in a manner that is “not degrading, inhuman or harmful.”

Representing the majority, Chief Justice McLaughlin wrote that “neither the Convention on the Rights of the Child nor the International Covenant on Civil and Political Rights explicitly require state parties to ban all corporal punishment of children” (Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004, para. 33). While she noted that the UN Human Rights Committee considers corporal punishment of children in schools to be degrading treatment or punishment, “the Committee has not expressed a similar opinion regarding parental use of mild corporal punishment” (para. 33). She also noted that the CRC describes the best interests of the child as “a primary consideration” rather than “the primary consideration” (para. 10). She referenced neither Article 19(1) nor the *Concluding Observations* of the Committee on the Rights of the Child anywhere in the decision. Finally, she considered the best interests of the child to be “a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice” (para. 12).

Three Supreme Court justices dissented with the majority decision. Justice Binnie wrote:

There can be few things that more effectively designate children as second-class citizens than stripping them of the ordinary protection of the assault provisions of the Criminal Code. Such stripping of protection is destructive of dignity from any perspective, including that of a child. Protection of physical integrity against the use of unlawful force is a fundamental value that is applicable to all (para. 72).

Justice Deschamps wrote:

On its face, as well as in its result, s. 43 creates a distinction between children and others which is based on the enumerated ground of age. Moreover, the distinction or differential treatment under s. 43 constitutes discrimination. The government's explicit choice not to criminalize some assaults against children violates their dignity. ... S. 43 perpetuates the notion of children as property rather than human beings and sends the message that their bodily integrity and physical security is to be sacrificed to the will of their parents, however misguided. Far from corresponding to the actual needs and circumstances of children, s. 43 compounds the pre-existing disadvantage of children as a vulnerable and often-powerless group whose access to legal redress is already restricted (para. 82-83).

Justice Arbour wrote:

Section 43 of the Criminal Code infringes the rights of children under s. 7 of the Charter. The phrase "reasonable under the circumstances" in s. 43 violates children's security of the person interest and the deprivation is not in accordance with the relevant principle of fundamental justice (para. 81).

Justice Arbour also noted that the Committee on the Rights of the Child, in its *Concluding Observations on Canada's First Periodic Report*, called for the prohibition of corporal punishment (para. 187) and that the Committee's *Concluding Observations on Canada's Second Periodic Report* called for removal of the 'reasonable force' defence and the prohibition of all forms of violence against children, however light, in the family, schools, and other institutions (para. 188).

Despite these arguments, in 2004, the majority of Supreme Court Justices upheld the constitutionality of section 43.

In its 2012 *Concluding Observations on Canada's Combined Third and Fourth Periodic Reports*, the Committee on the Rights of the Child comments on this decision:

The Committee is gravely concerned that corporal punishment is condoned by law in the State party under Section 43 of the Criminal Code. Furthermore, the Committee notes with regret that the 2004 Supreme Court decision *Canadian Foundation for*

Children, Youth and the Law v. Canada, while stipulating that corporal punishment is only justified in cases of “minor corrective force of a transitory and trifling nature,” upheld the law (CRC/C/CAN/CO/3-4 2012, para. 44).

In 2015, the Truth and Reconciliation Commission of Canada issued 94 Calls to Action in response to the extensive documentation of violence committed against Indigenous children in Canada’s residential school system. The sixth of these was a call to repeal section 43 of the *Criminal Code*. Soon after, Canada’s Prime Minister pledged to take immediate government action on all 94 calls to action. He took no action on Call to Action 6. Despite his re-election in 2019, he has continued to neglect his pledge.

Today, Canada’s Department of Justice states the following on its website:

All children in Canada are protected from all forms of violence through the *Criminal Code* (<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mcb-cce/index.html>).

Evidence of Rights Violations

Violation under Cluster III (Art. 3)

Section 43 violates the General Principle of the best interests of the child (Article 3). Findings of extensive research conducted over the past 30 years show, virtually without exception, that corporal punishment predicts solely negative developmental outcomes (Afifi et al., 2017; Gershoff, 2002; Gershoff & Grogan-Kaylor, 2016). These outcomes include higher levels of aggression, antisocial behaviour, and mental health problems; weaker parent-child relationships; slower language and intellectual development; and poorer school achievement. The relationships between corporal punishment and these outcomes are similar in magnitude to those between severe physical abuse and the same harm outcomes.

