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Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

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● (1530)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): It's a great pleasure to reconvene our study on Bill C-78. We are joined by a very distinguished panel here today. Via video conference from Beersheba, we have Gene Colman, who is representing Lawyers for Shared Parenting.

Mr. Colman, can you hear us?

Mr. Gene Colman (Lawyer, Lawyers for Shared Parenting): Yes, I can.

The Chair: Perfect. In case we lose any video conference technology, we always put the witness on video first. I know you're seven hours ahead, so you probably appreciate that. We'll put you first.

From the Family Dispute Resolution Institute of Ontario we have Ms. Barbara Landau, mediator, arbitrator, psychologist and lawyer. From the Canadian Bar Association we have Melanie Del Rizzo, the chair of the family law group, and Sarah Rauch, the chair of child and youth law. From the Canadian Association for Equality we have Mr. Brian Ludmer, advisory counsel. Welcome.

We're going to start.

Mr. Colman, you have approximately eight minutes. The floor is yours, sir.

Mr. Gene Colman: Thank you very much, Mr. Chairman.

My experience, first of all, is as a family law lawyer since 1979. As a law student, I founded the Canadian Journal of Family Law. I've published many family law articles, including one that was cited favourably by the Supreme Court of Canada. My practice is dedicated to finding the optimum solutions for kids. I appear before you as a founder of Lawyers for Shared Parenting and co-author, along with five others, of the brief that our organization submitted.

As a little bit of my personal history, I have one 47-year marriage. I have seven kids, with no divorces amongst the married ones, and 13 grandkids. I hope that demonstrates that I have no personal axe to grind here.

If my views with respect to rebuttable presumption of equal shared parenting are adopted, I will likely ultimately have less family law legal work to do, and I hope that happens.

There are two reasons that this committee should adopt rebuttable presumption for equal shared parenting. The social science literature is crystal clear, and the public overwhelmingly wants it, but many lawyers do not.

The social science literature overwhelmingly establishes the utility of ESP, which is short for equal shared parenting. You can find the footnoted sources at footnote 44 of our brief. If you need help to access them, just send me or my co-authors an email. At my website, complexfamilylaw.com, I have a number of quotations from the social science literature under the title “Equal Shared Parenting Thought of the Day”.

It really comes down to three simple points when we're dealing with the literature. One, the closer we get to 50% residential time, the better the outcomes are for children. Two, ESP gives better outcomes on many axes of measured child behaviour and child adjustment. Three, ESP outcomes are better, even independent of other factors.

Let me make three points there. One is on the quality of the parent-child relationship, and we've learned that even marginally fit parents are beneficial for kids. The second factor is parental incomes. Benefits of ESP are not tied to standards of living, as some have claimed. Third, whether it's a low-conflict or high-conflict level, they do not yield appreciably different results in terms of benefits to children, but I will concede that extremely high-conflict situations could negate equal shared parenting.

The arguments against ESP are responded to much better than I could do by Professors Nielsen and Kruk, and they are cited in our brief.

I want to talk about public opinion polls. Our brief, on pages 13-15, presents the public opinion polls. Public support for rebuttable presumption is very consistent and high. Opposition within the bar is very strong, and for that, please see Professor Nick Bala's brief and see the Canadian Bar Association brief.

Bill C-78 did not even mention anything approaching a rebuttable presumption for ESP, so I ask, why doth they so vehemently protest? If we adopt the L4SP position—that's Lawyers for Shared Parenting—you will make a lot of lawyers very unhappy, but you will make many Canadians very pleased indeed.

Do you choose the lawyers, or do you choose the public? I say, choose neither. Choose the children. Give the children of divorce the best chance to maintain and strengthen relationships with all of their parents and grandparents. Even with your much-applauded change in terminology, unless you take the very bold step that I am urging on you here today, the system will continue to pit parents against each other, each trying to prove that he or she was the primary parent, and each trying to prove that he or she is a better parent. It's time to implement a sea change. It's time to really make a difference in the lives of Canadian children.

