David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

A Brief Submitted to:

The Standing Committee on Justice and Human Rights

House of Commons

Regarding:

Bill C-273, *An Act to amend the Criminal Code of Canada (Corrinne's Quest and the Protection of Children)*

Submitted by:
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DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

The David Asper Centre for Constitutional Rights is a centre within the University of Toronto, Faculty of Law devoted to advocacy, research and education in the area of constitutional rights in Canada. The Centre was established in 2008 by the generous donation of David Asper and was officially launched in early September 2008. It houses a unique legal clinic that brings together students, faculty, members of the bar and other advocates to work on significant constitutional cases and advocacy projects. It is the only Canadian centre in existence that attempts to bring constitutional law research, policy, advocacy and teaching together under one roof. Access to justice and social justice are clear themes that have motivated the advocacy work of the Centre since its inception. The Centre defines these themes more specifically as access to constitutional rights.

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Cheryl Milne is a practising lawyer and the Executive Director of the David Asper Centre for Constitutional Rights, Faculty of Law, University of Toronto. She was called to the Ontario Bar in 1987 and completed her MSW at University of Toronto in 1991. She practised at the legal clinic Justice for Children and Youth from 1991 to 2008 where she appeared at all levels of court and various administrative tribunals on behalf of young people. She was counsel to the Canadian Foundation for Children, Youth and the Law in its constitutional challenge to the corporal punishment defence in the Canadian *Criminal Code*. More recently she has represented the Asper Centre at the Supreme Court of Canada in *Attorney General of B.C. v Council of Canadians with Disabilities*, *Attorney General of Ontario v G.*, and *Barton v HMQ* among others. She is a past Chair of the Ontario Bar Association, Constitutional, Civil Liberties and Human Rights Section and the CBA National Constitutional and Human Rights Law Section executive. She is on the executive of the Child and Youth Law Section of the CBA and serves on the Steering Committee of the National Association of Women and the Law (NAWL). As adjunct faculty, she teaches a Constitutional Advocacy clinic, Constitutional Litigation, and Children, Youth and the Law at the Faculty of Law, University of Toronto. She served as an expert on the Council of Canadian Academies' Expert Panel on Medical Assistance in Dying for Mature Minors and in 2021 was retained to prepare a Child Rights Impact Assessment for proposed child protection legislation for the Office of the Child and Youth Advocate for the Province of PEI. She was awarded the Ontario Law Society Medal in 2019 in recognition of her contributions to legal education and advocacy for children's rights.

Recommendation: Section 43 of the *Criminal Code*[1] of Canada should be fully repealed through the enactment of Bill C-273.

Introduction

The Asper Centre supports Bill C-273 to repeal section 43 of the *Criminal Code* ("s. 43"). The use of force to correct and discipline a child is constitutionally untenable. Further, it creates significant confusion in the messaging by the Government of Canada ("Canada") on the use of force in familial and educational contexts. Domestic law, Canada's international obligations, the government's undertaking to implement all of the Calls to Action by the Truth and Reconciliation Commission,[2] and the relevant social science evidence all support its removal.

Section 43 is an unconstitutional provision

In our view, section 43 is a violation of a child's rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). The Supreme Court of Canada's decision in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [3] is questionable today because of significant developments in the law and in the circumstances and evidence that together fundamentally shift the parameters of the debate.[4] The current circumstances render the Supreme Court of Canada's decision obsolete. Any continued justification for keeping section 43 in law cannot rest on the Court's legal reasoning or factual foundation in that case. Parliament's continued sanction of the use of violence on a vulnerable group of individuals is neither necessary nor useful. Rather, section 43 relegates the rights of children in a manner that is not demonstrably justified in Canada's free and democratic society.

Section 43 violates section 7 of the *Charter*. The provision endorses the use of physical violence, in instances that would otherwise qualify as assault under section 265(1) of the *Criminal Code*, which clearly engages a child's security of the person interest.[5] This is not a trivial engagement, but one that frequently co-occurs with physical abuse.[6] In more recent decisions, the Supreme Court has clarified that a law will infringe section 7 where its effect is not connected to its object or purpose.[7] A law allowing for the use of corrective force is arbitrary because harming a child is unnecessary to achieve an educational outcome,[8]and according to the prevailing science

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[1] *Criminal Code*, SC 1995, c. C-46 s. 43.
[2] Call to Action #6
[3] 2004 SCC 4 [*Canadian Foundation*].
[4] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101, <https://canlii.ca/t/g2f56>, retrieved on 2023-04-29, [*Bedford*] at para 42: 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.
[5] *Criminal Code*, SC 1995, c. C-46 s. 265(1).
[6] See generally Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect – 1998: Major Findings*, Ottawa, 2000; Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect – 2003: Major Findings*, Ottawa, 2005; Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008: Major Findings*, Ottawa, 2010.
[7] *Bedford* at para 98; *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*] at para 72.
[8] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 132 [*PHS*].

produces the opposite effect.[9] Indeed, the majority's assertions that the force used must always be for an educative purpose[10] and that the child must be capable of benefiting from the correction[11] are belied by the current evidence.

