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Standing Committee on Justice and Human Rights

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EVIDENCE

Chair

Mr. Art Hanger

Standing Committee on Justice and Human Rights

● (1535)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I'd like to call to order the Standing Committee on Justice and Human Rights. Our agenda, as noted, will be a clause-by-clause consideration of Bill C-252.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I don't have a copy. I asked for one.

[*English*]

The Chair: We'll go to clause-by-clause consideration.

Shall clause 1 carry?

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): I'm sorry, Mr. Chairman.

Does the government have an amendment? We will have to see the amendment.

[*English*]

The Chair: Are there amendments?

An hon. member: Yes, Rob has one.

[*Translation*]

Mr. Réal Ménard: We will have to see the amendment. We don't have the amendment.

Do you have the amendment?

[*English*]

Mr. Rob Moore (Fundy Royal, CPC): I did. I have it here. We can make copies.

I'll tell you what it does. We had some individuals here yesterday from the department who recommended that we change "ensure" to "shall order", the idea being that "ensure" was placing a fairly heavy onus on the judge to follow.... It brings the language into line with what's currently in the Divorce Act.

Mr. Myron Thompson (Wild Rose, CPC): I have a copy.

Mr. Rob Moore: Does everyone have the amendment in front of them?

[*Translation*]

Mr. Réal Ménard: I don't think that it's the amendment.

● (1540)

[*English*]

Hon. Sue Barnes (London West, Lib.): May I ask a question on that? Are you giving this as a government—?

Mr. Rob Moore: This is a government amendment to change, "the court shall then ensure" to "the court shall make a variation order".

Hon. Sue Barnes: Do we have some government people here to give us some answers?

Mr. Rob Moore: We do, and they can speak to it.

Hon. Sue Barnes: I'd like to question them.

The Chair: Would the department representatives sit at the table, please?

Ms. Barnes, what was your question?

Hon. Sue Barnes: Thank you very much. Forgive me if you've already answered this; I haven't had a chance to read the Hansard yet.

When we do this, by having in this bill "as long as it is consistent with the best interests of that child", essentially that would not change the status quo before the courts, because the courts always have to consider the best interests of that child. So even though we're holding this up as one thing that the judge shall consider, in reality, if this bill didn't exist, it wouldn't make one heck of a difference, because any advocate can still ask that that be considered in the best interest of a child upon application to the courts.

Am I gathering the essence of the law?

Mrs. Lise Lafrenière-Henrie (Senior Counsel, Family Law Policy, Department of Justice): That's correct. In determining the best interests of the child, the court can certainly consider the terminal illness of a parent and whether that's relevant to the interest of the child.

Hon. Sue Barnes: What I'm trying to really get at is this. I can say it in one of two ways. One way would be to say that this is extra wording but not required in order to come to the same outcome; in other words, it's an addition to the act that really is not necessary. The other way I could say it is that in all respects, nothing would change in family law with the addition of this. In other words, it can do no harm, but it's not doing any good either.

Mrs. Lise Lafrenière-Henrie: Can I just clarify? Are you talking about the whole provision?

Hon. Sue Barnes: Yes.

Mrs. Lise Lafrenière-Henrie: In terms of the impact it's going to have on the law, I think that's to be determined. There is certainly a policy consideration for the committee in terms of whether this is necessary. But as I said, coming back to the impact legally, as we said before, the court already has the discretion to do this, but I think the committee has considered other factors.

The first part of this provision says, for example—and this is something that goes a little further than just clarifying the discretion of the court—that the former spouse's terminal illness is considered a material change. That directs the law in a certain direction that leaves it non-discretionary. This is something that is more substantive in nature.

The second part of the provision, about how the court shall make the order once that change has been determined, is again very discretionary, and it's consistent with the current law.

Hon. Sue Barnes: Did Justice find any area that it felt would negatively affect family law, as we see it in Canada, by the addition of this bill?

Mrs. Lise Lafrenière-Henrie: Unfortunately, I can't comment on any advice we have given to our minister.

We haven't seen any constitutional issues.

Hon. Sue Barnes: I'm not asking about constitutional issues. I'm asking about practical issues, of the costs of going into litigation for thousands and thousands of people who have access orders.

Mrs. Lise Lafrenière-Henrie: It's very difficult to predict any impact that legislative change will have on litigation. We know that many good pieces of legislation lead to litigation because you need to interpret new terminology that is in a statute. In some cases, clarifying certain things may lead to less litigation. For example, a deemed change may make it easier for somebody to make a point of going back to court and getting a variation of an access order. But in terms of what impact it will have, it's very difficult to predict.

Hon. Sue Barnes: I'm going to try to make this easier for you.

I know you would have given advice to your minister. You would have canvassed the existing situation; you would have had statistics on access orders and litigation.

Are we creating, in our seeming will to provide a humanitarian access point, more problems for the system of justice or costs to the court than would happen without this bill?

