



Native Women's
Association of Canada



L'Association des
femmes autochtones
du Canada

Brief on Bill S-251

An Act to repeal section 43 of the Criminal Code (Truth and Reconciliation Commission of Canada's call to action number 6)

Prepared for the Standing Senate Committee on Legal and Constitutional Affairs

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Legal Unit
Native Women's
Association of Canada /
L'Association des Femmes
Autochtones du Canada
Headquarters
120 Prom. du Portage
Gatineau, QC
J8X 2K1
Tel: (613) 722-3033
Toll Free: 1-800-461-4043
Email : kpoirier@nwac.ca

Summary

The Native Women’s Association of Canada (NWAC) supports Parliament’s efforts towards answering the Truth and Reconciliation Commission of Canada’s (TRC) Call to Action 6 by repealing s. 43 of the *Criminal Code*. NWAC submits the following brief to the Standing Senate Committee on Legal and Constitutional Affairs as it studies Bill S-251, *An Act to repeal section 43 of the Criminal Code (Truth and Reconciliation Commission of Canada’s call to action number 6)*.

The purpose of the Bill is to repeal s. 43 of the *Criminal Code*, which 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.”¹ This section allows caregivers to use corporal punishment on children so long as it is “reasonable.”

For context, the TRC’s Call to Action 6 explicitly calls for the repeal of section 43.² The specter of residential schools looms large behind this Call, as Indigenous children suffered severe beatings in residential schools, leaving a far-reaching legacy of trauma that reverberates to this day.

International law also supports this repeal. The *United Nations Convention on the Rights of the Child* (UNCRC), to which Canada is a signatory, calls for states to ensure that: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”³ It also states that “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.”⁴

Previous attempts to repeal s. 43 failed. Bill S-251 is the 18th attempt since 1989 to achieve this goal.⁵ The United Nations Committee on the Rights of the Child reviewing Canada’s adherence to the UNCRC requested Canada prohibit corporal punishment and repeal s. 43.⁶

Since Bill S-251 calls for the repeal of this provision of the *Criminal Code*, if passed, it would remove the current legal protection for people who use spanking and other corporal methods (i.e. “force by way of correction”) to punish children. Without repeal, this type of physical

¹ *Criminal Code*, RSC, 1985, c C-46, s 43 [*Criminal Code*].

² 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).

³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 at 37(a).

⁴ *Ibid* at 19(1).

⁵ Canada, Parliament, *Debates of the Senate*, 44th Parl, Vol 153, No 68 (6 Oct 2022).

⁶ Committee on the Rights of the Child, *List of issues in relation to the combined fifth and sixth reports of Canada*, UNCRC, 2020, UN Doc CRC/C/CAN/Q/5-6 at para 8.

punishment would likely fall under the definition of assault, effectively making these methods of punishment illegal.

Corporal punishment has harmed Indigenous children

The TRC included Call to Action 6 to partially redress the harms caused by physical punishment suffered by Indigenous children in residential schools. Tragically, it is a well-established fact that authority figures in these schools routinely beat students, sometimes severely.⁷ The TRC's Final Report is filled with disturbing accounts, including one of a boy whose parents believe he took his own life after being flogged repeatedly by the school's disciplinarian.⁸ Responding to call 6 is an important step toward reconciliation, and to mitigating the devastating and far-reaching consequences of this dark chapter of Canadian history.

As the Senate heard from Hon. Marty Klyne in his speech at second reading of this bill, corporal punishment of children does not align with Indigenous parenting:

The churches and religious orders that operated Canada's residential schools had strong and interrelated conceptions of order, discipline, obedience, and sin...The approach to discipline used in schools was based in scripture: corporal punishment was a Biblically authorized way of not only keeping order, but also bringing children to the righteous path...Corporal punishment did not historically have this same level of acceptability among Aboriginal people. The large number of recorded parental complaints, coupled with the ongoing difficulty in recruiting students, is evidence of occasions where discipline imposed by the schools exceeded what would have been acceptable in either Aboriginal or European communities...⁹

While corporal punishment was unacceptable to many Indigenous parents from diverse Nations, the TRC points out that it was particularly incompatible with Inuit parenting, in which children are especially honoured. Hon. Klyne drew the Senate's attention to the following excerpts from the TRC's Final Report:

Traditional Inuit parenting is based on kinship relationships and cultural and spiritual beliefs. Inuit believe that a newborn named after a deceased relative takes possession of that relative's soul or spirit, and this is reflected in the parents' relationship with the child. According to the national Inuit women's association, Pauktuutit, it "would not be considered appropriate ... to tell a child what to do, as this would be the equivalent of ordering an elder or another adult about, thus violating an important social rule in Inuit culture."

