On May 31, 2018, Hon. Senator Raynell Andreychuk delivered a speech in opposition to Bill S-206 (during Second Reading): An Act to amend by Repealing Section 43 of the Criminal Code inclusive of the Supreme Court's 2004 Rulings defining the same.

NB: With this, S-206 passed Second Reading and now heads to committee for study.

We have copied the speech in its entirety below:

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 Joyal, P.C., for the second reading of Bill S-206, An Act to amend the Criminal Code (protection of children against standard child-rearing violence).

Hon. A. Raynell Andreychuk: Honourable senators, I rise today to speak to Bill S-206, An Act to amend the Criminal Code (protection of children against standard child-rearing violence).

Bill S-206 seeks to repeal section 43 of the Criminal Code which reads:

> 43. Every school teacher, 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 force does not exceed what is reasonable under the circumstances.

This is not the first time a bill has been before the Senate on this issue, nor is it the first time that I speak to it. My remarks today will, in part, refer to some of those previous speeches.

It remains clear that we are united in our conviction that a child's right to protection from violence is of paramount importance. However, as I have previously stated, I remain of the opinion that the consequences of a repeal of section 43 outright may pose significant damage to Canadian families and society, without changes to allow for reasonable measures and appropriate action in law to replace it.

Allow me to elaborate. Absent section 43, the general assault provisions contained within the Criminal Code could be applied to any parent or caregiver who uses reasonable force to respond to the needs of a child, or others. Therefore, any discussion of a repeal of section 43 must acknowledge the unique circumstances and challenges that accompany child-rearing.

The purpose of repealing section 43, as stated by previous proponents, is to eliminate all forms of corporal punishment. I do not believe the discussion around Bill S-206 should be around corporal punishment. It is rather about the legal and social implications likely to result from the criminalization of reasonable actions by responsible parents and teachers in the course of fulfilling their duties towards children and whether it violates the Canadian Charter of Rights and Freedoms or any other international human rights legislation.

I share the concern about the use of corporal punishment and do not agree with corporal punishment.

Various studies indicate that corporal punishment rarely leads to positive outcomes for the child, the parent or our society, and it is increasingly understood and accepted in modern Canadian society that other forms of discipline provide the best environment for a child to grow.

Recognizing the evolutionary nature of this process, the Canadian government has, for many years, through many administrations, sought to support this shift through education rather than outright prohibition.

This is reflected in the position of the Public Health Agency of Canada:

> All children need guidance to help them learn self-control. Positive guidance, or 'discipline,' teaches children skills, raises their self-esteem, and strengthens the parent-child bond. Physical punishment is not positive discipline. Children need safe, stable and nurturing relationships with their parents.
>
> Spanking is not an effective way to change your child's behaviour. Spanking can harm your relationship with your child. Research shows that spanking teaches your child to solve problems with aggression.
>
> Your child needs your guidance.
>
> Your child needs you to be consistent and patient.

The Senate has expressed a similar opinion.

In its April 2001 report entitled, *Children: The Silenced Citizens*, the Standing Senate Committee on Human Rights indicated that it did not support corporal punishment.

Reflecting the wisdom of the International Convention on the Rights of the Child, our committee stated:

> 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, ... believes that the federal government should launch education programs in the public sphere to foster a societal move against corporal punishment, creating a contextual framework from which individual families can draw support.

While the Convention on the Rights of the Child establishes clear obligations, it also notes that children's rights are generally progressive. Children, that is, are maturing, and their capacity to handle their own rights increases into adulthood.

The concepts of parental guidance and responsibility are reflected in the convention's recognition of children's rights to a family, as well as the right to protection from violence. This same logic underpins section 43 of the Canadian Criminal Code. It provides a very narrow defence for the use of force by a teacher or parent within the much broader assault provisions of the Criminal Code.

Absent section 43, any touching by a parent or a teacher in the course of caring, discipline or controlling the behaviour of the child could lead to criminal prosecution. The definitive case, which I ask senators to take into account, is the Supreme Court of Canada in its ruling in the *Canadian Foundation for Children, Youth and the Law v. Canada Attorney General*, 2004. It established principles to guide the application of section 43.

The court indicated that section 43 cannot be used to justify the use of corrective force for any child under 2 or for any child over 12. It established that the defence does not justify actions taken in anger or frustration, or to use of force involving any instrument or object, or blows to the head. Finally, section 43 only applies to "minor corrective force of a transitory and trifling nature," to quote the court. Therefore, section 43 is so narrowly defined now that its repeal would leave parents and teachers without resources to any justifiable use of physical contact by way of correction or restraint of a child or pupil.