No study, over decades of research, has found that corporal punishment has any positive outcomes. By allowing and justifying corporal punishment, section 43 not only violates the best interests of the child principle but places children’s healthy development at risk.

In *General Comment No. 13 The Right of the Child to Freedom from All Forms of Violence*, the Committee states:

The interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence. It cannot be used to justify practices, *including corporal punishment* and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity (CRC/C/GC/13, para. 61, emphasis added).

RECOMMENDATION: That the Government of Canada immediately repeal section 43 of the Criminal Code and dedicate sufficient funding and resources for universal parent support and education.

Violation under Cluster IV (Art. 19)

Article 19 of the CRC obligates States parties to “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 other person who has the care of the child.” The Committee on the Rights of the Child has repeatedly affirmed corporal punishment is violence.

In *General Comment No. 8 The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, the Committee states:

There is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalized violence against children. *Corporal punishment and other cruel or degrading forms of punishment are forms of violence* and States must take all appropriate legislative, administrative, social and educational measures to eliminate them (CRC/C/GC/8, para. 18, emphasis added).

In *General Comment No. 13 The Right of the Child to Freedom from All Forms of Violence*, the Committee states:

Physical violence includes all corporal punishment and all other forms of torture, cruel, inhuman or degrading treatment or punishment (CRC/C/GC/13, para. 22).

Thus, rather than protecting children from all forms of violence, as Canada states, section 43 of the *Criminal Code* violates children’s rights to protection.

RECOMMENDATION: That the Government of Canada immediately repeal section 43 of the Criminal Code and dedicate sufficient funding and resources for universal parent support and education.

Violation under Cluster VI (Art. 24)

Section 43 violates the child’s right to “the highest attainable standard of health” (Article 24(1)) and to the abolition of “traditional practices prejudicial to the health of children” (Article 24(3)). Since the 1970s, it has been repeatedly shown that most child physical abuse—typically defined as physical injury—is, in fact, corporal punishment (Gil, 1974; Kadushin & Martin, 1981; Trocmé et al., 2001; Trocmé et al., 2005). In other words, in most cases of child abuse injury, the caregiver’s intent was to punish the child. When a caregiver strikes a child, the risk of more

severe violence escalates. For example, a Quebec study found that children who are spanked are seven times more likely to be punched, kicked and choked than children who are not spanked (Clément et al., 2000). Thus, section 43 justifies actions that place children's physical health at risk for no benefit.

Recent neurological studies indicate that corporal punishment is associated with changes in the child's developing brain. For example, it is related to decreased volume of the prefrontal cortex, which is primarily responsible for reasoning and problem-solving that are necessary for healthy relationships and decision-making (Teicher et al., 2016). Other studies have found that corporal punishment predicts a higher risk of drug and alcohol abuse, possibly through altering the brain structures that increase vulnerability to addictions (Afifi et al., 2017; Sheu et al., 2010).

An analysis of the 2003 cycle of the *Canadian Incidence Study of Reported Child Abuse and Neglect* (CIS-2003) showed that the Supreme Court of Canada's definition of "reasonable force" actually describes the vast majority of substantiated cases of physical abuse in Canada (Durrant et al., 2009). Of the more than 27,000 cases of physical maltreatment substantiated in 2003, 91% of perpetrators were parents; 69% of children were between 2 and 12 years, inclusive; 87% of children were not learning impaired; 81% of children were not hit with objects; and 71% did not sustain injuries. In 77% of cases, the caregiver hurt the child with the intent to punish.

The most recent cycle of the CIS revealed that more than 18,000 cases of physical maltreatment of children were substantiated in 2008. It is widely agreed that this number represents "the tip of the iceberg." In 75% of these substantiated cases, the caregiver intended to punish the child. Therefore, by justifying corporal punishment, section 43 violates children's rights to the highest attainable standard of health, placing their mental and physical health at risk.

RECOMMENDATION: That the Government of Canada immediately repeal section 43 of the Criminal Code and dedicate sufficient funding and resources for universal parent support and education.

Violation under Cluster VII (Art. 28)

Under Article 28(2) of the CRC, Canada is obligated to "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."

In *General Comment No. 1 The Aims of Education*, the Committee on the Rights of the Child states:

Children do not lose their human rights by virtue of passing through the school gates. ... The Committee has repeatedly made clear in its concluding observations that the use of

corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline (CRC/GC/2001/1, para. 8).

