

## **Criminal Code**

### **Bill to Amend—Second Reading**

On the Order:

Resuming debate on the motion of the Honourable Senator Hervieux-Payette, P.C., seconded by the Honourable Senator Tardif, for the second reading of Bill S-209, An Act to amend the Criminal Code (protection of children).—(*Honourable Senator Andreychuk*)

**Hon. A. Raynell Andreychuk:** Honourable senators, I rise today to speak to Bill S-209, which is the present form of a bill that has already been before us several times. I think it would be helpful for honourable senators to review a little of the history of the work that the Standing Senate Committee on Human Rights has undertaken, which concluded with a report entitled *Children, the Silenced Citizens*, which was filed in April of 2007.

The Standing Senate Committee on Human Rights has undertaken an exhaustive study on the UN Convention on the Rights of the Child and how it applies to Canada. We were interested to see whether the convention had been fully implemented into federal and/or provincial laws. The primary aim of the study was to determine whether Canadian children are benefiting from the UN Convention on the Rights of the Child and whether the convention has been used as a tool to address key problems facing children in this country.

With relevance to Bill S-209, the committee studied articles 19, 28, 37 and 38 and the optional protocol on the involvement of children in armed conflicts. The bill talked about adequate and fair treatment of children within the context of families and schools. I will not go into detail. I will simply refer honourable senators to our study, which was exhaustive in the study of these articles of the convention. (1530)

I also want to bring to the attention of honourable senators that in January 2004, the Supreme Court upheld the constitutional validity of section 43 of Canada's Criminal Code and the "reasonable chastisement" defence, which allows for the correction of children by force. That section of the Criminal Code states:

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.

The court found that the Criminal Code provision neither violated the life, liberty and security of the person nor the equality or cruel or unusual punishment rights contained in the Charter. However, in upholding section 43, the court also narrowed the reasonable chastisement defence, specifying that physical discipline: May generally only be used by parents — although teachers may use physical discipline to remove a child from the classroom or to secure compliance; may only be used against children older than two and not yet teenagers; may not be used against children incapable of learning from it because of a disability or some other contextual factor; may only be applied if it is minor corrective force of a transitory or trifling nature; may not involve the use of objects or blows or slaps to the head as such actions are deemed unreasonable; must be corrective

and used to address actual behaviour, rather than an expression of frustration or an abuse of personality; and must be intended to restrain or control, or to express symbolic disapproval.

Therefore, if one takes into account the UN Convention on the Rights of the Child and what the Supreme Court decision of 2004 states, corporal punishment would not be allowed in layman's terms for children under the age of two or for teenagers. Therefore, those who could be subject to corporal punishment are those between the ages of two and twelve. With the list attached for reasonable force, corrective behaviour is now very limited, despite the fact that many people still believe that corporal punishment can be utilized against any or all children. The court stated that the gravity of the precipitating event is not relevant to the use of the section 43 defence and that courts will determine "reasonableness" based on an objective test with respect to the particular circumstances of the case. This leads to a very limited use and, therefore, an issue of the defence when section 43 is being used is the only issue for continued debate. Education is the key for Canadians to comply with both the convention and the Supreme Court of Canada decision.

Beyond the federal criminal law, it is important to note that the standard for foster care and the way that provincial education acts across Canada deal with physical discipline in the classroom vary from province to province. At the time of our report in April 2007, Alberta, Ontario and Manitoba had not explicitly prohibited corporal punishment in their education acts, but many had guidelines for restriction upon its use.

Many Canadian witnesses relied on the reports of the UN Committee on the Rights of the Child. In several reports, the committee indicated their deep concern that Canada had not enacted specific legislation prohibiting all forms of corporal punishment. However, the United Nations Committee on the Rights of the Child consistently recommended that state parties also initiate national campaigns to raise awareness of the negative effects of corporal punishment and to encourage the development of positive, non-violent child rearing and educational practices. Throughout virtually all the testimony, witnesses and reports pointed out the need for education and for alternative methods of discipline to be explored.

Our committee stated:

From the outset, education should be a primary goal of any initiatives taken in this sphere. This is the position that was articulated by the Committee on the Rights of the Child, whose members told our Committee that public education is even more important than changing the law. There is a clear need for further research into alternative methods of discipline, as well as the effects of corporal punishment on children. As well, the Committee, being our committee, believes that the federal government should launch education programs in the public sphere to foster a societal movement against corporal punishment, creating a contextual framework from which individual members of families can draw support.

