Liberals Vow to Repeal Section 43 of the Criminal Code

January 21, 2016

The federal Liberals have agreed to remove the section in the *Criminal Code* that permits teachers and parents to use reasonable force to correct the behaviour of children in their care.

In promising to enact all of the recommendations of the Truth and Reconciliation Commission ("TRC"), the federal Liberals have agreed to remove the section in the *Criminal Code* that permits teachers and parents to use reasonable force to correct the behaviour of children in their care.[1]

The Truth and Reconciliation Commission, which heard thousands of stories of physical abuse inside Indian residential schools, said in its final report that "corporal punishment is a relic of a discredited past and has no place in Canadian schools or homes." The repeal of section 43 of the *Criminal Code* was No. 6 on a list of 94 "calls to action" included in the report.[2]

Parliament has recognized the fact that educators may be justified in using force against a student in special circumstances. A teacher who applies physical force in the course of disciplining a student may be subject to a criminal charge of assault. The *Criminal Code* provides a defence, however, for teachers, parents and persons standing in the place of a parent who use reasonable force against a child for the purpose of correction. Section 43 of the *Criminal Code* provides:

"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."

In 2004, the Supreme Court of Canada ruled that physical force was acceptable within certain bounds — it cannot be used on children under the age of 2, it cannot involve implements, such as a paddle or a belt, and blows to a child's head are not allowed.[3]

Teachers cannot use any form of corporal punishment, the court ruled, although they may restrain students to gain compliance with their instructions.

The court stated, "Substantial societal consensus, supported by expert evidence and Canada's treaty obligations, indicates that corporal punishment by teachers is unreasonable."[4]

The court ruled that section 43 will protect a teacher who uses reasonable, corrective force to restrain or remove a child in appropriate circumstances.

The court concluded that section 43 provides "parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law."[5]

Teachers praised the 2004 Supreme Court decision, saying that educators need flexibility in certain circumstances to remove a child from a classroom or break up a fight in the school yard.

When asked if Prime Minister Justin Trudeau's promise to act on every TRC recommendation meant repealing section 43 of the *Criminal Code,* a spokesman for Justice Minister Jody Wilson-Raybould confirmed that the government is committed to implementing all of the commission's calls to action. [6]

Heather Smith, president of the Canadian Teachers' Federation, said that she would be open to section 43 being repealed so long as it was replaced with another provision that specifically protected educators who may feel the need to use physical force as defined by the 2004 Supreme Court decision in carrying out their duties.[7]

"There are times that teachers need to physically intervene with students", Ms. Smith stated. "Section 43 certainly does not give teachers or any other adult a licence to abuse, but what it does do is provide some protection if physical intervention is required."[8]

From an education perspective, section 43 of the *Criminal Code* is seen as protecting teachers against frivolous or vexatious allegations.

Those who oppose section 43 argue that there is a principle in law called *de minimis* that prevents Crown attorneys from prosecuting trivial offences.[9] This is a legal doctrine by which a court will not consider trivial matters that are not worthy of judicial scrutiny.

It is argued that if a parent called a children's aid society after witnessing a teacher physically intervene to break up a schoolyard fight between two students, an investigation would be unlikely to go forward if there were no other signs of maltreatment or evidence of excessive use of force.

The concern arises that if section 43 of the *Criminal Code* is repealed and is not replaced by another provision protecting educators, there may be enhanced exposure to teachers involved in physical contact with students to a criminal charge of assault.

Despite the protections in section 43, it is recommended that teachers and school administrators refrain from using physical contact as a means of correction. As a society, we should encourage the use of educational measures to promote better ways of disciplining children. In a school context, educators should consider using peer

mentoring, restorative justice conferences, review of expectations, conflict mediation and time-outs as proactive ways to manage and monitor student conduct. These programs are commonly used by schools to promote and support positive student behaviour. It is hoped that such programs will lead to improved student communication skills, increased self-confidence and taking responsibility for one's own actions.

Furthermore, teachers, administrators and school staff play an important role in supporting students and contributing to a positive learning environment. Schools where respectful interactions are encouraged and modelled are integral to supporting students in developing positive behaviours.

[1] Gloria Galloway, " Liberals agree to revoke spanking law in response to TRC call", The Globe and Mail, December 20, 2015.
[2] *Ibid.*
[3] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004), 234 D.L.R. (4th) 257.
[4] *Supra,* at para. 38.
[5] *Supra,* at para. 59.
[6] Gloria Galloway, footnote 1.
[7] *Ibid.*
[8] *Ibid.*
[9] Joanna Smith, "Liberals vow to scrap 'spanking' law", *Toronto Star*, December 22, 2015.

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