Although the Supreme Court of Canada ruled in 2004 that teachers may not claim the section 43 defence if they use corporal punishment, the wording of the law has not changed. Thus, the Criminal Code still states that teachers are justified in using “force by way of correction.” In other words, section 43 of the *Criminal Code* has not been amended to include any of the limitations placed on the use of corporal punishment by the Supreme Court of Canada. These limitations were intended to provide guidance to courts trying charges of assault against children. Time and research have revealed that these limitations have been unevenly applied by the courts and are largely unknown to the general public.

RECOMMENDATION: That the Government of Canada immediately repeal section 43 of the Criminal Code and dedicate sufficient funding and resources for universal parent support and education.

Children’s Views and Experiences

There is no indication that the federal government has meaningfully sought out the views of children and youth in Canada on corporal punishment. However, research conducted in other countries can shed light on children’s perspectives.

Willow and Hyder (1998) interviewed 76 children between the ages of four and seven in the United Kingdom to explore their feelings about ‘smacking’. The children described the impact of smacking in terms of physical pain (76% of the sample) and emotional distress, including: feeling miserable/sad/unhappy/upset (34%); crying (13%); and feeling ashamed/embarrassed, like they want to run away, and that they don’t like their parents (7%). Few described positive impacts on their behaviour: trying to do something right/be good/make amends (17%); apologizing (6%); or learning from their mistake (1%). A much larger proportion described negative behavioural impacts, including crying/screaming/being upset/feeling sad or hurt (42%); avoiding adults (40%); being naughty/cheeky/nasty (18%); getting angry/grumpy/cross (13%); and smacking back/smacking others/thinking it’s OK to smack (7%). Children described the experience as painful and degrading. For example, a 7-year-old girl said, “It kind of feels horrid, it just feels horrid, you know, and it really hurts. It stings you and makes you feel horrible inside... makes you feel ashamed inside.”

Using a similar methodology in New Zealand, Dobbs et al. (2006) found that younger children were likely to describe the physical pain of being struck; a 7-year-old said, “It hurts you all over.” Older children were more likely to describe the emotional pain; a 9-year-old said, “You feel real upset because they are hurting you and you love them so much and then all of a

sudden they hit you and hurt you and you feel like as though they don't care about you because they are hurting you." Children described fear, sadness, anger, unexpressed hatred and a desire for revenge in response to corporal punishment.

In an Australian study, Saunders and Goddard (2008) interviewed 31 children aged 8 to 17 years about their own experiences or their witnessing of corporal punishment of others. In general, these children viewed the adults who strike children as "intimidating, disrespectful and thoughtless." For example:

Being smacked is like being treated like something very little and not important to the rest of the world (12-year-old).

[Hitting] hurts the kids, and it upsets the adults if they've done it, so it's stupid both ways...it hurts both people...if you're a parent, they're sad, and the kid's sad...what in the world point is it for doing it? (10-year-old)

He didn't really hurt me...but...I was very scared an' you don't like your dad doing things like that...not a nice thought that you can't rely on him (10-year-old).

In Canada, 250 young people aged 9 to 18 years were interviewed between 2004 and 2006 (Covell, 2006). They described violence as "endemic" in their lives, and many reported being smacked, spanked and beaten. These youth identified a combination of parent education and a ban on physical punishment as two important components of addressing family violence in Canada.

Parents should not be able to hit their children. People don't think that is violence, but it is. By legalizing physical punishment things will only get worse (p. 14).

Comments on the State Report

In its *Combined Fifth and Sixth Periodic Reports*, delivered in 2019, the Government of Canada states:

1. The *Criminal Code* and PT [provincial/territorial] child protection laws provide comprehensive protection to children against violence. Of note, section 43 of the *Criminal Code* is a limited defense to criminal liability for parents, persons standing in the place of parents, and teachers for the non-consensual application of reasonable force toward children that is reasonable under the circumstances. The issue of whether section 43 should be repealed raises differing and strongly held views across Canada. The Government of Canada continues to support parenting education programs that promote the non-physical discipline of children and alternative disciplinary choices, including publications that explain the law in Canada (para. 68).

