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## BACKGROUND PAPER



# The “Spanking” Law: Section 43 of the *Criminal Code*

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(Background Paper)

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# THE “SPANKING” LAW: SECTION 43 OF THE CRIMINAL CODE

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## 1 INTRODUCTION

Section 43 of the *Criminal Code*, which expressly offers parents and teachers a defence when they use reasonable force to discipline a child, is a controversial provision of Canada’s criminal law.

In recent decades, a growing number of people have called for an end to any form of physical punishment of children and youth in Canada, which would necessarily include the repeal of section 43, and as recently as late 2015, legislation to repeal section 43 was introduced in the Senate.

Other advocates, while acknowledging that abuse itself is never justified, have argued that minor physical correction is acceptable in certain circumstances and that individuals should not risk criminal prosecution as a result of their parenting techniques.

This paper reviews the content of section 43 and its judicial interpretation by the Supreme Court of Canada, a majority of which upheld the provision as constitutional in 2004. It then discusses past proposals to repeal the section, and the legal effects that such a repeal would have, given the definition of assault in Canada’s *Criminal Code* and the availability of common law defences. Finally, public opinion on abolishing section 43, research regarding the effects of physical punishment and international perspectives on the issue are briefly examined.

## 2 SECTION 43 OF THE *CRIMINAL CODE*

Section 43 of the *Criminal Code* 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.

This defence of “lawful correction” or “reasonable chastisement” appeared in Canada’s first *Criminal Code* in 1892. The content has remained virtually unchanged since that time, with the exception of the removal of masters and apprentices from among the relationships covered by the defence.<sup>1</sup>

## 3 SUPREME COURT OF CANADA RULING REGARDING SECTION 43

On 30 January 2004, the Supreme Court of Canada released its decision in the case of *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.<sup>2</sup> The issue was whether section 43 is unconstitutional.

Six of nine justices concluded that the provision does not violate the *Canadian Charter of Rights and Freedoms*, as it does not infringe a child’s rights to security of the person (section 7) or a child’s right to equality (section 15), and it does not constitute cruel and unusual treatment or punishment (section 12).

Three justices dissented in three different respects.

### **3.1 OPINION OF THE MAJORITY**

The majority of justices in *Canadian Foundation for Children, Youth and the Law* upheld section 43 on the basis that the protection it affords only extends to parents, teachers and persons who have assumed all of the obligations of parenthood. Further, they noted that the section 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 justices stated that 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. They also noted that the child must have the capacity to understand and benefit from the correction, which means that section 43 does not justify force against children under two or those with particular disabilities.

The justices further clarified that the words “reasonable under the circumstances” in section 43 mean that the force must be transitory and trifling and must not harm or degrade the child. They stated that the idea is to look at the need for correction in the circumstances rather than the gravity of the child’s misbehaviour. According to the decision, reasonableness further implies that force may not be administered to teenagers, as it can induce aggressive or antisocial behaviour, it may not involve objects such as rulers or belts, and it may not be applied to the head.

Finally, the majority concluded that, while corporal punishment itself is not reasonable in the school context, teachers may use force to remove children from classrooms or secure compliance with instructions.

### **3.2 DISSENTING OPINIONS**

In a first dissenting opinion, Justice Ian Binnie concluded that section 43 violates children’s equality under section 15 of the Charter. However, he noted that the infringement is justified under section 1 as reasonable in a free and democratic society, although only with respect to parents and persons standing in their place. Justice Binnie also concluded that, because the justification rests on respecting the family environment, where only limited corrective force is used to carry out important parental responsibilities, the defence in section 43 should not be available to teachers.

Justice Louise Arbour, also dissenting, found section 43 unconstitutionally vague and therefore a violation of children’s security and not in accordance with principles of fundamental justice under section 7 of the Charter. Citing a lack of judicial consensus

on what constitutes force that is “reasonable under the circumstances,” she found section 43 to be incapable of providing clear guidance to parents, teachers and law enforcers.