The Department of Justice outlines a number of instances in which parents, caregivers or teachers may be required to apply physical force, and I quote:

> . . . to control a child or keep the child, or other children, safe. Grabbing a child to keep that child from running across the street, carrying a screaming three-year-old out of a store, or separating two young students who are fighting may require a parent, caregiver or teacher to touch or restrain the child.

Another way of looking at this is that the repeal of section 43 would place children in the same position as an adult under law.

I therefore do not wish to debate the merits of corporal punishment but to determine the effect of the removal of section 43 from the Criminal Code without reinsertion of any other section or initiative to assist the child, the parent, the teacher and society.

The most constructive analysis on section 43 came in the majority decision of the Supreme Court to which I previously referred. The court was asked to answer three basic questions: First, does section 43 of the Criminal Code infringe on the rights of children under section 7 of the Canadian Charter of Rights and Freedoms? Second, does

section 43 of the Criminal Code infringe on the rights of children under section 12 of the Canadian Charter of Rights and Freedoms? And third, does section 43 of the Criminal Code infringe on the rights of children under section 15(1) of the Canadian Charter of Rights and Freedoms? The court demanded that the answer to all three questions was that there was no infringement and that section 43 was indeed constitutional.

(1730)

In the judgment's first paragraph, the Chief Justice indicated:

> The issue in this case is the constitutionality of Parliament's decision to carve out a sphere within which children's parents and teachers may use minor corrective force in some circumstances without facing criminal sanction. The assault provision of the *Criminal Code*, R.S.C. 1985, c. C-46, s. 265, prohibits intentional, non-consensual application of force to another. Section 43 of the *Criminal Code* excludes from this crime reasonable physical correction of children by their parents and teachers.

The Chief Justice stated:

> I am satisfied that the substantial social consensus on what is reasonable correction, supported by comprehensive and consistent expert evidence on what is reasonable presented in this appeal, gives clear content to s. 43. I am also satisfied, with due respect to contrary views, that exempting parents and teachers from criminal sanction for reasonable correction does not violate children's equality rights. In the end, I am satisfied that this section provides a workable, constitutional standard that protects both children and parents.

To the question of whether section 43 of the Criminal Code offends section 7 of the Charter, the Supreme Court noted:

> Section 7 of the *Charter* is breached by state action depriving someone of life, liberty, or security of the person contrary to a principle of fundamental justice. The burden is on the applicant to prove both the deprivation and the breach of fundamental justice. In this case the Crown concedes that s. 43 adversely affects children's security of the person, fulfilling the first requirement.
>
> This leaves the question of whether s. 43 offends a principle of fundamental justice.

The Supreme Court deliberated on this, and the majority view addressed the issue put forward by the plaintiff, which was that:

> The implication is that for s. 43 to be constitutional, it would be necessary to provide for separate representation of the child's interests.

The Chief Justice found that the ". . . child's interests are represented at trial by the Crown" and gave reasons as to why that was adequate and desirable.

The Foundation, the plaintiff in the Supreme Court case, stated:

> . . . it is a principle of fundamental justice that laws affecting children must be in their best interests, and that s. 43's exemption of reasonable corrective force from criminal sanction is not in the best interests of the child.

Therefore, the Foundation argued, section 43 violates section 7 of the Charter.

The Chief Justice, on behalf of the majority, respectfully disagreed and stated:

> While "the best interests of the child" is a recognized legal principle, this legal principle is not a principle of fundamental justice.

Cases were cited to prove the point. In fact, the Supreme Court noted that Article 3(1) of the Convention on the Rights of the Child describes the "best interests of the child" as ". . . 'a primary consideration' rather than 'he primary consideration.'"

The Supreme Court drew on the wording in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, at paragraph 75. In this judgment, Madam Justice L'Heureux-Dubé stated:

> . . . the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.

The Supreme Court therefore found that ". . . the legal principle of the 'best interests of the child' may be subordinated to other concerns in appropriate contexts."

The Foundation also argued that section 43 was unconstitutional because of "vagueness and overbreadth."

The Supreme Court responded that the standard for "vagueness" states:

> A law is unconstitutionally vague if it "does not provide an adequate basis for legal debate" and "analysis"; "does not sufficiently delineate any area of risk"; or "is not intelligible". The law must offer a "grasp to the judiciary" . . . .

But they noted that certainty is not required.

In determining whether section 43 delineates a risk zone for criminal sanctions, the court stated:

> The purpose of s. 43 is to delineate a sphere of non-criminal conduct within the larger realm of common assault. It must, as we have seen, do this in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids *ad hoc* discretionary decision making by law enforcement officials. People must be able to assess when conduct approaches the boundaries of the sphere that s. 43 provides.

Applying this principle, the court indicated that section 43 ". . . delineates who may access its sphere with considerable precision." It therefore found that there was no violation of the Charter in this case.