2. Many PTs offer programs that teach positive parenting and discipline strategies for home and in-care milieus. For instance, both New Brunswick and Québec have legislation that require operators of childcare facilities to ensure positive reinforcement and guidance of children, and ensure that no child is subjected to any form of physical punishment or verbal/emotional abuse or is denied physical necessities. Many PT governments have a zero physical discipline policy for childcare facilities (para. 69).

Inaccuracies in Canada's Report

The inaccuracies in Canada's *Combined Fifth and Sixth Periodic Reports* can be summarized as follows:

1. Section 43 is not "a limited defence to criminal liability for the non-consensual application of force toward children that is reasonable under the circumstances."
 - Rather than providing a limited defence, Section 43 states that corrective force (i.e., corporal punishment) is "justified" – that is, it is the right thing to do. In a unanimous 1984 decision, Canada's Supreme Court ruled:

"Section 43 is ... a justification. It exculpates a parent, schoolteacher or person standing in the place of a parent who uses force in the correction of a child, because it considers such an action not a wrongful, but a rightful, one" (Ogg-Moss v. R., [1984] 2 S.C.R. 173).
 - Section 43 explicitly tells parents, teachers and caregivers that hurting children is a rightful act and that they can do so with impunity.
2. Provincial/territorial child protection laws do not provide comprehensive protection to children against violence.
 - Provincial/territorial child protection laws are generally typically invoked after children have already suffered harm or injury or have been deemed to be at high risk for harm.
 - Corporal punishment by biological parents is not prohibited in any province or territory.
 - Corporal punishment by school personnel is not prohibited in Alberta or Manitoba.
 - Corporal punishment by foster parents is prohibited in only five provinces (British Columbia, Alberta, Manitoba, Ontario and Quebec), leaving children in five provinces and three territories unprotected.
 - Provincial/territorial approaches to parenting education and the use of corporal punishment in childcare facilities are inconsistent across the country.

- The protection of children’s bodily integrity should not arbitrarily turn on their place of residence. The Government of Canada has an obligation to protect all children, regardless of where they live.
3. The government’s response that different groups might take different positions on the repeal of section 43 is an inadequate reason for retaining it.
- The government has taken action on issues far more controversial (including same-sex marriage and medically assisted dying) on the basis of evidence and human rights standards.
 - In the case of corporal punishment, all evidence demonstrates that it places children’s health and development at risk. Canada’s retention of section 43 negates three recommendations by the Committee on the Rights of the Child, and violates General Comments 1, 8 and 13 and CRC Articles 3, 19, 24 and 28.
 - In *General Comment No. 13 The Right of the Child to Freedom from All Forms of Violence*, the Committee on the Rights of the Child states: “an adult’s judgment of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention” (CRC/C/GC/13, para. 61).
 - It is the government’s obligation to take leadership on human rights issues, regardless of public opinion.
4. While some groups might oppose the repeal of section 43, the majority of Canadians are very likely to support it.
- Canadians’ approval of physical punishment has declined steadily; as long ago as 2012, only 17% approved of it.
 - An independent national poll conducted as long ago as 2003 found that repealing section 43 was supported by 51% of Canadians, but would be supported by 72% if research showed that physical punishment is not effective and can be harmful, and by 80% if research showed it would decrease child abuse (Decima Research Inc., 2003). This research now exists in abundance. If the government informed Canadians about it, a large majority would support the repeal of section 43.
 - There is broad consensus among professionals that section 43 must be repealed. The *Joint Statement on Physical Punishment of Children and Youth*, which recommends repeal, has been endorsed to date by 648 respected organizations representing the health, education, child welfare, sport, faith, Indigenous, immigration, human rights and business sectors (<https://www.cheo.on.ca/en/about-us/physical-punishment.aspx>). These organizations can support the implementation of law reform through awareness raising, public education, and parent support.

5. The accessibility of positive parenting programs is far from adequate.
 - There is no universal parent support or education in Canada.
 - The only federally supported parenting program is *Nobody's Perfect*, which is available only to parents of children under 6 years, who are young, single, isolated or have low income or education.
 - Community agencies experience immense struggles for stable funding of prevention programs. Just recently, Manitoba has cut funding to Parent-child Coalitions by 50%, Alberta has closed its Parent Link Centres, and Ontario has eliminated the Office of the Child and Youth Advocate.
 - The federal government has a responsibility to ensure that all children in Canada are fully protected from violence, and that their parents have access to stable, high quality education and support.