In a third dissenting opinion, Justice Marie Deschamps determined that section 43 violates section 15 of the Charter because 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.”<sup>3</sup> Justice Deschamps stated that although reasonable flexibility in child-rearing is a valid objective, a law that permits more than only very minor applications of force unjustifiably impairs the rights of children. Justice Deschamps would therefore have struck down section 43 for both parents and teachers.

## 4 PROPOSALS FOR REFORM

In 1984, the Law Reform Commission of Canada recommended the repeal of section 43 as a defence for teachers.<sup>4</sup> A majority of the Commission suggested that section 43 be maintained for parents, primarily out of concern that the criminal law would otherwise unduly encroach on family life for every trivial slap or spanking.<sup>5</sup>

Twenty years later, in a report on children’s rights in Canada, the Standing Senate Committee on Human Rights recommended the repeal of section 43 and highlighted the need for a public education campaign with respect to the negative effects of corporal punishment. It also recommended further research into alternative methods of discipline and called on the Department of Justice Canada to analyze whether existing common law defences should be made expressly available to those charged with assault against children.<sup>6</sup>

Most recently, in 2015, the Trudeau government committed to implement the 94 Calls to Action<sup>7</sup> made by the Truth and Reconciliation Commission of Canada,<sup>8</sup> one of which was the repeal of section 43.

These efforts for reform have been accompanied by numerous legislative attempts to abolish corporal punishment over the past decades, primarily in the form of private members’ bills introduced in the House of Commons or public bills introduced in the Senate.<sup>9</sup> The most recent one, Bill S-206, whose sole clause (aside from the coming-into-force provision) repeals section 43, was introduced in the Senate in December 2015 and began second reading in February 2016.<sup>10</sup>

## 5 LEGAL EFFECTS OF A REPEAL OF SECTION 43

### 5.1 APPLICATION OF OTHER *CRIMINAL CODE* PROVISIONS

If section 43 were repealed, the general assault provisions of the *Criminal Code* would apply to anyone who uses force against a child without the child’s consent. A statutory defence based on “reasonable chastisement” would no longer be available to parents, teachers and guardians. Because section 265 of the *Criminal Code* prohibits the non-consensual application of force and section 279 prohibits

forcible confinement of another person without lawful authority, some have expressed concern that the abolition of the defence in section 43 would criminalize parental conduct short of what is usually considered corporal punishment, such as restraining an uncooperative child in a car seat, physically putting a child to bed, or physically restraining a child to avoid a dangerous situation.<sup>11</sup>

Possible responses are that such actions could be defended under common law doctrines, which are discussed in section 5.2 of this paper, or on the basis of a child’s implied consent to allow a parent to care for and nurture him or her. Alternatively, law enforcers may, in practice, exercise discretion not to prosecute. Comparisons might be made to various types of unwanted contact between adults that legally constitute assault but are addressed through other measures, such as public education and workplace policies, or not addressed at all. Varying degrees of culpability, depending on the severity of the physical force used, may also be addressed through sentencing.

One way of dealing with the concern that some parental conduct could be criminalized if section 43 is repealed could be to build a provision into the law confirming that reasonable force may be used for the purposes of protection. Some examples would be averting immediate danger or harm, preventing a child from committing a crime, or “performing the normal daily tasks that are incidental to good care and parenting.”<sup>12</sup>

## 5.2 RESORT TO COMMON LAW DEFENCES

As noted above, if the defence of reasonable chastisement in section 43 were repealed, common law defences would remain.<sup>13</sup> The common law defence of necessity precludes criminal responsibility in emergency situations for involuntary conduct aimed at protecting oneself or others. As it is based on true involuntariness of an action, the defence has been interpreted narrowly.<sup>14</sup> Three elements must be present:

- imminent peril or danger;
- the absence of a reasonable legal alternative; and
- proportionality between the harm inflicted and the harm avoided.

