Criminal Code

Bill to Amend—Second Reading—Debate Continued June 18/09

On the Order:

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

Hon. John D. Wallace: Honourable senators, I am pleased to rise today to speak on the important matter of Bill S-209, which **purports** to afford new protection to children under the Criminal Code by proposing to repeal and replace current section 43 of the Criminal Code.

I would like to begin by acknowledging that this bill is a well-intended attempt to deal with an issue that has significant importance and implications to all Canadian families. That issue is whether a legislated ban is required and is appropriate in regard to what is referred to in Bill S-209 as "corporal punishment" of children. The issue is whether a legislated ban will ensure that children will be better protected than they are today, from what Senator Hervieux-Payette frequently refers to in her second reading speech as "child-rearing violence."

I fully agree with the intention behind this bill, however, with respect, I cannot agree with the need to replace the existing law as it relates to this particular issue.

Undoubtedly, there is no one among us who disagrees with the proposition that children should be free from physical abuse and injury. That is beyond question. However, in my view, that is not what this current debate surrounding existing section 43 of the Criminal Code is really about. Rather, the debate and the concern of many, including myself, concerns the appropriateness of the use of minor forms of physical contact by parents in parenting their children, and the application of criminal law to enforce a particular view of **what does constitute "proper parenting,"** and in circumstances that have absolutely no relevance whatsoever to what is reasonably contemplated by Senator Hervieux-Payette's phrase "child-rearing violence."

In this regard, I would like to begin by first referring senators to current section 43 of the Criminal Code, which reads as follows:

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.

On January 30, 2004, the Supreme Court of Canada released its decision in the case of *Canadian Foundation for Children, Youth and Law v. Canada (Attorney General)*. The issue that was before the court was whether section 43 of the Criminal Code was unconstitutional. Six of the nine justices concluded that this section does not violate the Canadian Charter of Rights and Freedoms, since it does not infringe a child's rights to security of the person, or a child's right to equality, and it does not constitute cruel and unusual treatment or punishment.

The majority of the justices in **the *Canadian Foundation* case** upheld section 43, on the basis that it protects only parents, schoolteachers and persons who have assumed all of the obligations of parenthood. Further, it maintains a risk of criminal sanction if force is used for non-educative or non-corrective purposes, and limits the type and degree of force that may be used.

The words "by way of correction" in section 43 mean that the use of force must be sober and reasoned, address actual behaviour, and be intended to restrain, control **or express symbolic disapproval.** The child must have the capacity to understand and benefit from the correction, so that section 43 does not justify force against children who are under two years of age or those with particular disabilities.

The words "reasonable under the circumstances" in section 43 mean that the force must be **transitory and trifling**, must not harm or degrade the child, and must not be based on the gravity of the wrongdoing.

"Reasonableness" further implies that force may not be administered to teenagers, as it may induce aggressive or anti-social behaviour, may not involve objects such as rulers or belts, and may not be applied to the head. While corporal punishment itself is not reasonable in the school context, a majority of the Supreme Court did conclude **that teachers may use force to remove children from classrooms or secure compliance with instructions.**

I continue to believe that the 2004 decision of the Supreme Court of Canada in the *Canadian Foundation* case represents an effective balance between the interests of children and their parents and teachers, and our wider society.

This decision by the Supreme Court narrowed the application of the defence available under section 43 of the Criminal Code as to when parents and teachers could use reasonable force to discipline a child, setting out limitations that were consistent with both the Canadian Charter of Rights and Freedoms and the United Nations Convention on the Rights of the Child.

As a result, and as I previously stated, a defence is now open only to parents who are able to show that they used reasonable force within the circumstances, and that the force was minor**, resulting in nothing more than trivial and trifling effects** on the child.

In other words, from the time of the 2004 Supreme Court of Canada decision, it was made clear that the defence of using reasonable force to discipline a child was not available to parents where there were, for example, any marks on the child or where an object was used, or where the force was applied to the child's head, or in circumstances where the child was incapable of learning from the correction.

I believe that part of the reason we are here today is that the current law may not, in fact, be well understood, leading some to be confused about whether "corporal punishment" is or is not allowed under the current Supreme Court of Canada test. Part of the confusion is that often debate can occur between people talking about very different ideas of what is meant by "corporal punishment."