6. The educational message of positive parenting programs is profoundly undermined by the retention of section 43.
 - Social workers and parent educators often find themselves having to inform parents about how they can legally hit their children by following the Supreme Court's limits.
 - It is extremely difficult to send a clear message to parents when the law contradicts it.
 - A study of five European nations demonstrated that parental attitudes and behaviour shifted more dramatically in countries where the law clearly prohibited corporal punishment than in countries with public education but laws that permitted corporal punishment. The greatest impact on attitudes and behaviour is seen in countries with both prohibition and public education, as the messages are clear, consistent and mutually affirming.

Inaction by Canada

Canada has failed to implement:

1. The 1982 Canadian *Charter of Rights and Freedoms'* guarantee to all citizens of their rights to security of the person (Section 7) and equal protection of the law regardless of age (Section 15).

2. The 1995, 2003 and 2012 *Concluding Observations* of the Committee on the Rights of the Child, which have repeatedly and urgently called for repeal of section 43 and prohibition of all corporal punishment of children.

3. The 2002 recommendation of the Special Rapporteur of the UN Commission on Human Rights, who noted that physical punishment is inconsistent with the *Universal Declaration of Human Rights* and called upon states to take legal measures to ensure children's rights to protection (van Boven, 2002).
4. The 2006 recommendation of the *World Report on Violence against Children*, which urged "an end to the justification of violence against children, whether accepted as 'tradition' or disguised as 'discipline'" and concluded that "Governments are ultimately responsible for the protection of children. It is therefore up to Governments to act now, to fulfil their human rights obligations" (Pinheiro, 2006, p. 3, 355).
5. The 2006 *General Comment No. 8* which emphasized that the CRC "requires the removal of any provisions ... that allow some degree of violence against children (e.g., 'reasonable' or 'moderate' chastisement or correction) in their homes/families or any other setting" (UN Doc. CRC/C/GC/8, para. 31).
6. The 2007 recommendation of Canada's Standing Senate Committee on Human Rights, which recommended repeal of section 43 by April 2009 (p. xvii).
7. The 2015 call by the Truth and Reconciliation Commission of Canada to repeal section 43: "Corporal punishment is a relic of a discredited past and has no place in Canadian schools or homes" (Truth and Reconciliation Commission of Canada, 2016, p. 165).
8. The 2018 *Draft Report of the United Nations Human Rights Council's Working Group on the Universal Periodic Review*, which called on Canada to:
 - a. "Explicitly prohibit corporal punishment of children in all settings, including at home" (6.213 Montenegro);
 - b. "Enact and implement [Senate Private Member's] Bill S-206 [to repeal section 43] as soon as possible" (6.214 Sweden);
 - c. "Continue the important work on reconciliation with Canada's indigenous peoples by fulfilling the Government's promise to implement all of the recommendations of the Truth and Reconciliation Commission in a timely manner" (6.249 Sri Lanka); and
 - d. "Implement all of the 'calls to action' from the Truth and Reconciliation Commission" (6.250 Australia).

Good Practices

To date, 59 countries have implemented legislative reforms to ensure children have full protection from assault, including corporal punishment. In three of these countries, longitudinal population-level data have been collected to document the impact of these laws: Sweden, Germany and New Zealand. Sweden and Germany have civil law systems, while New Zealand, like Canada, is a common law system.

Sweden

Sweden repealed its criminal defence in 1957. In 1979, it became the first country to explicitly prohibit all corporal punishment of children. The law was accompanied by a universal education campaign about the rationale and implementation of the ban. Within two years, 99% of Swedes were familiar with the law.

Approval of corporal punishment has declined substantially. In 1965, 53% of adult respondents agreed that “a child has to be given corporal punishment from time to time;” by 1981, this proportion had declined to 26%. By 2011, 92% of parents believed that it was “wrong to beat or slap a child, even if the child had made the parent very angry.” A 2010 comparative study of parental attitudes in China, Colombia, Italy, Jordan, Kenya, Philippines, Sweden, Thailand and the US found that Sweden was the only country where no parent believed that corporal punishment was necessary in bringing up children. The former Chair of Sweden’s Parliamentary Commission against Child Abuse (1998–2001) concluded that support for and use of physical punishment have declined so steeply in Sweden “that it is probably one of the greatest changes in attitudes and behaviour ever seen in adult Swedes” (Janson, 2005, p. 1414).