While the defence might be available, for example, to a parent preventing a child from running into the street, it would not be available to a parent who, with or without thinking, strikes a child who is misbehaving.

The defence of *de minimus*<sup>15</sup> is an alternative common law defence that precludes punishment for a trivial or technical violation of the law. Compared to that of necessity, this defence is more likely to relieve parents and guardians of criminal convictions resulting from minor forms of physical punishment. However, it might not be as available to teachers, given society’s growing lack of acceptance of the use of corporal punishment in schools. The *de minimus* defence depends on whether the offence may be viewed as not serious, and the offender not deserving of criminal sanction.



### 5.3 PROVINCIAL LAWS

Through their legislative authority over education and child protection, some provinces and territories have already explicitly prohibited corporal punishment in schools, childcare facilities and foster care.<sup>16</sup> Quebec removed references to a “right of correction” from its *Civil Code* in 1994.<sup>17</sup> However, legislation is inconsistent across the country. Should Parliament repeal section 43 under its criminal law power, physical punishment of children would become unlawful in all Canadian jurisdictions. Any provincial or territorial law that remained inconsistent would yield to the paramount federal statute. The repeal of section 43 would therefore create legal consistency across Canada.

## 6 PUBLIC OPINION IN CANADA AND SOCIAL SCIENCE RESEARCH

The issue of whether parents should be permitted to physically punish their children is divisive in Canada. A national survey in 2003<sup>18</sup> indicated that while a large majority of respondents (69%) were in favour of repealing section 43 of the *Criminal Code* with respect to teachers, fewer (51%) supported ending the provision for parents. The same survey found that respondents were more inclined to support the removal of section 43 if guidelines were developed to prevent prosecutions of minor slaps or spans (60%), if research demonstrated that physical punishment is ineffective and potentially harmful (61%), or if research showed that repealing section 43 would decrease abuse (71%).

Using a smaller population sample in 2012, a survey of young adults without children indicated that 46% were in favour of repealing section 43 if guidelines are developed to prevent prosecutions of minor slaps or spans, while 26% disagreed with repeal, and 17% had “favourable attitudes” towards spanking.<sup>19</sup>

Finally, a 2016 Angus Reid poll on moral values indicated that 57% of Canadians regard spanking a child as “always or usually morally wrong,” with 32% viewing spanking as “always or usually morally acceptable.”<sup>20</sup>

Over 550 organizations in Canada have endorsed a position stating that physical punishment of children and youth plays no useful role in their upbringing, and calling for the same protection from assault as that given to Canadian adults.<sup>21</sup> Other groups, conversely, support the parental protection offered by section 43 and argue that parents should be free to decide how to discipline their children, provided that it is fair, reasonable and never abusive.<sup>22</sup>

There is a growing body of research indicating that corporal punishment does have detrimental effects on children.<sup>23</sup> According to these studies, corporal punishment places children at risk of physical injury, physical abuse, impaired mental health, a poor parent/child relationship, and increased childhood and adolescent aggression and antisocial behaviour. However, these findings are disputed in other studies. The two main criticisms are these: that research on the negative effects of corporal punishment does not adequately distinguish between physical punishment and

physical abuse, and that research cannot determine whether the negative outcomes attributed to physical punishment are actually caused by the punishment.<sup>24</sup>

## 7 INTERNATIONAL PERSPECTIVES

In 1991, Canada ratified the United Nations *Convention on the Rights of the Child*, Article 19 of which mandates the protection of children from all forms of physical or mental violence, injury or abuse.<sup>25</sup> In response to reports from Canada regarding the action it has taken to meet the requirements of the Convention, the United Nations Committee on the Rights of the Child has repeatedly recommended that physical punishment of children in schools and families be prohibited and that section 43 be removed.<sup>26</sup>