That's not a policy question.

● (1545)

Mrs. Lise Lafrenière-Henrie: As I said, it's very hard to predict the impact. I think it clarifies what a deemed change in circumstance is, and the second part simply confirms the discretion of the court to make the best decision in the child's best interests.

Hon. Sue Barnes: I'll try another way.

If you had an access-seeking parent right now—without the benefit of this piece of legislation—in a terminal situation, would any court in Canada consider that a non-material change in circumstance, in your opinion?

Mrs. Lise Lafrenière-Henrie: Can you repeat the first part of the question, please?

Hon. Sue Barnes: The law as it currently stands allows anybody to go before the court on a material change in circumstance, in cases of access applications. Is there any court in Canada today that would not consider the major illness—terminal illness or critical condition—of a former spouse a material change in circumstance, in your opinion?

Mrs. Lise Lafrenière-Henrie: Unfortunately, I cannot speak to what the court would do.

We presented evidence on Monday that there has been case law where the courts have considered a terminal illness to be a change in circumstance.

Hon. Sue Barnes: Exactly. I think you just answered the question.

Thank you.

Mrs. Lise Lafrenière-Henrie: But the question was whether any court might not, and unfortunately, I can't answer that.

Hon. Sue Barnes: I'm not asking you to look into the mind of the court. The answer I was seeking is whether the courts have found this to be a material change in circumstance.

Mrs. Lise Lafrenière-Henrie: Yes, they definitely have.

Hon. Sue Barnes: Has there been any case that you're aware of where they haven't found it to be a material change in circumstance?

Mrs. Lise Lafrenière-Henrie: Not that we're aware of.

Hon. Sue Barnes: In essence, then, this isn't going to change the existing law.

Mrs. Lise Lafrenière-Henrie: It will not, necessarily, with respect to how the court makes an order and its exercise of discretion. It can provide more direction with respect to what a change in circumstance is.

Hon. Sue Barnes: So then it might be codifying case law.

Mrs. Lise Lafrenière-Henrie: The case law hasn't deemed it to be a change in circumstance in all cases, and this is what it would do here.

Hon. Sue Barnes: Okay. That answers the question.

It took a while.

The Chair: Thank you, Ms. Barnes.

Mr. Bagnell.

Hon. Larry Bagnell (Yukon, Lib.): I only have one question.

Is there any indication by anyone that people who didn't get custody might try to say, I just have to go to my doctor and get a certificate, and now I can have custody?

Mrs. Claire Farid (Counsel, Family Law Policy, Department of Justice): Certainly, it's always open to people to put evidence before the court that there has been a material change. There would have to be sufficient evidence before the court for it to make an order that there has been a material change in circumstances or that it would be in the best interests of the child now to make a new order.

Certainly there would have to be sufficient evidence before the court. I don't think that—

Hon. Larry Bagnell: Let me ask it in a different way.

Was there any indication that a person who didn't have custody but who wanted custody might, any time they get critically sick in a way that falls within the definition, try to use this as an excuse to get custody?

Mrs. Claire Farid: There are no definitions in the provision.

Hon. Larry Bagnell: Then, any time they got very sick—?

Mrs. Claire Farid: The first part of the provision states that any time there was a terminal illness or critical condition, there would be a change in circumstances. Once that individual has shown that they have a critical illness, they would be able to then get to the second part of the analysis.

What I mean to say is that once they've gotten to that first part of the analysis, the court would be able to analyze the whole issue.

● (1550)

The Chair: Mr. Moore.

Mr. Rob Moore: Thank you, and thank you to our witnesses.

This is specifically on the amendment. I know we spoke about this yesterday, but the overriding feature of the best interests of the child is still fully intact with this amendment.

We spoke about and Ms. Barnes raised the issue of other case law. There has been case law that found that a terminal illness was a factor that could result in a variance, but this requires the court to consider that terminal illness in every case. Whether they issue a variance or not, always the overriding factor is the best interests of the child.

Is that in fact the case, as we perceive it is?

Mrs. Claire Farid: Yes, that's correct.

The Chair: Are you finished, Mr. Moore?

Ms. Barnes.

Hon. Sue Barnes: Is there any concern within the department about frivolous or vexatious issues? That would be my only concern around this bill, that somebody who had just lost access for very good reasons of best interests....

Let's say, for instance, it was a convicted pedophile father who lost access to his kids. Now, all of a sudden, he has a terminal cancer, and bingo, we have the expensive litigation all over again, and the uncertainty and trauma that goes with it. Anybody who has practised family law knows there are incredible stresses not only on the court system, but in the family situations.

What do you have to say about that area?