A longitudinal study followed a representative group of children from their birth in the late 1950s to adulthood (Klackenberg, 1981). Almost all of the children raised prior to the ban had been struck by their mothers by the age of 4 and about one-third were still hit at age 12. The majority had been given “a real beating.” Among children born soon after the ban’s passage, 66% had not experienced any corporal punishment. Of those who had been corporally punished, more than 80% reported only one or two incidents in their entire childhoods; virtually none were hit with objects. By 2011, 86% of 15- and 16-year-olds reported no experience of physical punishment; only 3% had experienced it several times.

The prohibition was expected to be one component of Sweden’s child abuse prevention strategy, as professionals could now intervene early with clear messages and parent support, rather than reacting only after violence had escalated to severe levels. Between 1982 and 1995, the proportion of child welfare measures implemented on a compulsory basis declined steadily (Durrant, 1997). While out-of-home placements exceeded provision of in-home supports in

1982, the reverse was true by 1989 and this trend continued through the mid-1990s. Between 1982 and 1995, out-of-home placements decreased by one-third, and in-home support measures more than doubled.

In the years following the prohibition, reporting of assaults against children increased. This change was expected, as one aim of the law was to make violence against children more visible and less acceptable. However, the proportions of these reports that were pursued and prosecuted did not increase through the 1980s and 1990s, despite a 1982 policy change making prosecution substantially easier to pursue (Durrant, 1997).

Germany

Germany prohibited all corporal punishment of children in 2000. The law was accompanied by a year-long national awareness-raising campaign. By 2005, more than 90% of parents stated that non-violent childrearing is their ideal.

Interviews were conducted with 2,000 parents in 1996 and 3,000 parents in 2001 (Bussman, 2004). The percentage of parents who reported ever giving their children “light slaps” declined from 72% to 59%; the percentage who reported ever spanking their children declined from 33% to 26%.

National surveys of youth (12 to 18 years) were carried out in 1992 (n = 2,400) and 2002 (n = 2,000). The percentages of respondents reporting that they had ever experienced various types of physical punishment declined substantially over that 10-year period (Bussman, 2004).

Between 1992 and 2011, the proportion of 16- to 40-year-olds reporting that they were never physically punished as children doubled, from 26% to 52% (Pfeiffer, 2012). The proportion reporting “light violence” in childhood decreased from 58% to 36%.

In interviews of 350 staff of family-serving agencies, 84% reported that they informed parents about the prohibition when counselling them (Bussman, 2011). Many reported that being able to tell parents that corporal punishment is not allowed makes their work with clients easier and that it greatly facilitates counseling. Parents were twice as likely to report suspected abuse to child protective services in 2005 than they were in 1996.

New Zealand

New Zealand, which had a criminal defence almost identical to Canada’s, prohibited all corporal punishment of children in 2007 and implemented universal parent education and support. One year after the law’s passage, a survey was conducted of a representative sample of 750 adults aged 18 years and older (New Zealand’s Children’s Commissioner, 2008). Most respondents (91%) were aware that the law on physical punishment had been changed. Of those who were

aware of the change, 92% knew that it was now illegal to hit and smack children and 84% knew that parents were allowed to hold or restrain children to keep them safe.

Six national attitudinal surveys were conducted between 1993 and 2013 (D'Souza et al., 2016). Over this period, the proportion of adults agreeing that "there are certain circumstances when it is alright for parents to smack/use physical punishment with a child" declined from 87% to 40%.

New Zealand's Ministry of Health (2016) has conducted three National Health Surveys since 2006. The surveys have included samples of parents and caregivers of more than 4,000 children aged 1 to 14 years. Parents were asked whether they had physically punished their children in the previous four weeks. The proportion who answered affirmatively declined by almost half from 2006/07 to 2015/16.

Police tracking studies have shown that the rate of prosecution has remained low and steady, and that police are increasingly likely to refer cases to social service agencies than to prosecute them (Hughes, 2009; www.police.govt.nz).

Practical Implications of Canada's Current Legislation

Section 43's "justification" of corporal punishment of children remains federal law in Canada. Beyond its clear violations of four clusters of rights (outlined above), the law and the Supreme Court's interpretation of it present serious practical problems.

First, while the Supreme Court ruled that teachers may no longer claim the defence, the wording of section 43 remains unaltered. The law continues to state that "schoolteachers are justified in using force by way of correction toward a pupil," creating confusion about whether school corporal punishment is actually prohibited.