Considering the requirement that the force be "by way of correction," the Chief Justice concluded:

> These words, considered in conjunction with the cases, yield two limitations on the content of the protected sphere of conduct.
>
> First, the person applying the force must have intended it to be for educative or corrective purposes . . . .

> Second, the child must be capable of benefiting from that correction.

This led, of course, to all the exceptions that the Supreme Court has noted where force can be used, and that is not under the age of 2, not over the age of 12, and only in a transitory manner, and I have already referred to that.

The court explored cases in which the term "reasonableness" has been defined, and it found:

> Section 43 does not exempt from criminal sanction conduct that causes harm or raises a reasonable prospect of harm. It can be invoked only in cases of non-consensual application of force that results neither in harm nor in the prospect of bodily harm. This limits its operation to the mildest forms of assault. People must know that if their conduct raises an apprehension of bodily harm they cannot rely on s. 43. Similarly, police officers and judges must know that the defence cannot be raised in such circumstances.

The court then went on to say:

> Within this limited area of application, further precision on what is reasonable under the circumstances may be derived from international treaty obligations. Statutes should be construed to comply with Canada's international obligations: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 137. Canada's international commitments confirm that physical correction that either harms or degrades a child is unreasonable.

Canada is a party to the United Nations Convention on the Rights of the Child. Therefore, Article 5, Article 19(1) and Article 37(a) must be taken into account. Similar language to Article 37(a) of the international convention is also found in the International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, to which Canada is a party.

The court found:

> The preamble to the *International Covenant on Civil and Political Rights* makes it clear that its provisions apply to "all members of the human family". From these international obligations, it follows that what is "reasonable under the circumstances" will seek to avoid harm to the child and will never include cruel, inhuman or degrading treatment.
>
> Neither the *Convention on the Rights of the Child* nor the *International Covenant on Civil and Political Rights* explicitly require state parties to ban all corporal punishment of children.

Concerns regarding a repeal of section 43 were outlined by the Canadian Bar Association during the study of a previous iteration of this bill by the Standing Senate Committee on Legal and Constitutional Affairs in June 2008.

(1740)

On the subject of a repeal of section 43, Mr. Greg DelBigio, Chair of the National Criminal Justice Section of the Canadian Bar Association, stated the following:

> We are concerned that the changes suggested by the bill would dramatically expand the reach of criminal law in a wide range of circumstances . . . .
>
> They would give rise to consequences . . . : arrest, removal from the home and being subject to bail conditions that might prevent a person from returning home or having contact with the children. The person might be subject to those bail conditions until the charge is resolved. Depending on where in Canada this occurs, that type of charge might take months to resolve.

He went on to describe the potential irreparable damage that could affect families in these situations:

> In the meantime, there is a disruption to the family. There is the criminal charge itself. Then, if there is a trial, it creates a situation where family members, including the child, will testify against the parent who has been charged. There are the penalty consequences of a conviction and the further consequences that might impact the family, such as, for example, loss of employment. The potential consequences are far-reaching and in many ways dramatic.

A repeal of section 43 carries with it particular challenges for vulnerable communities and minority groups. Allow me to quote from an article published in *The Lawyer's Daily* by Queen's University law professors Lisa Kelly and Nicholas Bala:

> Families already living in the shadow of state surveillance — immigrant families, single mothers, First Nations families, and working poor households — are most likely to attract police scrutiny.
>
> Parents in high-conflict separations may also be subjected to reports urging that police enforce the letter of the law.
>
> What vulnerable children and families need most is not greater punishment, but basic supports.

Honourable senators, I concur with this position. Harsher criminal punishments for families in these circumstances may cause further damage.

Moreover, further attention must be given to families with children with disabilities, who may act violently and require the application of physical restraint in order to protect themselves and others from harm.

Greater emphasis must be placed on additional resources for support services and education. We have much to learn from countries where corporal punishment has been abolished, as approaches vary from that which is proposed in Bill S-206.

Let us look to Sweden as an example. Sweden was the first country to ban corporal punishment in 1979. This was achieved through an amendment to the Parenthood and Guardianship Code, which reads:

> Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other humiliating treatment.

According to Dr. Joan E. Durrant, who undertook a long-term study of the impact of the ban in Sweden:

> Its primary purpose was to educate, not coerce.

She added:

> While the law makes clear that the criminal law on assault applies equally to assaults of adults and children, it is important to note that the law was not intended as a means of criminalizing carers, for this reason the law was written into the Parents' Code, which carries no criminal penalties . . . .

The ban in Sweden was also accompanied by an extensive public education campaign. According to Dr. Durrant, this included the distribution of pamphlets to all households with children, available in all major immigrant languages. Information was also printed onto milk cartons sold in grocery stores across the country.