In my view, the kind of behaviour most of us think of when we speak of "corporal punishment," that is applying abusive physical force such as striking with a belt, a ruler, a spoon or other object, would most certainly constitute what Senator Hervieux-Payette has referred to as "child-rearing violence," and that type of action is clearly not permitted under the current law.

However, if we are to take the term "corporal punishment" literally, as including any physical contact, no matter how small or trifling, then it is clear that the Supreme Court of Canada has determined that minor slaps or swats are part of reasonable parenting and should not be subject to criminal sanction, provided it is within the very strict limitations I have previously referred to.

As I have said, and with all due respect, I do not believe that enacting Bill S-209 into law, even with the best of intentions to further clarify the law in this area, will result in better balance than that which has already been achieved by our Supreme Court of Canada. Rather, I am concerned that the proposed change to the existing law will inevitably and unnecessarily put parents, children and families before the courts as judicial interpretations of the new wording are developed**. If there are concerns as to how well the general public understands the existing law, then the answer surely lies in creating more public awareness, and not in risking potential damage to responsible parents and their families as a result of the wording proposed by Bill S-209.**

I am well aware that the subject matter of Bill S-209 has been debated previously here and elsewhere, and that a great deal of thought and effort has gone into a previous study of this challenging issue by the Standing Senate Committee on Legal and Constitutional Affairs.

I understand that the current wording of Bill S-209 is a deliberate attempt on the part of some members of the Standing Senate Committee on Legal and Constitutional Affairs to respond to the concerns expressed by some of the witnesses who appeared before them concerning the proposed outright repeal of the defence for parents and teachers under section 43 of the Criminal Code.

What concerns me greatly, however, is that not one of the witnesses who appeared before the Senate committee ever had a chance to make representations on the language that was eventually chosen by the committee members as a response to the concerns they identified with regard to a complete proposed repeal of section 43 of the Criminal Code.

Undoubtedly, the opinions and advice of witnesses who appear before the committee in its further consideration of current Bill S-209 will be of utmost importance to the further deliberations of the committee members, and all honourable senators of this chamber, on this extremely important matter.

I am concerned that the three specific circumstances proposed in Bill S-209 as to when reasonable force is justified are not enough to ensure that reasonable parents, who make reasonable decisions in the parenting of their children, are not subject to the application of Canadian criminal law prosecution, and such a result is never in the best interests of the children and their parents.

As a comparative example, it is interesting to note that legislation existing in New Zealand that also deals with this topic, and which has been favourably referred to by Senator Hervieux-Payette in her second reading speech, includes an exemption for parents NB "performing the normal daily tasks that are incidental to good care and parenting."

In my view, aside from the defence and protection provided under current section 43 of the Criminal Code, the absence of a similar provision in Bill S-209 runs the risk of subjecting children and their parents to unnecessary and totally inappropriate legal intervention.

I believe that the current law continues to represent the best balance to protect children from abusive parents, which is undoubtedly necessary, while also allowing parents to help guide their children through the many difficult steps of growing up in today's society. Responsible parents need to have room to parent without fear of criminal prosecution.

As I have said, I prefer the current law, which has been interpreted and upheld by the Supreme

Court of Canada as being consistent with both the Canadian Charter of Rights and Freedoms and the United Nations Convention on the Rights of the Child.

We need to consider carefully how to maintain an appropriate balance between protecting children from abusive parents, while at the same time protecting reasonable families from unwarranted interference from government and the criminal justice system.

As with each of my fellow honourable senators, I look forward to further debate and Senate committee study on this issue, as well as further careful consideration of how best to balance these competing and extremely important considerations.

The Hon. the Speaker *pro tempore***:** Is there continuing debate?

Hon. Sharon Carstairs: Honourable senators, I thank Senator Wallace for his comments today. I could not disagree more with everything he said, because I am a firm advocate of this bill. In fact, it was originally my bill, eons ago, before it became Senator Hervieux-Payette's bill. For that reason, I will reserve and ask for the adjournment of this debate so I can refute each and every one of his arguments, because it is children who are in need of protection in Canada, not parents.

(On motion of Senator Carstairs, debate adjourned.)