At the same time, international covenants recognize the integrity of the family unit and indicate that parents have the primary responsibility for the upbringing and development of the child.<sup>27</sup> Further, in *Canadian Foundation for Children, Youth and the Law*, a majority of the Supreme Court of Canada considered the *Convention on the Rights of the Child* and concluded that it did not explicitly require state parties to ban all corporal punishment of children.<sup>28</sup>

While 193 countries have ratified the *Convention on the Rights of the Child*, as of June 2016, a smaller number – 49 countries – had legislated bans on corporal punishment in both the home and school.<sup>29</sup> Other countries, or jurisdictions within them, have passed laws prohibiting force of certain types or in certain contexts. Indeed, the number of states implementing such bans has jumped dramatically in the past decade.<sup>30</sup>

Nevertheless, some states that have banned corporal punishment have done so through family and civil law bans, reserving criminal assault charges for more serious conduct.<sup>31</sup> As discussed in section 5.1 of this paper, because the definition of assault in Canada's *Criminal Code* is based on the non-consensual nature of the contact, there may be greater risk in Canada in removing the section 43 defence, although such concerns could be dealt with by building reassurances into the law.

## 8 CONCLUSION

In general, advocates on both sides of this debate tend to agree that children should be free from physical abuse and injury. Rather, the disagreement is about the effects of minor forms of physical punishment and the appropriateness of using criminal law to enforce a particular view of what constitutes proper parenting.

Some are confident that prosecutorial discretion and existing common law defences will continue to prevent individuals from being charged or convicted for trivial slaps and spanks or protective restraint. Others fear that parents may face intervention from neighbours or passersby, investigations by police and even imprisonment for limited punishment of their children, or for a momentary but arguably human lapse of judgment.

Child welfare and protection laws go some distance in the prevention and detection of child abuse, and a number of public education campaigns exist to encourage parents not to use even minor forms of physical punishment on their children.<sup>32</sup>

Given these developments, advocates for the repeal of section 43 say that the provision sends the mixed message that it may be acceptable to strike a child. But those against the removal of section 43 from the *Criminal Code* worry about an inverse message if the provision is repealed: criminal prosecution and conviction may result from any physical contact or restraint that is used against a child.

As with many social issues, there appears to be little agreement in Canada on the acceptability of section 43, a position that is reflected in the divergent views expressed by the Supreme Court of Canada and the United Nations Committee on the Rights of the Child.

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## NOTES

1. Section 55 of the 1892 *Criminal Code* read: “It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances.”
2. [Canadian Foundation for Children, Youth and the Law v. Canada \(Attorney General\)](#), 2004 SCC 4 [CFCYL v. Canada].
3. *Ibid.*, para. 232.
4. Law Reform Commission of Canada, *Assault*, Working Paper 38, Ministry of Supply and Services, Ottawa, 1984, pp. 44 and 53.
5. *Ibid.*, pp. 44–45 and 53.
6. Standing Senate Committee on Human Rights, [Children: The Silenced Citizens – Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children](#), Final report, April 2007.
7. 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](#), 2015, p. 320.
8. Prime Minister of Canada, [“Statement of the Prime Minister on Release of the Final Report of the Truth and Reconciliation Commission,”](#) 15 December 2015.
9. See, for example, Bill C-305, An Act to amend the Criminal Code (protection of children), 2<sup>nd</sup> Session, 35<sup>th</sup> Parliament, 1996; Bill S-14, An Act to amend the Criminal Code and the Department of Health Act (security of the child), 2<sup>nd</sup> Session, 35<sup>th</sup> Parliament, 1996; [Bill C-368, An Act to amend the Criminal Code and the Department of Health Act \(security of the child\)](#), 1<sup>st</sup> Session, 36<sup>th</sup> Parliament, 1998; [Bill C-329, An Act to amend the Criminal Code \(protection of children\)](#), 1<sup>st</sup> Session, 37<sup>th</sup> Parliament, 2001; [Bill S-21, An Act to amend the Criminal Code \(protection of children\)](#), 1<sup>st</sup> Session, 38<sup>th</sup> Parliament, 2004; and [Bill S-207, An Act to amend the Criminal Code \(protection of children\)](#), 1<sup>st</sup> Session, 39<sup>th</sup> Parliament, 2006.
10. [Bill S-206, An Act to amend the Criminal Code \(protection of children against standard child-rearing violence\)](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 2015.