⁷ Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 5* (MQUP, 2016) at 66 [TRC Report: The Legacy]; Martha Troian, "'A very painful artifact': Strap used at residential school moves from family home to archives", (1 November 2018), online: <<https://www.aptnnews.ca/national-news/a-very-painful-artifact-strap-used-at-residential-school-moves-from-family-home-to-archives/>>.

⁸ Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Missing Children and Unmarked Burials: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 4* (MQUP, 2016) at 84.

⁹ Canada, Parliament, Debates of the Senate, 44th Parl, Vol 153, No 88 (6 Dec 2022) at 1600.

Ignorance of this aspect of Inuit culture caused many non-Aboriginal people, including residential school administrators and child welfare officials, to make culturally biased judgments. They often saw Inuit parents as extremely permissive and indifferent to discipline. At the residential schools, in contrast, teachers attempted to control a child's behaviour through corporal punishment and other harsh disciplinary measures distasteful to Inuit parents.¹⁰

The harms done to Indigenous children who suffered physical punishments in residential schools continue to reverberate today in various forms. It is important to protect future generations from such harms.

International law vs. Canadian case law

Section 7 of the *Canadian Charter of Rights and Freedoms*¹¹ guarantees the life, liberty and personal security of all Canadians. International law (including the aforementioned UNCRC Articles 19 and 37) also enshrines the human right to be free from physical violence. Section 43 of the *Criminal Code* directly contradicts these principles by creating the potential for children to be deprived of their most basic human right to physical safety and security.

However, in 2004, in the leading case on this issue, the Supreme Court of Canada found that s. 43 is constitutional.¹² The court held that certain types of corporal punishment are “reasonable in the circumstances” while others are not, thus limiting the scope of what is permissible under s. 43. “Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour. Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful. Corporal punishment which involves slaps or blows to the head is harmful. These types of punishment, we may conclude, will not be reasonable.”¹³ This means that other types of “reasonable” corporal punishment of children remain legal in Canada.

Regarding international laws aimed at protecting children from abuse, the majority held that the international treaties Canada has signed do not “explicitly require state parties to ban all corporal punishment of children.”¹⁴ They concluded that what flows from Canada's international law commitments is that “what is ‘reasonable under the circumstances’ will seek to avoid harm to the child and will never include cruel, inhuman or degrading treatment.”¹⁵ While they acknowledge that the Human Rights Committee of the United Nations has spoken out against corporal punishment of children in schools as this engages the prohibition against degrading punishment,

¹⁰ TRC Report: *The Legacy* supra note 7 at 40-41.

¹¹ *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹² *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76 [*Canadian Foundation*].

¹³ *Ibid* at 37.

¹⁴ *Ibid* at 33.

¹⁵ *Ibid* at 32.

they assert that “the Committee has not expressed a similar opinion regarding parental use of mild corporal punishment.”¹⁶

Three Justices dissented, for various reasons, including that s. 43 is unconstitutionally vague and lack of judicial consensus on a definition of “reasonable under the circumstances,”¹⁷ and that 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.”¹⁸

The reasoning used in *Canada Foundation* does not align with the contemporary UN position on corporal punishment, and it is debatable whether it did even in 2004. Despite the majority’s decision to uphold the law, and its reasoning that international law does not explicitly forbid corporal punishment of children, the United Nations Committee on the Rights of the Child has repeatedly called for the repeal of section 43 and has expressed “grave concern” about Canada’s ongoing failure to act.¹⁹

Since the *Canada Foundation* case was decided, the UN Deputy High Commissioner for Human Rights and the Chair of the UN Committee on the Rights of the Child, among others, have spoken out against corporal punishment of children on the basis that it violates their rights and causes numerous harms.²⁰ Currently, 65 countries have full prohibition of corporal punishment and 27 more have committed to do so.²¹ Canada has thus far failed to follow suit, drawing criticism both internationally from the UN as aforementioned, and domestically. To date, 680²² Canadian child welfare organizations and prominent experts have signed a joint statement aimed at ending corporal punishment of children.²³

Parents are unlikely to face assault charges for protective actions if s. 43 is repealed

Concerns about the potential of criminalizing parents who must physically restrain a child to protect them from harm have been raised in previous attempts at passing legislation to repeal s. 43. For example, Hon. Senator Donald Neil Plett stated in the senate debate of Bill S-206 in 2014 that “by repealing section 43, parents who, for example, physically put a child who is having a temper tantrum to bed or restrain an uncooperative child in a car seat could risk being charged

¹⁶ *Ibid* at 33.

¹⁷ *Ibid* at 177 – 192.

¹⁸ *Ibid* at 232.

¹⁹ UN Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Periodic Report of Canada. Committee on the Rights of the Child; Geneva, Switzerland: 2012. CRC/C/CAN/CP/3-4, para. 44.

²⁰ United Nations Office of the High Commissioner for Human Rights website “Ending corporal punishment of children”, online: OHCHR <<https://www.ohchr.org/en/stories/2013/01/ending-corporal-punishment-children>>.