Equally, section 43 violates section 15 of the *Charter*. It draws a distinction based on age, an enumerated and protected ground in the *Charter*, and denies the benefit of legal protection from physical interference. Children have long occupied a precarious and vulnerable position within Canadian society, and perpetuation of that disadvantage is sufficient to make a section 15 claim.[12]The current social science makes it clear that the use of even mild physical punishment is associated with harm and runs counter to the child's need for a safe environment. The Supreme Court's conclusions to the contrary are no longer supportable.

Even without the changes in the jurisprudence over the past 20 years, the common law doctrine of *stare decisis* supports departing from the Supreme Court of Canada's decision in *Canadian Foundation*. *Stare decisis* does not condemn the law to stasis; rather, our courts are encouraged to depart from established precedent where novel legal issues arise or where the underlying circumstances have changed.[13] Those circumstances include international condemnation, robust social science literature and public sentiment condemning the use of physical punishment on children.[14] Just as the Supreme Court of Canada did in *Carter*, Parliament should take note that the law, the evidence and public sentiment have changed since the last decision on section 43.[15]

Section 43 is a confusing provision

The provision is unworkable, both for parents and for courts. Any further attempts to carve out exceptions will only perpetuate the uncertainty in its use.

For parents, the current message is confusing. Through section 43, parents are told that they are justified in using reasonable force to punish their children. Section 43 alone is confusing because the elements of reasonability are a confusing and incoherent list set out in a Supreme Court of Canada judgment. Reasonability is an esoteric concept that confuses law students and lawyers alike – our courts struggle with its application daily and expecting parents to adhere to that legal standard invites complications.[16] Canadian parents' confusion is exacerbated when the Canadian government tells parents that they should not hit children, but if they do they may avoid criminal sanction by following certain guidelines. Even when parents follow those guidelines, they still

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[9] Durrant, J.E., Ensom, R., and Coaliation 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 [*Joint Statement*].
[10] *Canadian Foundation*, para 24.
[11] *Canadian Foundation*, para 25.
[12] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at paras 50-52 [*Fraser*].
[13] *Carter v Canada (Attorney General)*, 2015 SCC 5, at para 44; *Canada (Attorney General) v Bedford*, 2013 SCC 72, at para 42.
[14] *Joint Statement*.
[15] *Carter*, at paras 26, 56.
[16] See for example the case of *R v M*, 2020 ABPC 94, where a person in the place of a parent was convicted of assault in using excessive force in an attempt to spank a 6 year old child.

may be subjected to intervention by the state through a child protection investigation.[17] Even if courts hold that reasonable force is not abuse, child protection experts consider the totality of circumstances rather than a single instance. Therefore, child protection experts consider patterns of physical punishment or the risk that the force used could escalate to more harmful forms of abuse in their determination.

Despite the Supreme Court's clear message in *Canadian Foundation* that force that causes injury to a child is prohibited, children are still being injured in situations where courts have found the force to be reasonable.[18] More alarmingly, children are being seriously injured and in the rare instance, killed, where parents apply force they claimed was or intended to be reasonable.[19]Since the *Canadian Foundation* decision many of these parents have been convicted and sentenced to serve time in jail for circumstances in which they felt justified at the time in assaulting their children as a form of discipline.[20]

Courts also struggle with the application of section 43 through identifying whether force is applied out of anger and frustration. In *Canadian Foundation*, the Supreme Court of Canada held that force cannot be applied out of anger and frustration, though subsequent cases have held that corrective force may be applied while angry or frustrated so long as it is not the dominant purpose.[21] This is a false dichotomy that invites the court to engage in guesswork. Where corrective force is applied and there is evidence of anger or frustration, section 43 jurisprudence invites the court to make its best estimate on the internal thoughts of a defendant. A defendant's alleged corrective actions might have no bearing on their motivations which might otherwise characterize the incident as abuse.[22]

Most importantly, section 43 is confusing for children, because it sends mixed signals on the use of physical violence in society. Children are taught from a young age to use their words and not their hands. Violence is bad behaviour that begets punishment. Yet some children suffer recurring instances of corporal punishments when they do not follow rules. Telling a child, on the one hand, that they cannot use their hands while spanking them with the other is illogical on its face.

