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CRIMINAL CODE

**BILL TO AMEND—SECOND READING—
DEBATE CONTINUED**

Statement by:

The Honourable Murray Sinclair

Tuesday, March 7, 2017

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Hon. Murray Sinclair: Honourable senators, I am pleased to speak to Bill S-206, an act to repeal section 43 of the Criminal Code.

I support this bill and have agreed, on the retirement of Senator Hervieux-Payette, to become the new sponsor, because I believe in the right of children not to be assaulted and in the need for the law to recognize that right as fully as it does for every person in this country. You must keep in mind that section 43 only applies to situations where a child has been assaulted, and accordingly it has limited application.

As we grow as a society, every generation will do things differently because societies change as more information is available to us. On its website, Justice Canada has observed the following:

In the past, it was acceptable to hit people to make them obey. . . . children, students, servants, and employees might, for example, be whipped to punish them or force them to do certain tasks. . . .

Over the last century, society has changed and the law has changed too. Employers are no longer allowed to history employees - ever. School boards have banned teachers —

— throughout Canada —

— from hitting students

In 1991, Canada committed to protecting children from all forms of violence and to act in the best interests of children when we signed on to the UN Convention on the Rights of the Child. Since then, the UN has called for the repeal of section 43 of our Criminal Code three times and has expressed “grave concern” about our inaction as a country on this issue.

In 2006, the UN Secretary-General’s Study on Violence against Children concluded that all governments are ultimately responsible for the protection of children and to fulfill their human rights obligation. States were called upon to end justification of violence against children, whether it be accepted as a tradition or disguised as a discipline.

In 2007, the Senate itself recommended the repeal of section 43 by April of 2009.

In 2015, the Truth and Reconciliation Commission called for the same action.

It’s now time for us to actually do something about it.

Sweden was the first country to prohibit the use of physical correction of children 37 years ago. The last time this subject came up in the upper chamber in 2013, 33 other countries had banned this practice. Now, in 2017, only 4 years later,

52 countries have prohibited the use of force for the purpose of correction on children, and 54 additional countries have committed to doing so.

The growing body of research tells us that 75 per cent of physical abuse cases involving children in Canada arose from incidents of physical punishment by parents. People who believe they have the right to hit children clearly have trouble controlling themselves when doing so.

In addition, the Law Commission of Canada estimated that physical abuse of children cost the economy of Canada billions of dollars annually.

Research shows that even mild physical punishment of children predicts poorer mental health, negative parent-child relationships, increased antisocial behaviour and increased risk of violence toward intimate partners and children in adulthood. The Public Health Agency of Canada, the Department of Justice and provincial governments all agree.

In a Global News poll conducted in 2016, more than 60 per cent of Canadians agreed that spanking should be illegal. The Children’s Hospital of Eastern Ontario leads a coalition of over 580 national organizations and advocates. That coalition released a Joint Statement on Physical Punishment of Children and Youth and also called for the repeal of section 43.

Canadian attitudes are changing, honourable senators. Research evidence, the voices of experts and child advocates, as well as public opinion, affirm that the physical correction of children, which section 43 protects, is no longer appropriate and represents a more archaic time when we were unaware of the damage that it caused.

For those concerned about protecting parents, even without section 43, the law still provides sufficient protection for them, for teachers and for guardians who have to apply physical force to children in minor cases or when socially acceptable and legally necessary. It will not allow them to hit kids under the guise of correcting them, however, and it never should do so.

Honourable senators, you and I and everyone else in this country, except children, have the right not to be assaulted. No one has the right to hit us or to push us or to twist our arms or to lock us in a room or to tie us to a chair. Yet, we allow people to do that to children. The damage to children is immeasurable. I have heard their stories.

At one Indian residential school in Alberta, a teacher was charged with assaulting a student by punching him three times in the face, causing serious injury. The teacher had been convicted of assault at trial but was acquitted on appeal by a court which held that the degree of force that he used was reasonable. That case set the tone for how all children in residential schools were treated thereafter.

In the Fort Albany Indian residential school, I was told of children who when caught speaking their language or misbehaving in any way were tied to an electric chair and had an electric current run through their bodies until they twisted and

screamed. I heard stories of children who ran away from the schools being stripped naked and whipped, in a room filled with other students, to teach them all a lesson. Some ended up in school-run infirmaries because of their injuries, with no one standing up for them.

The violence that indigenous children experienced at the hands of their guardians at those schools became so much a part of their lives that it is often reflected in the way that they came to treat their own children. Residential schools in this country are clear evidence that child violence begets parental violence. Hitting children to change their behaviour simply does not work.

It is easy for us to agree that such excessive violence as I have told you about is unacceptable, but some think that something less might be okay. It is true that not all assaults that children experience are of the magnitude that we heard about in Fort Albany. "Assault" is, after all, simply the application of force, no matter how small, to another person without their consent, but we must not forget that minor touching is not criminalized anyway, on the principal of *de minimis*. If it is something so minor, it is unworthy of the criminal's law attention and sanction.

The law also recognizes that some applications of force are socially and legally acceptable. In order to get someone's attention, for example, sometimes you have to touch them on the shoulder or on an arm. Engaging in a boxing match or body checking in hockey are not assaults on the basis of consent. Accidental touching is not illegal, nor is the use of reasonable force to defend or protect yourself or another person or even your property.