²¹ End Corporal Punishment, “Countdown - Global Initiative to End All Corporal Punishment of Children”, February 24, 2023, online: <<https://endcorporalpunishment.org/countdown/>>.

²² See: <https://www.cheo.on.ca/en/about-us/physical-punishment.aspx> (posted number of signatories as of June 14, 2023 is 680).

²³ Joan Durrant and Ron Ensom, Coalition on Physical Punishment of Children and Youth, Ottawa, 2004. “Joint Statement on Physical Punishment of Children and Youth. online: http://js-advocacy.ca/pdf/joint_statement_e.pdf For more information on the statement and its background, see: <https://www.cheo.on.ca/en/about-us/physical-punishment.aspx>

and convicted of a criminal offence.”²⁴ However, these concerns are likely unwarranted, given the context. These types of necessary protective actions are not corporal punishments, and moreover are unlikely to be considered assault in the circumstances. They would therefore be unlikely to result in criminal charges against parents.

Further, s. 34 of the *Criminal Code* provides a defence for using physical force if a person has reasonable grounds to believe that such force was necessary to protect someone in danger, thereby protecting parents who must physically intervene to protect a child who is at risk of harm.²⁵

Common law defences also exist, including the defence of necessity,²⁶ which could be relevant in emergency situations where a parent had no choice but to use non-consensual force to protect a child from imminent danger - for example, by grabbing a child who was about to run into traffic. Further, the principle of *de minimis*²⁷ which means that the law does not waste time on trivial or unintended violations, would likely apply in situations which were clearly not serious cases of assault. Of course, this begs the question of what constitutes a “serious” offence in the context. While it may not fully alleviate the concerns of those who worry that repealing s. 43 will leave parents open to criminal charges, it would likely protect parents from prosecution for matter of course parenting challenges like putting a cranky child in a car seat.

Bill S-251 and Indigenous women, girls, Two-Spirit, transgender, gender-diverse and LGBTQQAI+ peoples

Recent Statistics Canada data shows that experiencing abuse in childhood correlates with an increased risk of lifetime violent victimization for Indigenous women: “Indigenous women (42%) were more likely than non-Indigenous women (27%) to have been physically or sexually abused by an adult during childhood and to have experienced harsh parenting by a parent or guardian. These childhood experiences were associated with an increased prevalence of lifetime violent victimization.”²⁸ While opinions vary on whether corporal punishment is abuse, slapping and spanking are included in the definition of “harsh parenting” used by Statistics Canada in collecting this data.²⁹

This Bill is especially important to Indigenous women, girls, Two-Spirit, transgender, gender-diverse and LGBTQQAI+ peoples due to their disproportionate risk of experiencing family violence and intimate partner violence (“IPV”): 6 in 10 experience IPV, and 4 in 10 experience physical abuse.³⁰ This risk is even higher for women with intersecting marginalized identities.

²⁴ Canada, Parliament, Debates of the Senate, 2nd Session, 41st Parliament, Volume 149, Issue 55, May 1, 2014 at 1530.

²⁵ *Criminal Code* s. 34.

²⁶ See for ex: *Perka v. The Queen*, 1984 CanLII 23 (SCC), [1984] 2 SCR 232.

²⁷ See for ex: “De Minimis - Practical Law”, online: <[https://ca.practicallaw.thomsonreuters.com/1-382-3382?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/1-382-3382?transitionType=Default&contextData=(sc.Default)&firstPage=true)>; *R. v. Juneja*, 2009 ONCJ 572 at para 15.

²⁸ Statistics Canada “Violent victimization and perceptions of safety: Experiences of First Nations, Métis and Inuit women in Canada”, (26 April 2022), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00004-eng.htm>>

²⁹ *Ibid.*

³⁰ *Ibid.*

86% of 2SLGBTQQAI+ Indigenous women and 74% of Indigenous women with a disability experienced IPV.³¹

Data shows an alarming increase in family violence reports over the course of the pandemic.³² Moreover, since 2009, police-reported “family violence against children and youth increased by 25%, with a larger increase noted among girls (+31%) than among boys (+14%).”³³ While dangers are more pronounced for all children, girls are particularly at risk: “In 2021, children and youth aged 17 years and younger represented one in five (19%) victims of police-reported family violence. Of these 24,504 children and youth, more than 6 in 10 (64%) were girls. The rate of family violence among children and youth was 343 victims per 100,000 population, and it was nearly twice as high among girls (447) than boys (242).”³⁴