Other defences would capture cases that are appropriately protected by section 43

Repealing section 43 would not open the proverbial floodgates because other defences enumerated in the *Criminal Code* or in the common law may shield non-abusive instances of corrective force. The existence of prosecutorial discretion adds another robust layer of protection

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[17] Durrant, Joan E., Fallon, Barbara, Lefebvre, Rachael, and Allan, Kate, "Defining Reasonable Force: Does It Advance Child Protection?", *Child Abuse & Neglect* 71:32-43.
[18] *R. v A.(M.)*, [2011] O.J. No. 873 [cited in *R. v. P.M.*, 2021 NSPC 11]: bruising on a 6-year-old from the accused's hand that last 2 weeks was considered reasonable.
[19] *R. v. Sinclair*, 2008 MBCA 15 (CanLII), <https://canlii.ca/t/1vt2p>, retrieved on 2024-04-05.
[20] *R. v. St-Laurent*, 2023 QCCQ 1557 (CanLII), < https://canlii.ca/t/jwmqn >, retrieved on 2024-04-05; *SB v. R.*, 2012 QCCA 1419 (CanLII), < https://canlii.ca/t/fsb3r >, retrieved on 2024-04-05; *R. v. CC*, 2018 QCCQ 3610 (CanLII), < https://canlii.ca/t/hsbhh >, retrieved on 2024-04-05.
[21] *Canadian Foundation* at para 40; *R v Ndona-Mbuende*, 2022 ONSC 1192, at paras 86 [*Ndona-Mbuende*]; *R v Bell*, [2001] O.J. No. 1820 (Ont.S.C.J.), at para 9 [*Bell*].
[22] *R. v. Gervin*, 2012 MBQB 44 (CanLII), <https://canlii.ca/t/fq3sq>, retrieved on 2024-04-05: father was acquitted of assault for pushing his son down because there was insufficient evidence that he was acting out of frustration.

by ensuring that only appropriate instances of abuse see their day in court. Taken together, there is no reason why instances that Parliament envisioned to be protected by section 43 would be prosecuted in a world without that provision.

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 charged for placing a child in a car seat or breaking up a fight on the school ground.[23] 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)[24] 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.

The defence of person and defence of property would still be available to potential defendants. Under these defences, parents are permitted to use reasonable force to control children who pose a threat to themselves, others, or property.[25] These defences would capture anything from everyday classroom management to more significant emergency situations. Similarly, the defence of necessity is also available.[26] 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.[27]

Repealing section 43 would fulfill Canada's obligations

Canada has garnered significant attention for its endorsement of the use of physical punishment on children. Since Canada ratified the United Nations *Convention on the Rights of the Child* ("the *Convention*") in 1991, the Committee on the Rights of the Child has called for a repeal of

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[23] It is important to note that youth workers, who are caregivers to many young people with behavioural challenges, do not have the benefit of section 43 as a defence, but instead follow clear guidelines and regulations on the use of reasonable restraint for protect young people in their care. See for example, *Family, Youth And Child Services of Muskoka v. J.M.*, 2009 CanLII 46441 (ON SC), <https://canlii.ca/t/25j8b>, retrieved on 2024-04-05, where the parent was ordered to only use the level of restraint that was permitted under legislation for youth workers.

[24] 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.

[25] *Criminal Code*, SC 1995, c. C-46 s. 34; *Criminal Code*, SC 1995, c. C-46 s. 35.

[26] The common law defence of necessity excuses breaches of law, where the harm done by breaking the law is less than the harm that would have been done by obeying the law. As noted in *R. v. Latimer,* 2001 SCC 1 (CanLII), [2001] 1 SCR 3, <https://canlii.ca/t/523c>, retrieved on 2024-04-05, at paras 29-31, it is applicable in the narrow situation of imminent peril where there is no reasonable lawful alternative.

[27] *R. v. A.E.*, 2000 CanLII 16823 (ON CA), <https://canlii.ca/t/1fb9p>, retrieved on 2023-04-29; see also the example of *R. v Sheppard*, 2017 CanLII 2872 (NL PC), <https://canlii.ca/t/gx4pl>, retrieved on 2024-04-05, where deemed consent was found to apply to an adult with significant disabilities in a situation where section 43 would not apply.

section 43 of the *Criminal Code* on five separate occasions.[28] Section 43 also contravenes the *Universal Declaration of Human Rights* ("the *Declaration*").[29] Ending all forms of violence against children is a key item on the *Agenda for Sustainable Development 2030*.[30] These agreements are key international obligations that inform domestic policy in a variety of ways, and Parliament should strive for consistency with them, especially when dealing with vulnerable actors like children.