11. See, for example, a speech by Senator Donald Plett during debate of Bill S-206, which would have repealed section 43 of the *Criminal Code*: [Debates of the Senate \(Hansard\)](#), 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament, 1 May 2014, 1530. Further discussion of reasonable physical restraints can be found in Global Initiative to End All Corporal Punishment of Children, [Prohibiting corporal punishment of children: A guide to legal reform and other measures](#), February 2009, pp. 10–11. More discussion of the negative implications of repeal are found in Lisa Kelly and Nicholas Bala, “More Harm than Good: Repealing Reasonable Correction Defence Could Backfire,” *The Lawyers Weekly*, 19 February 2016, p. 12.
12. Global Initiative to End All Corporal Punishment of Children (2009), p. 20.
13. Common law defences are expressly available by virtue of section 8(3) of the *Criminal Code*. Certain statutory defences, though limited in scope, would also remain available, such as those permitting the use of force in self-defence (s. 34) or to protect property (s. 35).
14. See, for example, [R. v. Perka](#), [1984] 2 S.C.R. 232; and [R. v. Latimer](#), [2001] 1 S.C.R. 3.
15. The full maxim is *de minimus non curat lex* and has been stated to mean that the law does not care for small or trifling matters. See Jean Hétu, “De minimus non curat praetor: une maxime qui a toute son importance!” *Revue du Barreau*, Vol. 50, 1990, p. 1065.
16. Physical punishment is prohibited under legislation governing foster care in British Columbia, Alberta, Manitoba, Ontario and Quebec; under legislation governing day care centres in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut; and under legislation governing schools and education in British Columbia, Saskatchewan, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut. See Global Initiative to End All Corporal Punishment of Children, [Country report for Canada](#), March 2016; and Global Initiative to End All Corporal Punishment of Children, [Ending legalised violence against children: Global progress to December 2015](#), December 2015.
17. Reasonable and moderate correction was permitted under article 651 of the *Civil Code of Quebec* (1980) (*An Act to establish a new Civil Code and to reform family law*), S.Q. 1980, c. 39, but did not reappear in the *Civil Code of Quebec* (1994), S.Q. 1991, c. 64.
18. Toronto Public Health, [National Survey of Canadians’ Attitudes on Section 43 of the Criminal Code](#), September 2003.
19. Tessa Bell and Elisa Romano, “Opinions about child corporal punishment and influencing factors,” *Journal of Interpersonal Violence*, Vol. 27, No. 11, 2012, pp. 2208–2229.
20. Angus Reid Institute, Canadian Opinion Poll, “[Canadians say our moral values are weakening four-to-one over those who say they’re getting stronger](#),” 13 January 2016, p. 3.
21. Children’s Hospital of Eastern Ontario, “[Joint Statement on Physical Punishment of Children and Youth](#),” Update no. 16, *Physical Punishment*.
22. See, for example, REAL Women of Canada, “[The Anti-Spanking Gang Gears Up – REALity](#),” 14 January 2016.