Alternatively, in countries where corporal punishment was banned through criminal law, measures to protect adults accompanied those changes. In May 2007, the Parliament of New Zealand amended section 59 of the New Zealand Crimes Act. It was replaced by a new section 59, entitled "Parental Control," which states — incidentally, it is similar to section 43 of the Criminal Code, and was replaced by this:

> (1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—
>
> (a) preventing or minimising harm to the child or another person; or
>
> (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
>
> (c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
>
> (d) performing the normal daily tasks that are incidental to good care and parenting.

I should say that New Zealand went a lot further than I suggest we should go.

There are restraints, and I think I'm running out of time rather quickly. After twenty minutes I think it's the patience of my colleagues I'm more worried about.

I have enumerated in the past that jurisdictions that have banned corporal punishment still allow for restraints or correction when necessary in a very low ban. Therefore, I am suggesting that if this bill goes to committee in its current form, our focus should shift to continuing to educate parents with regard to alternate discipline strategies. We should consider exploring additional strategies and changes on issues of reasonableness, restraint, safety and security.

We have changed the world that children live in. It's important that we protect them in new ways, and perhaps section 43 of the Criminal Code needs revision. It is already reduced to a very narrow ban by the Supreme Court — not under the age of 2, not over 12 — and a very narrow interpretation.

What has concerned me, and I haven't had time to go into it, is that there are cases now coming up of assault charges against parents. The question is whether they are real assault cases or whether it was a reasonable restraint in the best interests of the

child. I understand this bill is going to the Legal and Constitutional Affairs Committee, and I think we need to set real time aside to look at what is going on in the assault provisions as well as section 43.

I think it is time that we modernize the relationship. What I don't want is to sever more children from their parents. It is too easy to do so under an assault charge.

We know the damaging effects. I'm looking at Senator Sinclair, who knows the damaging effects of separating children.

We know the shortcomings of our alternate placement areas for children. In the end, can a bureaucracy help a child as much as a parent? Surely we should be supporting the parent to be able to parent appropriately.

I find Bill S-206 difficult in one other area and that is in its title: An Act to amend the Criminal Code (protection of children against standard child-rearing violence). I believe that title is unwarranted, too provocative and too accusatory against parents and teachers, and it is time for us to reflect fully.

I give full credit to the Standing Senate Committee on Human Rights that undertook an exhaustive study of children. We did say *Children: The Silenced Citizens*. They don't speak for themselves. They need to be heard more often for themselves. But we also know that they need a protective environment, and it should start by parental care in the first place.

In this age of new services for ourselves and new ways of living for ourselves, as I used to say in court, these laws were made for adults. We didn't take into account the needs of present-day children, and every decade we should be looking at whether our laws suit children, particularly on something as blunt as our Criminal Code.

There are some new cases emerging, and I did not put them in because I think I would have run over my 45 minutes. They are emerging, and they're coming up in the provincial courts, which aren't that easy to find all the time, where parents are doing what I think is correct for the child. Teachers are doing what is correct.

(1750)

The easiest thing is to lay an assault charge. Section 43 now seems to be avoided because of the circumspection of it in the Supreme Court. I could be wrong. Therefore, I think the issue is not just the repeal of section 43; it is to look at the most appropriate support for children and parents and to say violence is not part of it, so it should not be in our title. We should not talk about standard rearing processes because families have different ways of doing so. There is no standard of parenting, as I found out in family services.

We put minimum standards below which you cannot transgress. Beyond that, we respect families as they grow differently. They are different. But when they are in trouble, we need to help them; we don't need to criminalize them. Only when it is intentional harm, intentional beyond transitory, when we're not in anger, that we should even consider anything but an assault charge.

Section 43 needs a lot of work. It has had a lot of work in the Senate, but I think a decade later it needs a new full review. I hope it will receive that in committee.

Thank you for your patience.

The Hon. the Speaker *pro tempore*: Will you accept a question, Senator Andreychuk?

Senator Andreychuk: Yes.

Hon. Joseph A. Day (Leader of the Senate Liberals): Thank you. You made a comment that you understand this is going to the Legal Committee, but a lot of this sounded like Human Rights subject matter to me. Have there been discussions as to where the bill should be sent after second reading?

Senator Andreychuk: I leave it to the leadership. I can give advice. I'm mindful that the leaders have to balance committees and workloads. I've been here for quite some time. I found that I can give my advice and it should only be taken as advice. I'm sure that the leaders have taken advice, and wherever it goes I would be happy to be part of it. I'm not going to let go of this. It has been 10 years of my life.

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

Some Hon. Senators: Agreed.

Senator Plett: On division.

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

Referred to Committee

The Hon. the Speaker *pro tempore*: Honourable senators, when shall this bill be read the third time?

(On motion of Senator Sinclair, bill referred to the Standing Senate Committee on Legal and Constitutional Affairs.)