

Call to Action #6 and Children's Rights



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Call to Action # 6

Section 43 of the Criminal Code of Canada

Correction of child by force

Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is

under his care, if the force does not exceed what is reasonable under the circumstances.

We call upon the Government of Canada to repeal Section 43 of the Criminal Code of Canada.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General, 2004 SCC 4

In 2004, the majority of judges at the Supreme Court of Canada upheld the constitutionality of section 43 of the *Criminal Code* and determined that it did not infringe upon a child's rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*). More specifically, they determined that given how the provision only applies to specific individuals in the child's life and how the type and degree of force are circumscribed, the use of "spanking" to correct a child's behaviour does not necessarily infringe upon the child's right to security of the person (section 7 of the *Charter*) or equality (section 15 of the *Charter*), nor does it constitute cruel and unusual treatment or punishment (section 12 of the *Charter*).

In its decision, the Supreme Court provided clarifications regarding when spanking may be constitutionally acceptable. For example, they defined "reasonable force" (it must be "transitory and trifling," objects must not be used, and blows or slaps to the head is unreasonable) and stated that force may not be used on children under two years old or teenagers.

However, three of the nine judges dissented in the decision, although for different reasons. Of note, Justice Marie Deschamps was of the position that section 43 of the *Criminal Code* contravened section 15 of the *Charter*, as it "encourages a view of children as less worthy of protection and respect for their bodily integrity based on outdated notions of their inferior personhood." [i]



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Convention on the Rights of the Child

The right of a child to be free from corporal punishment is interwoven into many provisions of the *Convention on the Rights of the Child* (the Convention). Notably, article 19(1) provides that the State must protect children against all forms of physical violence:

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

In 2006, the Committee on the Rights of the Child (the Committee) issued General Comment 8 (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) which affirmed that the elimination of corporal punishment of children is an obligation of all State parties under the Convention.

The Committee's General Comment 15 also articulated the child's right to the enjoyment of the highest attainable standard of health. It recognized the negative impact of corporal punishment on a child's health, "including fatal and non-fatal injury and the psychological and emotional consequences." [ii]

CALL TO ACTION #6

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Corporal punishment was a common practice in Europe and British North America. It became one of the colonial practices used to subjugate the Indigenous populations; it was frequently employed in residential schools to control and “kill the Indian in the child.” The use of corporal punishment, as well as the other forms of abuse and neglect exercised in these institutions, resulted in intergenerational trauma that perpetuates to this day.

The Truth and Reconciliation Commission’s Call to Action 6 recognizes that corporal punishment is contrary to traditional Indigenous teachings, where children are seen as gifts that are loaned from the Creator. Ending corporal punishment is one step toward ending the continued violence being committed against Indigenous people.

REPEALING SECTION 43 WOULD CONSEQUENTLY BE ONE STEP TOWARD THE ONGOING PROCESS OF DECOLONIZATION AND RECONCILIATION. [III]

There is a growing body of scientific evidence indicating that spanking is detrimental to a child’s physical and mental health and that it is an ineffective disciplinary strategy in the long term. It can lead to increased aggression and antisocial behaviour, impair a child’s trust and confidence, hinder their ability to form close relationships, and cause resentment and a sense of worthlessness.[iv]

Many provinces have exercised their legislative authority to explicitly prohibit corporal punishment in schools, childcare facilities, and foster care. However, not all provinces have done so and, as a result, the standard is inconsistent across the country. Furthermore, since provinces can only legislate within their legislative authority, the provincial prohibition of corporal punishment does not extend to all areas of a child’s life; rather, it tends to be limited to the education and child protection spheres.[v] The federal repeal of section 43 will consequently ensure uniformity in the protection of children in Canada and eliminate any unfairness that arises solely from where a child is living.

Even after the Supreme Court of Canada decision in 2004, there have been many recommendations to repeal section 43. This includes the “Joint Statement on Physical Punishment of Children and Youth” with 664 endorsements as of August 1, 2022.[vi] There has also been a long history of attempted legislative reform including, most recently, Bill C-273, which completed its first reading on May 19, 2022.

CONTINUING CALLS FOR REPEAL

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The Government's Response

Although the Government has committed to implementing all the Calls to Action, the Indigenous Watchdog notes that progress on Call to Action #6 has "Not Started."^[vii]

The Government reports that they continue to promote parental education, including the negative impact of corporal punishment on children. As for their next steps, the Government indicates that they will "continu[e] to explore how best to respond to the Truth and Reconciliation Commission's Call to Action 6 to repeal section 43 of the Criminal Code."^[viii]

An often-cited obstacle in the repeal of section 43 is that the Government does not want to criminalize parents for disciplining their children. However, based on evidence from other countries, the prohibition of corporal punishment does not lead to parents getting criminal records or going to jail for spanking. Rather, it leads to a decreased use of spanking and a change in public attitudes toward it.