I want to mention two briefs, the B'nai Brith Canada brief, authored by John Syrtash, who I see is in the room today, and my very good friend Professor Nick Bala's brief. With reference to Mr. Syrtash's brief, B'nai Brith Canada has expressed support in its brief for a rebuttable presumption for ESP.

● (1535)

While Lawyers for Shared Parenting welcomes that support, we do caution that the test its legal counsel, Mr. Syrtash, applies is overly stringent—namely, that the presumption is rebutted only in "unconscionable circumstances". We maintain that there must be greater flexibility.

L4SP also commends John for his analysis of the family violence sections of the bill. We agree that the current wording will likely create [*Technical difficulty—Editor*].

The Chair: We'll see if we can recover Mr. Colman. This is why we go with the witness on video conference first.

In the meantime, just so that we don't lose any time here, I suggest we go to Ms. Landau. She had wanted to go next.

Please begin your testimony. We'll come back to Mr. Colman afterwards, if we've recovered him. I'm sorry for the quick change.

Dr. Barbara Landau (Mediator, Arbitrator, Psychologist and Lawyer, Family Dispute Resolution Institute of Ontario): That's okay. Thank you, Mr. Chairman.

It's a pleasure to welcome Bill C-78 with its many positive reforms. I represent the Family Dispute Resolution Institute of Ontario. I've submitted my bio. I will briefly note the items that we strongly support and then discuss issues that we think can be improved. I will refer to a few sections of the B.C. Family Law Act, which I've provided, that we think should be incorporated. I've also attached a sample parenting plan. I can answer questions about that.

We are strongly supportive of the following: the encouragement for co-operative out-of-court dispute resolution options, where appropriate; the requirement to screen for domestic violence, broadly defined, including physical, psychological and emotional abuse; the importance of looking at the impact of domestic violence on children when assessing parenting capacity; the replacement of outdated "custody and access" language with "parenting orders" and the encouragement to create parenting plans; the inclusion of an extensive list of criteria for determining the child's best interests; a clarification of how relocation cases will be approached, although with some changes that we will be recommending; and the implementation of an administrative process to update child and spousal support.

Those are the things we're strongly in favour of. We also have recommendations for clarification or additions. Our focus is how to improve the process of divorce and assist families, especially children, to make this difficult transition in a supportive, timely, less conflicted and less costly manner. This will require greater co-operation between the federal government and provincial partners.

The first thing we're recommending is that the definition of family dispute resolution process should be stated as follows: "means a consensual process outside of court agreed upon by the parties". That would be the language we'd use. The list of consensual out-of-court processes is incomplete. It should include med-arb, arbitration and parenting coordination. I would ask you to look at appendix A for the B.C. definition. We recommend that family justice services be subsumed under family dispute resolution processes. Having two different categories is confusing.

Second is the duty to screen for domestic violence. We recommend that the duty apply to all professionals assisting separating families. That duty has been in our child welfare legislation for several decades. Separations raise the risk level for family violence—up to lethality—even when this has not previously been a concern. This is an important safeguard. Again, look at the B.C. Family Law Act in appendix B.

The third recommendation is around the duties of lawyers and legal advisers. The definition of "legal adviser" versus "lawyer" should be clarified. Lawyers are required under the new legislation to inform clients about family dispute resolution options. There should be no exemption for lawyers or other professionals on the basis that they're unaware of such services. That may have been the case 40 years ago. Today it's not the case.

If lawyers are unsure about safety, they should refer clients to a trained domestic violence professional to assess the risk and report on what might be appropriate. The lawyer's duty should arise from the time they're retained, not delayed until an action is commenced. There should be specific consequences for lawyers or other professionals who fail to fulfill this duty. In the past, this has been a duty under the Divorce Act. It has not been followed.

The next point concerns unified family courts. Unified family courts should be created in any province that wishes them. The advantages are that they reduce confusion, they're more efficient, they're less costly, and they can address all of the issues in one court. They ensure, where possible, that there's one judge, a family law specialist—I'll underline that—for each family. Ideally, that's for marriage breakdown, domestic violence and child welfare. This ensures that decisions can be monitored for compliance.