The international call to eliminate the physical punishment of children is not without reflection on the nuances of physical contact necessary in interacting with children. General Comment No. 8 of the UN Committee on the Rights of the Child notes,

> 14. The Committee recognizes that parenting and caring for children, especially babies and young children, demand frequent physical actions and interventions to protect them. This is quite distinct from the deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation. As adults, we know for ourselves the difference between a protective physical action and a punitive assault; it is no more difficult to make a distinction in relation to actions involving children. The law in all States, explicitly or implicitly, allows for the use of non-punitive and necessary force to protect people.
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> 15. The Committee recognizes that there are exceptional circumstances in which teachers and others, e.g. those working with children in institutions and with children in conflict with the law, may be confronted by dangerous behaviour which justifies the use of reasonable restraint to control it. Here too there is a clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish. The principle of the minimum necessary use of force for the shortest necessary period of time must always apply. Detailed guidance and training is also required, both to minimize the necessity to use restraint and to ensure that any methods used are safe and proportionate to the situation and do not involve the deliberate infliction of pain as a form of control.[31]

Canada takes an unpopular position by maintaining section 43 in spite of the *Convention* and the *Declaration*. There are 65 countries who prohibit the use of physical punishment on children.[32] In this respect, Canada is antiquated and finds itself at odds with World Health Organization and

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[28] In 1995, 2003, 2012, and 2022, the UN Committee has called on Canada to repeal s. 43. In its Concluding Observations in 2012, the Committee expressed grave concern over Canada's inaction.

[29] van Boven, T., (2002), *Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment*, UN Doc A/57/Rev 1.

[30] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*.

[31] United Nations Committee on the Rights of the Child, General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia).

[32] Albania, Andorra, Argentina, Austria, Benin, Bolivia, Brazil, Bulgaria, Cabo Verde, Colombia, Congo, Costa Rica, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Ireland, Israel, Japan, Kenya, Kosovo, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Moldova, Mongolia, Montenegro, Nepal, the Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Peru, Poland, Portugal, Romania, San Marino, Seychelles, Slovenia, South Africa, South Korea, South Sudan, Spain, Sweden, North Macedonia, Togo, Tunisia, Turkmenistan, Ukraine, Uruguay, Venezuela, and Zambia.

the Council of Europe.[33] In 2018, Canada joined the Global Partnership to End Violence Against Children and became a Pathfinding Country[34] with a goal to end violence against children. The repeal of section 43 must be a foundational aspect of this plan.

Finally, and most importantly, Canada has committed to fulfilling all of the Calls to Action of the Truth and Reconciliation Commission. After documenting recurrent humiliating and abusive punishments within the residential school system, the Commission concluded that "Corporal punishment is a relic of a discredited past and has no place in Canadian schools or homes."[35] Call to Action #6 calls upon the Government of Canada "to repeal Section 43 of the *Criminal Code of Canada*.[36]

Conclusion

In 1984, the Law Reform Commission tabled Working Paper 38, entitled "*Assault*", where the Commission devoted considerable attention to corporal punishment and s. 43 of the *Criminal Code*. The Commission thought that "the law should give a clear and unblurred message to the effect that all unnecessary violence is off-limits".[37] They recommended that Parliament repeal section 43 after the Government had developed educational and policy tools to minimize any effects on family life. Indeed, the Attorney General in the *Canadian Foundation* case argued that it had been implementing that educational campaign. *40 years later, it is finally time to repeal section 43.*

It is important that public education continues to ensure that the parents and teachers who may be impacted by the elimination of the defence are aware of the law and positive alternatives to physical punishment, and that those policing and prosecuting offences are aware of alternatives to influence behaviour short of full criminal prosecution in minor incidents.

Nowhere else in Canadian law does the law sanction non-consensual assault on an identifiable class of persons. Section 43 is based on the problematic notion that children must be controlled through the infliction of pain. Section 43 is not just unconstitutional: it reflects bad public policy. It is the legalization of violence against children, and Canada would be better off without it.

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[33] World Health Organization (2021), *Fact Sheet: Corporal Punishment and Health*; Council for Europe, *Raise your Hand against Smacking*.
[34] 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-endviolence-against-children/road-map-end-violence-against-children.pdf
[35] Truth and Reconciliation Commission of Canada, *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) p 144.
[36] Truth and Reconciliation Commission of Canada, *Calls to Action*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).
[37] Law Reform Commission (1984), *Working Paper 38: Assault*, Ministry of Supply and Services Canada at p. 44.