As suggested in the United Nations' recent study on violence against children, which used the Convention on the Rights of the Child as a framework for its discussions and recommendations, gender-sensitive parental education programs should be developed to promote healthy parent-child relations, orienting parents towards constructive and positive forms of discipline and approaches to child development, which also take into account the evolving capacities of children and the importance of respecting their views. Education is also necessary to ensure that parents do not fear the loss of the reasonable chastisement defence.

If honourable senators will look at our report of April 2007, in particular at Recommendation No. 2, we did discuss the elimination of corporal punishment, but we stated that the following steps should be included:

The immediate launch of an extensive public and parental education campaign with respect to the negative effects of corporal punishment and the need to foster enhanced parent-child communication based on alternative forms of discipline; and

Calling on the Department of Health to undertake research into alternative methods of discipline, as well as the effects of corporal punishment on children;

Repeal of section 43 of the Criminal Code by April 2009;

Honourable senators will see that there was a two-year lead into that. Finally, Recommendation 2 included:

Calling on the Department of Justice to undertake an analysis of whether existing common law defences — such as necessity and the de minimis defence — should be made expressly available to persons charged with assault against a child.

I bring these matters to the attention of honourable senators because Bill S-209 calls for the repeal of section 43. In fairness to the proponent, Senator Hervieux-Payette, in her first draft, indicated immediate repeal of the section. In this bill, she does have a time limit before enactment. We need to look at whether this is a fair time limit. The committee said two years; one year has passed. We are still at one year, but we were contemplating, as the UN Committee on the Rights of the Child said, that education is a precondition if we really care about the interests of the child.

When the previous bill came to the committee after our report was finished, the bill was before us, but we chose to complete our study so that we would have that as background and information. We then turned to looking at the repeal of section 43 of the Criminal Code. While we did not look into all of the legal ramifications of section 43 in its repeal, Ms. Gillian Blackwell, Senior Counsel, Department of Justice, appeared before the committee in June 2007. She spoke about the repealing process and why section 43 was in the Criminal Code in the first place.

Ms. Blackwell said:

I will now return to section 43 of the Criminal Code. This section is intended to provide protection from criminal liability for a limited category of persons, those responsible for maintaining, protecting and educating children. It is based on the premise that parents are responsible for raising their children and, in doing so, are expected to provide their children with guidance, supervision and education. They are ultimately responsible for teaching their children self-control and the ability to differentiate right from wrong.

Parents regularly apply non-consensual force in raising their children, be it guiding a reluctant child to bed by the hand or putting a child's winter boots on when the child prefers to wear sandals in the snow — personal experience. Section 43 therefore shelters parents from criminal liability for the use of reasonable force for restraint, control or to express disapproval of a specific behaviour.

Section 43, as a defence, is applicable only when the following elements have been met. First, it applies only to parents, persons acting in their stead and teachers. Second, it applies only to acts undertaken for the specific purpose of correction, discipline or guidance. Third, the child or pupil being corrected must be under the care of the parent or teacher. Finally, the force must be reasonable under the circumstances. This last criterion is critical, and clear guidelines on its meaning were provided by the Supreme Court of Canada. In short, a parent is responsible for teaching their child self-discipline.

Moreover, the Supreme Court of Canada provided useful and balanced guidelines that define the limited sphere of protection offered by section 43 for parents. In my respectful opinion, these guidelines provide much greater direction than the common law defences that some witnesses allege are available to fill a gap following a potential repeal of section 43. . .

She goes on to say:

We do know, however, that if section 43 were simply repealed, any non-consensual force that a parent or teacher uses on a child or pupil could be an assault, given the broad definition under the Criminal Code. There would no longer be a statutory defence to criminal charges where the force that is used is a minor, corrective force of a transitory or trifling nature. Parents who physically put a reluctant child in a car seat or remove a child to their bedroom for time out are applying non-consensual force and could be convicted of a simple assault.

Criminal law and provincial and territorial child protection laws already protect children from abuse, and repealing section 43 may simply expose parents to criminal liability.

When examining section 43 of the Criminal Code, the question is not whether, as individuals, we believe that light physical discipline is effective; the question is whether we should use the full force of the criminal law, our most powerful tool, against parents

trying to raise children to be responsible members of society.