23. See, for example, Joan Durrant and Ron Ensom, "Physical punishment of children: lessons from 20 years of research," *Canadian Medical Association Journal*, Vol. 184, No. 12, 2012; Catherine A. Taylor et al, "Mothers' Spanking of 3-Year-Old Children and Subsequent Risk of Children's Aggressive Behaviour," *Pediatrics*, Vol 125, No. 5, 2010; Elizabeth Gershoff et al, "Parent Discipline Practices in an International Sample: Associations with Child Behaviors and Moderation by Perceived Normativeness," *Child Development*, Vol. 81, No. 2, 2010; Elizabeth Gershoff, "Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review," *Psychological Bulletin*, Vol. 128, No. 4, 2002; and Murray A. Straus, David Sugarman and Jean Giles-Sims, "Spanking by Parents and Subsequent Antisocial Behavior of Children," *Archives of Pediatrics and Adolescent Medicine*, Vol. 151, No. 8, August 1997.
24. See, for example, Robert E. Larzelere and Brett R. Kuhn, "Comparing Child Outcomes of Physical Punishment and Alternative Disciplinary Tactics: A Meta-Analysis," *Clinical Child and Family Psychology Review*, Vol. 8, No. 1, March 2005. See also Diana Baumrind, "Does Causally Relevant Research Support a Blanket Injunction Against Disciplinary Spanking by Parents?," Invited Address at the 109<sup>th</sup> Annual Convention of the American Psychological Association, San Francisco, August 2001.
25. [Convention on the Rights of the Child](#), 20 November 1989, article 19(1):
  - 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.
26. United Nations Committee on the Rights of the Child, [Concluding Observations on the combined third and fourth periodic report of Canada](#), CRC/C/CAN/CO/3-4, 6 December 2012, paras. 44–45. In response to Canada's most recent reports, the Committee stated that it  
  
is gravely concerned that corporal punishment is condoned by law in the State party under Section 43 of the Criminal Code... The Committee urges the State party to repeal Section 43 of the Criminal Code to remove existing authorization of the use of "reasonable force" in disciplining children and to explicitly prohibit all forms of violence against all age groups of children, however light, within the family, in schools and in other institutions where children may be placed. Additionally, the Committee recommends that the State party:
  - (a) Strengthen and expand awareness-raising for parents, the public, children, and professionals on alternative forms of discipline and promote respect for children's rights, with the involvement of children, while raising awareness about the adverse consequences of corporal punishment;
  - (b) Ensure the training of all professionals working with children, including judges, law enforcement, health, social and child welfare, and education professionals to promptly identify, address and report all cases of violence against children.
27. [International Covenant on Civil and Political Rights](#), 16 December 1966, art. 23(1): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." See also [International Covenant on Economic, Social and Cultural Rights](#), 16 December 1966, art. 10(1):
  - The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

See also *Convention on the Rights of the Child*, art. 18(1): “Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.”

28. *CFCYL v. Canada*, para. 33.
29. The countries with the legislated bans are Albania, Andorra, Argentina, Austria, Benin, Bolivia, Brazil, Bulgaria, Cape Verde, Congo, Costa Rica, Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Honduras, Hungary, Ireland, Israel, Iceland, Kenya, Latvia, Liechtenstein, Luxembourg, Macedonia, Malta, Moldova, Mongolia, Netherlands, New Zealand, Nicaragua, Norway, Peru, Poland, Portugal, Romania, San Marino, South Sudan, Spain, Sweden, Togo, Tunisia, Turkmenistan, Ukraine, Uruguay and Venezuela. (Global Initiative to End All Corporal Punishment of Children, “[States which have prohibited all corporal punishment.](#)”)
30. Global Initiative to End All Corporal Punishment of Children, “[Countdown to universal prohibition.](#)”
31. Sweden, for example, has legislated against physical punishment of children in its *Parenthood and Guardianship Code*. See Adamira Tijerino, “Under Scrutiny: Corporal Punishment and Section 43 of the Criminal Code of Canada,” Draft Document, B.C. Institute Against Family Violence, Vancouver, 2001, section V; and Global Initiative to End All Corporal Punishment of Children, “[Country report for Sweden.](#)”
32. See for example, Government of Canada, “[Pamphlet – What’s Wrong with Spanking?](#)”