Mrs. Lise Lafrenière-Henrie: In such a situation, what the provision would do is get to the second part, which is what kind of order the court will make more quickly. So instead of having to reach the threshold of a material change in circumstance that requires evidence before the court, and before the court can then make a variation order, with this provision you would basically have that deemed to be a material change in circumstance. You would immediately go to the second part of the test, which is what kinds of orders should the court make in the best interests of the child.

So the best interests of the child remains the test, and it would be on a case-by-case basis. In the case you described, we would hope that the court would consider past conduct and the ability of that parent to be a parent as an important factor.

Hon. Sue Barnes: *C'est tout.*

The Chair: Thank you, Ms. Barnes.

Mr. Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you.

Good morning, ladies.

I believe that we have already met once, on Monday or Tuesday, I believe.

I would like to know something. You are proposing a change to the document that was given to me. I will read you the French version, as it concerns me somewhat. In the second last line of the paragraph, this is what is written:

> the court makes a variation order related to access to the child that is in the interest of the child.

Naturally, the interest of the child is protected in the sentence. What concerns me, is that you are talking about a variation order. That assumes that there has already been a decision, meaning an order. When you say " variation ", that means that there has already been a decision.

So, in many cases, a problem of this nature will not arise. One goes before the court, and engages in what we call in Quebec summary proceedings. We have a problem. The right to custody of the child becomes a priority. The judge sets a date as soon as possible because he must make an important decision. So, in less than 10 days - on average, it's 10 to 15 days in the district of Quebec - the judge sees us.

Let's say that I am terminally ill. I am told quite clearly: I knew nothing yesterday, but today the doctor tellis me that I have terminal cancer.

So, you are going to block the whole system. In fact, a variation order, that would mean that the judge had already heard the parties. Is that really what I am to understand?

The sentence in paragraph (5.1) proposed from Bill C-252 says this:

> (5.1) [...] and the court then ensures that the spouse obtains right of access[...]

Therefore, that could be a variation or the first decision. For your part, you limited yourself to what we call the variation order, meaning that there was an order already made. That is not the case currently.

I want to make sure that we understand each other.

● (1555)

Mrs. Lise Lafrenière-Henrie: There are two elements. First, I just want to clarify the fact that it is not the department that proposed this. We proposed different options to be considered. Above all, we took into account the current wording of the act. It is important to see how, in section 17 of the Divorce Act, orders are handled.

It is important to talk about a variation order in this case because it is a provision of section 17, which deals with variations to orders. Pursuant to section 17, no other order can be made other than a variation order. Therefore, it is important to qualify it as such.

A first order would be made pursuant to section 16. We explained on Monday why that had been changed.

Mr. Daniel Petit: Thank you.

[*English*]

The Chair: Thank you, Mr. Petit.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): I want to clarify the use of the verb in the proposed amendment "and the court shall make a variation order". A lot of the time, I'm more used to seeing the words "may make a variation order". In this case, the way I read it, the court would have to make a variation order, even if it didn't want to vary anything. That was my only question.

Mrs. Claire Farid: Could you please repeat that?

Mr. Derek Lee: I'm wondering if the proposed wording would require a court to actually make a variance order, even in cases where it didn't really see a need to vary.

I'm wondering whether the verb in "may make a variation order" might be more appropriate?

Mrs. Lise Lafrenière-Henrie: The divorce side usually does say that the court "may" make an order. We agree with that.

Again, this is what we had to work with. I think there were some discussions.

Mr. Derek Lee: I understand.

There was a sense that the statute should be forcing the court to either make a variance or an order that took the material change into account.

I'm a little uncomfortable with it, in the sense that if the court didn't really want to make a change, but was still forced under the wording of the statute to make an order, the court would be going through this unnecessary exercise of a judge saying, well, I have to make an order, but I'm only going to vary one word, like varying a note in a piece of music.

If we were to change the proposed change to say "may make", do you feel that would detract from the intent of the mover of the bill?

Mrs. Lise Lafrenière-Henrie: As I said, the Divorce Act usually says the court "may" make an order. It would be problematic to change "shall" to "may" here, because there could be an issue as to whether the court may make an order that is in the best interest. We would have to clarify that the court may make an order respecting access. Then it would have to be clarified, if it does make such an order, that it would have to be in the best interest.

It wouldn't be a simple change from the word "shall" to "may"; it would require bit more work.

Mr. Derek Lee: I'm going to leave this mulligatawny soup the way it is.

Thank you.

The Chair: Thank you, Mr. Lee, for doing that.

Let's get back to the amendment.

(Amendment agreed to [See *Minutes of Proceedings*])

(Clause 1 as amended agreed to on division)

● (1600)

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

Some hon. members: Agreed.

Some hon. members: On division.

The Chair: Shall I report the bill as amended to the House?

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill?

Some hon. members: Agreed.

The Chair: That takes care of the business on the orders of the day, except for the committee business, which is going to be in camera.

To the witnesses, thank you again for appearing. We really appreciate that.

[*Proceedings continue in camera*]

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