In their State party report to the Committee for the 2022 review, the Government cites the differences in public opinion as another obstacle to repealing section 43.^[ix] This is reference to how, for example, the results of an Angus Reid poll in 2016 indicated that 57% of Canadians believed that spanking a child is "always or usually morally wrong," while 32% of Canadians believed that spanking was "always or usually morally acceptable."^[x] However, differences in Canadians' views on corporal punishment are not a valid reason for refusing the repeated recommendations for reform. Protecting the rights of a marginalized group only if the majority agrees defeats the purpose of human rights and the principle of a constitutional democracy.

The Government also argues that the science against corporal punishment is debated: some argue that the research at this time does not conclusively attribute a child's negative outcomes to corporal punishment.[xi] However, there are increasingly more studies indicating that corporal punishment hurts children, and it is no longer possible to find credible research that justifies the use of corporal punishment.[xii] Although the Government continues to cite ambivalent research in support of the current law, it cannot ignore the overwhelming body of scientific proof indicating that the Supreme Court of Canada's decision in 2004 is out-of-date and that the continuing inclusion of section 43 in the Criminal Code is not evidence-based.

In its 2019 publication, "Canada: A Pathfinding Country - Canada's Road Map to End Violence Against Children," the Government acknowledged that laws are required to demonstrate that violence against children is unacceptable, and it states that "all children in Canada are protected from violence" through the Criminal Code and provincial and territorial laws.[xiii]

However, given how corporal violence is a form of violence against children, this position is neither true nor justified in light of section 43.

The Committee's Concluding Observations

The Committee has recommended multiple times for the Government to repeal section 43, including most recently in its 5th/6th review of Canada in 2022. In its Concluding Observations, the Committee asked the Government not only to continue its educational campaigns, but also to repeal section 43 and “explicitly prohibit all forms of violence” against all children:

Corporal punishment

25. The Committee takes note of the road map to end violence, 2019, but regrets that Bill S-206, which was aimed at repealing the defence allowing for “reasonable force” under section 43 of the Criminal Code, was not adopted. Recalling its General Comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, it urges the State party to:

- (a) **Repeal section 43 of the Criminal Code**, to remove the existing authorization of the use of “reasonable force” in disciplining children and explicitly prohibit all forms of violence against all age groups of children within the family, in schools and in other institutions where children may be placed;
- (b) Further promote positive, non-violent and participatory forms of child-rearing and discipline;
- (c) Conduct awareness-raising campaigns for parents and professionals working with and for children to promote attitudinal change within the family and the community.



REFERENCES

[i] At para 232.

[ii] At para 68.

[iii] Team ReconciliAction YEG, University of Alberta, "The Spanking Law' remains on the Books," (6 October 2020) (blog), online: <<https://ualbertalaw.typepad.com/faculty/2020/10/the-spanking-law-remains-on-the-books.html>>; Cory Bilyea, "Truth and Reconciliation: Call to Action No. 6 stalled", 26 August 2021, online: <<https://www.thestar.com/news/canada/2021/08/26/truth-and-reconciliation-call-to-action-no-6-stalled.html>>.

[iv] Cory Bilyea, "Truth and Reconciliation: Call to Action No. 6 stalled", 26 August 2021, online: <<https://www.thestar.com/news/canada/2021/08/26/truth-and-reconciliation-call-to-action-no-6-stalled.html>>.

[v] Library of Parliament, "Background Paper – The "Spanking" Law: Section 43 of the Criminal Code", Publication No. 2016-35-E, 3 June 2016, at p 3 [LOP Background Paper], at p 5.

[vi] CHEO, "Joint Statement on Physical Punishment of Children and Youth", (accessed 16 August 2022), online: <<https://www.cheo.on.ca/en/about-us/physical-punishment.aspx#See-what-some-endorsers-have-said-about-the-Joint-Statement>>.

[vii] Indigenous Watchdog, "Call to Action #6" (accessed 22 April 2022), online: <<https://www.indigenouwatchdog.org/cta/call-to-action-6/>>

[viii] Government of Canada, "Delivering on Truth and Reconciliation Commission Calls to Action – Education", (accessed 22 April 2022), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1524495412051/1557511602225>>.

[ix] At para 68.

[x] LOP Background Paper, *supra* note 6, at p 5.

[xi] *Ibid.*

[xii] See for example: Jill Anderson, "The Effect of Spanking on the Brain" (13 April 2021) Usable Knowledge, Harvard Graduate School of Education, online: <<https://www.gse.harvard.edu/news/uk/21/04/effect-spanking-brain>>.

[xiii] Public Health Agency of Canada, "A Pathfinding Country - Canada's Road Map to End Violence Against Children" (15 July 2019), online: <<https://www.canada.ca/en/public-health/services/publications/healthy-living/road-map-end-violence-against-children.html#ref>>.