Section 43 says that if you assault a child for the purpose of correcting a child's behaviour, you have a special defence if you use reasonable force. Society is beginning to accept that no amount of force is reasonable.

Children are the most vulnerable people in our society. They don't vote. They cannot influence political, social, legal or economic change. They are not recognized as citizens with equal human rights and civil rights to adults. They are considered legally incompetent.

We agree that children need to be protected from strangers. Why do we think, therefore, that they do not need to be protected from their own parents or teachers or guardians or from foster parents or social workers or jail guards? The fact is that they do. It is up to us, as grandfathers and grandmothers, as aunties and uncles and as the guardians of wisdom in this society, to do this by amending this law.

It is time for us to recognize that children are totally dependent on adults for their basic needs. When their rights are violated, their lack of power renders them incapable of resistance or of taking action. Their vulnerability also causes them significant emotional and mental harm, precisely because correctional assaults are inflicted on them by adults that they depend on for protection, for love and for emotional well-being.

The TRC found that the use of force for the purpose of correction in residential schools caused profound and long-lasting impacts that continue to reverberate within indigenous families and communities today. This cycle of violence has been linked

to high rates of children in the child welfare system, the over-incarceration of indigenous people and to high rates of violence within communities, including unconscionably high suicide rates.

In 2004, the Supreme Court of Canada ruled on section 43. Unfortunately, their reasoning has to be discerned by reading four different judgments involving nine different judges. That's another reason why Parliament needs to act. The question of whether or not children have a lower protection from assault should not be left to the general public to parse and to understand four separate Supreme Court of Canada reasons. To guide how force can be used to correct a child, the Department of Justice has summarized that Supreme Court ruling with the following principles:

One, the use of force to correct a child is only allowed to help the child learn and can never be used in anger.

Two, the child must be between 2 years of age and 12 years of age. In other words, section 43 is not available if the child is under 2 because they don't understand or over 12 years of age because there are better means of correcting them. That means, for example, that you can never hit a teenager.

Three, the force used must be reasonable, and its impact can only be transitory and trifling. If you actually hurt the child, section 43 is not available to you.

Four, even if the amount of force used is reasonable, it cannot be inhumane or degrading.

Five, the assailant must not use an object, such as a ruler or a belt, when assaulting a child.

Six, the assailant must not slap or hit the child on the face or in the head.

Seven, the seriousness of what caused the action by the parent or what the child did is never an excuse. It is absolutely irrelevant.

Eight, using reasonable force to restrain a child between 2 and 12 may be acceptable in some circumstances.

Nine, hitting a child in anger or in retaliation for something a child did is not considered reasonable and is against the law.

Finally, teachers cannot strike a child. However, they can use reasonable force to remove children from a classroom and guide them to where they have to go or be taken.

All of this points to one very clear conclusion: The law of hitting children is in a mess, and it calls out for reform.

This bill is not without opponents, as the previous failures of it to pass attest, despite its widespread public and professional acceptance. Some groups oppose the ban on physical punishment, such as Family First, out of New Zealand, because they say, since similar laws prohibiting the striking of children were introduced in 2007 in that country, there has been an increase in children diagnosed with emotional and behavioural problems. Law-abiding parents have been targeted as criminals, and levels of abuse have not declined.

No evidence has ever been found showing any long-term, positive benefits of hitting children. More reliable research shows that emotional and behavioural problems increase when children are hit, not when they aren't.

Contrary to Family First's assertion, a 2013 New Zealand report by police authorities showed that there had only been eight prosecutions of a parent in the six years after the law had been reformed.

Other groups claim that section 43 provides a defence to parents, caregivers and teachers against the charge of assault. If that ever happened it would be by sheer luck, given the vague and confusing state of the law of assaulting children. Three judges in a 2004 Supreme Court decision ruled that section 43 should be struck down because it violated the equality of children, and because the defence of hitting children where it is "reasonable under the circumstances" is constitutionally vague. They found there are other alternative and sufficient defences available to protect parents.

Hon. Claudette Tardif (The Hon. the Acting Speaker): Senator Sinclair, I'm sorry, but your time has expired. Are you asking for more time?

Senator Sinclair: May I have two more minutes, please?

The Hon. the Acting Speaker: Is leave granted, honourable senators?

Hon. Senators: Agreed.

Senator Sinclair: It is not only the law that needs to change to protect all children. If parents are using corrective force to discipline children, then those parenting practices need to change, too.

In 2012, Dr. John Fletcher, editor-in-chief in the Canadian Medical Association Journal, called section 43 an "anachronistic excuse for poor parenting." He wrote:

Parents need to be re-educated as to how to discipline their children. To have a specific code provision excusing parents is to suggest that assault by a parent is a normal and accepted part of bringing up children.

He added that section 43 is ". . . a constant excuse for parents to cling to an ineffective method of child discipline.

There are alternative methods to teach and discipline that do not involve physical violence. Parenting programs have been successful at teaching positive parenting techniques and improving the behaviour of children. These programs need to be widely available to Canadian families.

Section 43 sends a message that we in Canada approve of the assault of children. The United Nations has told us three times to do something about it. Over 60 per cent of Canadians want us to do something about it. More importantly, children need us to do something about it.

Do we want to live in a country that does not prohibit but only defines how we can assault children? I don't think so. Remember, we tell everyone with pride that this is a place that protects the vulnerable. We are the ones that must show leadership here, because if not us, then who?