Reliance on the *de minimis* defence could confuse further the law surrounding child discipline since the elements of the defence, when they are accepted, are still uncertain in Canadian criminal law.

Honourable senators, that is a quotation from some of the analysis done by the Department of Justice.

Suffice it to say that I join with those who do not believe in corporal punishment in this day and age. My concern is that the abolition of section 43 will lead to vulnerability for parents in a way that is not intended, in a way that the committee on the rights of the child and the convention did not envision, and in a way that might put parents into a section for assault.

I am concerned that parents using reasonable restraint, not force but restraint, and in fact teachers could be open to assault charges, and we are uncertain of what defences they could utilize. We have children today in schools who bully, we have children today in homes who have tools that we did not have when we were growing up, and it is incumbent upon us to determine what the effect of repealing section 43 will do to the issue of reasonable restraint. It is not a question of corporal punishment; it is a question, in my opinion, of reasonable restraint.

Therefore, I believe that the appropriate place to examine the Criminal Code issues and the consequences of any blanket repeal and what that might do to families, to teachers and to children should be looked at through the legal and constitutional lens. Therefore, I am very supportive of this bill being sent to the Standing Senate Committee on Legal and Constitutional Affairs.

We heard recently that more than one committee studies issues. Quite frankly, that is appropriate. We looked at the issues from a human rights issue point of view, from a child's perspective and from a convention issue point of view. It is now appropriate that we not revisit the corporal punishment issue but that we look at the consequence and the intent of repealing section 43 in its full extent, which was not the mandate of our committee when we studied the subject.

I look forward to further discussion and debate in the committee.

**Hon. Gerald J. Comeau (Deputy Leader of the Government):** In repealing section 43, if we do agree this afternoon to endorse this bill in principle and send it off to the Standing Senate Committee on Legal and Constitutional Affairs, are we not then saying, yes, we accept the principle of repealing section 43, and therefore there is very little we can do at committee?

**Senator Andreychuk:** Senator Cochrane did an excellent job of presenting the case,

namely, the principle that no one is now in favour of abusing a child. Therefore, there is an element of corporal punishment in section 43. I think we are all agreeing, in principle, on how we can update section 43. I agree in principle that corporal punishment is not an effective tool today but, as I put it, I have prefaced it conditionally with the comment that education is the key. Neither the Convention on the Rights of the Child nor the committee that has asked for the repeal has said that it should be done outright. They have hedged it around with conditions. In principle, I am saying we should send it to the Legal and Constitutional Affairs committee so that we can look at the issue of corporal punishment and its removal within a correct context, and ensure that we do not cause any undue harm to families, children or teachers, or that we, in fact, increase it.

When the matter was before the committee, I had asked that this be done, but there was no appetite to do so. Thus we hoped that in a third committee there would be a way of effectively repealing section 43, or amending it. The section could not be repealed outright, but could be substituted with a new section. I think this is legitimately within the purview of the Senate to refer, and therefore I am in favour of it. I certainly subscribe to all of the excellent remarks made by Senator Cochrane in her speech.

**Hon. Jim Munson:** Is the honourable senator satisfied that the government has moved forward on our recommendations in dealing with the educational component of delivering this message to the provinces and carrying out proactive programs in this regard? With respect to the repealing, that has one year still to go. Does the honourable senator still stand by that, for April of 2009?

**Senator Andreychuk:** I am not standing by 2009. That was a recommendation to the government. As the honourable senator knows, we have this reference, as a continuing reference, where we intend to bring back government officials to find out exactly what they have done on this matter. We are not letting go of this issue, and we are not agreeing that the government has done it. Quite frankly, at this point, we need to see more evidence on the table.

Governments of all stripes have been working on this discipline issue and alternative methods, but it waxes and wanes, and we need to get an update as to exactly what the Department of Health and the Department of Justice have been doing. It also strongly involves Aboriginals. As we know, they are oversubscribed in our court systems, and we would not want to do anything in this Criminal Code section that would make them even more vulnerable. It is a question of the easy way to lay a charge rather than deal with it in a family services concept. We have some information gaps, but I agree that it needs lead time.

**The Hon. the Speaker *pro tempore*:** Are honourable senators ready for the question?

**Hon. Senators:** Question!

**The Hon. the Speaker *pro tempore*:** Is it your pleasure, honourable senators, to adopt the motion?

**An Hon. Senator:** On division.

Motion agreed to and bill read second time, on division.