In many jurisdictions, assignments are based on the judge's availability, not their expertise. Imagine if one of you had a heart attack and the doctor assigned had expertise as an obstetrician. Each court appearance currently may have a different judge, and with no family expertise. Judges do not have sufficient time to read all of their new files, so adjournments and inconsistent decisions are frequent. However, UFCs cannot improve access to justice without adequate services. These are the services that we think should be there.

● (1540)

These would include funding for mandatory education programs, which are really important. They would include a description of dispute resolution options, safety advice, explanations of what parenting plans are, telling people about financial disclosure and so on, before couples make an application to court. This is already available in several provinces.

The other thing is funding for the screening of domestic violence for all family professionals, including judges. Triage should be available to help people get to the most appropriate dispute resolution process, either within or outside the court's mandate, or to a community service that would address issues such as mental health, addiction and so on, and determine which people should be fast-tracked to court.

This would require co-operation between the federal government and the provinces on funding, appointment of judges and service delivery. Currently, our family law system gets a failing grade from the 50% to 80% of family law litigants who are self-representatives.

Fifth is parenting plans. These are very important tools to help parents achieve what are the key objectives of Bill C-78. To help parents focus on caretaking responsibilities, reducing conflict and creating a practical child-centred road map, before they engage in an adversarial process.

I've attached an example of a short and a longer parenting plan. The longer one just explains the short one. We do not support a presumption of equal parenting, with all due respect to my friend, Gene, because this negates the assessment of parenting capacity. It overlooks issues of domestic violence, mental health, addiction and the encouragement for parents to work out a parenting plan that fits their unique circumstances and addresses their availability, the special needs of their children, the ages of the children and all of those things.

Also, equal time often results in pressure to reduce or eliminate child support and prevent relocation. The literature that he refers to is often quite biased. Much of the literature that supports equal parenting is based on people who have co-operatively decided to do that. I won't go into detail on it, but it also has small sample sizes and other things like that.

Parenting plans need to include the parents' responsibilities for the caretaking of their children and how significant decisions are made —not just what decisions but what process they're going to use and how they're going to handle disputes when they arise. There also needs to be a parenting schedule, which is not just the regular schedule but also includes school breaks, PD days, religious or other special days, and the process for changing a schedule when there are changes such as children getting older, changes in mobility or the presence of disputes.

Regarding views of the child, when trained professionals meet with children to hear their views, answer their questions and address their fears, parenting disputes are often resolved and children are more likely to accept the outcome. However, this is the one dispute I have with Nick Bala. I don't believe that judges are the best people to be interviewing children. Child specialists are more qualified and less costly, and they can meet with children in a supportive setting.

The next thing we are recommending is reinstating family court clinics. We recommend a co-operative funding arrangement between the federal Department of Justice and the provincial ministries of the attorneys general and ministries of health. These agencies should be located outside of the UFCs, as clients benefit from a less formal clinical environment. These clinics can offer triage, mediation, assessments and brief treatment for separating families, as well as child welfare issues. I was the chief psychologist at the family court clinic in Toronto. These are wonderful training grounds for mental health professionals, and they're publicly funded so they're affordable.

Relocation rules have been addressed, but they are too complex. There are too many parties. I think the criteria shouldn't be geographic distance. When a contemplated move will make the existing parenting schedule no longer feasible, there should be a graduated list of dispute resolution processes from informal to more formal. That would encourage people to indicate that they're going to move at the earliest possible time rather than waiting until the last minute.

● (1545)

The Chair: Thank you very much. It's much appreciated.

Dr. Barbara Landau: I want to donate a copy of my *Family Dispute Resolution* text to the Library of Parliament.

The Chair: We'll keep it with the clerk, until such time as we've finished our study, so that anybody can consult it.

Dr. Barbara Landau: This has all the different dispute resolution options, in each chapter, written by wonderful, leading professionals, so not just by me. You have all kinds of good stuff in here. It's the 6th edition.

The Chair: Thank you so much.

Dr. Barbara Landau: There you go.

The Chair: That's very generous.

Mr. Colman, we have recovered you. You had disappeared about five minutes into your submission, so you have about three minutes left. I'm going to turn it back to you because I don't want to lose you again.