Second, contradictions among laws in various jurisdictions (federal, 10 provincial, 3 territorial) send a confusing message to parents, caregivers and children regarding young people's rights to legal protection from assault. For example, a provincial/territorial child welfare authority could conclude that a child is at risk in her family and apprehend her. Police could lay a charge of criminal assault, but the parents could invoke the section 43 defence, even though their child has been apprehended based on risk to the child's welfare. If this child is then placed in foster care in Ontario, her foster parents would be forbidden from using corporal punishment, even though, if they did use it, section 43 could protect them from criminal charges. However, those same foster parents could physically punish their biological children, as this is not prohibited by provincial/territorial laws. If the child was subsequently adopted, her adoptive parents would

be allowed to corporally punish her. This inconsistency demonstrates not only that children do not have equal protection to that of adults; they do not have equal protection among themselves, as their rights to protection vary depending on where they live and their relation to the adult punishing them.

Third, far from protecting all children from violence, as the Government of Canada claims, the Supreme Court's limitations on reasonable force have confused judges who must wrestle with which limits apply. For example, a mother hit her 13-year-old (not allowed) daughter on the face (not allowed) (*R. v. Kaur* [2004] O.J., 4676). But the judge found that the slap was 'minor corrective force of a transitory and trifling nature' (para. 21). Thus, the judge struggled to decide whether a slap to the head that is transitory and trifling is unreasonable.

Only those slaps to the head which amount to 'corporal punishment' or 'discipline' are not covered by section 43. There are other types of slaps to the head which, although they are assaults, are covered by section 43 because they do not amount to 'corporal punishment' or 'discipline' and they are 'minor corrective force of a transitory and trifling nature' (para. 33). In my view, it is apparent that the slap delivered by [the mother] falls into this second category. It cannot be properly said that the light slap which did not hurt [the child] amounted to 'corporal punishment' or 'discipline' and, as I previously found, the slap was an instance of 'minor corrective force of a transitory and trifling nature'. From this it follows that section 43 does justify this use of force by [the mother], and she will accordingly be found not guilty (para. 34).

In another case (*R. v. Earl* [2004] NS 626), a father held a hot cigarette lighter (not allowed) to his 7-year-old son's arm (allowed) to teach him the danger of fire, burning him such that a scab was visible three days later (not allowed). In acquitting the father, the judge ruled:

If, in fact, a warm lighter had been placed on the child for the purpose of educating the child about the dangers of [fire] without causing any injury to the child, I do not view this as a situation where discipline has been administered by use of an object, it is rather part of an education process (para. 9).

Rather than setting out a clear standard of full protection for children, the Supreme Court's limits on reasonable force have set out loopholes that deny children that protection and expose them to harm.

Conclusion

Canada continues to fail to protect its children from the most common form of violence they experience. For nearly three decades, an ever-growing body of research has demonstrated a strong and consistent link between corporal punishment and broad and enduring personal and

societal harm. Section 43 remains steadfastly anchored in the *Criminal Code* despite the compelling research on harm; the prohibition of corporal punishment by 59 countries, providing equal protection from assault to their young citizens; and the repeated urging of Canada by the Committee on the Rights of the Child to repeal section 43.

Two government actions effectively reduce the use of, and public support for, corporal punishment of children—legal prohibition and education (Durrant, 2019). While the government of Canada provides extensive public education on various aspects of child health and harm, it has largely ignored corporal punishment. The government’s official statement on section 43 is inaccurate, despite urging from experts to revise it. The tireless efforts of community agencies and professionals to end corporal punishment of children continue to be undermined by our criminal law.

All UN member states—including Canada—have adopted the target of ending all forms of violence against children under the *Agenda for Sustainable Development 2030* (Target 16.2). One of three indicators that will be used to measure progress towards this target is “the proportion of children aged 1–17 years who experienced any physical punishment and/or psychological aggression by caregivers in the past month.” Canada will struggle to show progress on this indicator as long as its law tells parents and caregivers that physical punishment is justified.

Canada’s continuing refusal to protect its young citizens must—finally—end. It is long past time for Canada to join the ever-growing list of countries that provide their young citizens with equal protection from assault. If Canada fails to do so, it will seriously jeopardize its standing on the international stage as a champion of children’s human rights.

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