While these statistics show an increase in family violence across the general Canadian population, Indigenous and racialized people are at heightened risk. As Ms. Heidi Illingworth, Ombudsman for the Federal Ombudsman for Victims of Crime recently submitted to the House of Commons, “It is important to recognize that the pandemic has had a disproportionate impact on vulnerable populations. Evidence indicates that the risk and number of violent incidents against women and children are increasing, especially among Indigenous, racialized, disabled and newcomer women and children and individuals who identify as 2SLGBTQ+.”³⁵

These statistics likely do not reflect the full extent of the violence Indigenous children experience because “only a small proportion of [family violence] is reported to authorities.”³⁶ Indigenous parents may be especially wary of reporting family violence or accessing services due to the risk that their children will be apprehended by child and family services if they do. Child apprehension can be devastating, and increases the risk of increased poverty as women face extreme depression and grief making it more difficult to get their children back in the future.³⁷

This troubling data points to the need to end violence against Indigenous children - particularly girls, who are most likely to experience abuse in childhood which can increase their chances of experiencing further violence throughout their lives. While violence in Indigenous families is a complex issue intertwined with other offshoots of colonial harms, one step forward would be to heed TRC’s call to action 6 and repeal section 43 and prohibit physical punishment of children.

³¹ Statistics Canada, “Intimate partner violence: Experiences of Indigenous First Nations, Métis and Inuit women in Canada, 2018”, (19 May 2021), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00007-eng.htm>>

³² Statistics Canada Government of Canada, “The Daily — Victims of police-reported family and intimate partner violence in Canada, 2021”, (19 October 2022), online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019c-eng.htm>>

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Heidi Illingworth, “Submission to the House of Commons Standing Committee on Justice and Human Rights on the Study of the Impacts of COVID-19 on the Justice System in Canada” May 2021 online: <<https://www.victimfirst.gc.ca/vv/2021/MAY-21/index.html>>

³⁶ Statistics Canada *supra* note 27.

³⁷ Kathleen S Kenny et al, “Health consequences of child removal among indigenous and non-indigenous sex workers: Examining trajectories, mechanisms and resiliencies” (2021) 43 *Sociology of Health & Illness*.

NWAC's Position

NWAC supports Bill S-251, as we have long called for the repeal of s. 43 of the *Criminal Code*, along with hundreds of other Indigenous organizations and children's rights advocates. It responds to the TRC's Call to Action 6, and aligns with Canada's commitments to uphold international laws protecting the rights of children. NWAC advanced this recommendation to the UN CRC Committee's periodic review of Canada's adherence to the treaty in April 2022.³⁸

As Senators Hon. Stan Kutcher and Hon. Klyne raised in debate, the TRC concluded that "corporal punishment is a relic of a discredited past and has no place in Canadian schools or homes."³⁹ NWAC agrees with the TRC's conclusion and supports the approval of Bill S-251.

NWAC's Recommendations for Bill S-251

NWAC's recommendation in this matter is simple: heed the TRC's Call to Action 6, approve Bill S-251, and repeal s. 43 of the *Criminal Code*.

About NWAC


The Native Women's Association of Canada (NWAC) is a national Indigenous organization representing political voices of Indigenous Women, Girls, Two-Spirit, Transgender, and Gender-Diverse+ (WG2STGD+) People in Canada. NWAC is inclusive of First Nations—on- and off-reserve, status, non-status, and disenfranchised—Inuit, and Métis. An aggregate of Indigenous Women's organizations from across the country, NWAC was founded on a collective goal to enhance, promote, and foster social, economic, cultural, and political well-being of Indigenous WG2STGD+ People in their respective communities and Canadian societies.

Since 1974, NWAC has established strong and lasting governance structures, decision-making processes, financial policies and procedures, and networks, to achieve its overall mission, vision, and goals. Today, NWAC engages in national and international advocacy aimed at legislative and policy reforms to promote equality for Indigenous WG2STGD+ and LGBTQQAI+ People. Through advocacy, policy, and legislative analysis, NWAC works to preserve Indigenous culture and advance the wellbeing of all Indigenous WG2STGD People, as well as their families and communities.

NWAC works on a variety of issues, including employment, labour and business, health, violence prevention and safety, justice and human rights, environment, early learning childcare, and international affairs.

³⁸ Native Women's Association of Canada, *Alternative Report* (April 2022), pdf online: *UN CRC* <<https://www.nwac.ca/assets-knowledge-centre/NWAC-UN-CRC-Submission-Canada-5-6th-periodic-review.pdf>>.

³⁹ *Supra* note 9 at 1610; *TRC Report: The Legacy* *supra* note 7 at 66.



NWAC provides support much like a “Grandmother’s Lodge.” We—as aunties, mothers, sisters, brothers, and relatives—collectively recognize, respect, promote, defend, and enhance our Indigenous ancestral laws, spiritual beliefs, language, and Traditions provided by the Creator.⁴⁰

⁴⁰ The Native Women’s Association of Canada, *About Us* (2023), online: <<https://nwac.ca/about-us>>.