Mr. Gene Colman: I hope we don't lose me again.

Thank you.

I was talking about the areas where L4SP agrees with Nick Bala's submissions. I talked about new terminology, the use of parenting coordinator and counselling services, and the best interests lists. I'm going to go forward. I want to make sure I finish this within the next three minutes.

I'm very proud to be a member of FDRIO and when I hear Barbara Landau giving such wonderful submissions—aside from the one, which you all will probably know that I didn't like—I am proud to be a member of the organization with Barbara.

To return to Nick Bala, we applaud Nick for bringing to the forefront the need to specifically address alienation and children resisting contact with a parent. We agree that children's views need to be considered, but his recommendation to encourage judicial interviews we cannot condone. As you'll see, I'm on the same page with Barbara Landau on that point. Interviewing children is an art and not all judges are sufficiently trained in that area. It places judges and children in a pressure cooker.

We agree with Nick's analysis of family violence and heartily welcome his call to the federal government to provide resources to support educational efforts and supports for victims of family violence.

With respect to relocation, we disagree with Professor Bala that there should be a 40% threshold, which he lifted from the child support guidelines. The L4SP brief points out that the onus or burden of proof should always be on the parent who proposes to relocate and thus deprive the child of significant contact with the other parent.

The other recommendations that Nick puts forward, we disagree with. In particular, of course, we disagree with his protestations against the rebuttable presumption. His discussion on pages three and four of his brief tends to largely cite his own work and gives propositions that are simply contrary to the social science literature.

In conclusion, for kids' benefit, we need to thwart the custody access wars from the get-go. We need to remove incentives to strife. No longer should parents need to prove the other unfit in order to win. To reduce conflict, the legal system employs presumptions, onuses and burdens of proof. Even C-78 proposes relocation presumptions. In 1997, we implemented some strong presumptions in the federal child support guidelines and succeeded in removing a huge source of conflict in our system.

Implementing a presumption for equal, shared parenting—that is shared decision-making and residential time that is approximately equal—is a progressive and totally child-focused reform. It's not about parents' rights and it's certainly not about fathers' rights. It's all about adopting legal and social policy that is bound to substantially improve the lives of children of divorce.

Mr. Chairman and members of the committee, thank you very much.

● (1550)

The Chair: Thank you very much. It's much appreciated.

Now we will move to the Canadian Bar Association.

Ms. Del Rizzo and Ms. Rauch, the floor is yours.

Ms. Melanie Del Rizzo (Chair, Family Law, Canadian Bar Association): Thank you very much for the invitation to present the Canadian Bar Association's views on Bill C-78 today.

Our submission represents the joint position of the CBA's family law section and the child and youth law section.

My name is Melanie Del Rizzo. I'm a family lawyer practising in St. John's, Newfoundland and Labrador. I'm the current chair of the national family law section of the CBA. The family section represents specialists in family law from across Canada. With me is Sarah Rauch, who's chair of the child and youth law section.

The CBA is a national association of over 36,000 lawyers, students, notaries and academics. An important aspect of our mandate is seeking improvements in the law and the administration of justice. It's that aspect of our mandate that brings us here to you.

Our brief also includes input from other CBA sections, which I'll highlight. The French-speaking members and the constitutional and human rights law section highlight that Bill C-78 omits any provisions to address current linguistic inequalities in family courts. The bill provides an important opportunity to offer explicit recognition of French language rights in any proceeding.

The alternative dispute resolution section contributed to our comments on the bill concerning greater use of dispute resolution processes. Some aspects of the bill may seem contradictory, and we suggest some changes to strengthen the importance of ADR processes in resolving family disputes.

While our submission contains 45 recommendations, which we hope that you'll review, I should stress that we strongly support the passage of Bill C-78. Much of it would address long-standing CBA concerns. All recommendations that we have made are made with a view to make the bill better from the perspective of lawyers who practise in this area.

One of the most important parts of Bill C-78 is the confirmation that the best interests of the child remain the pivotal test in any parenting determination. The CBA has long opposed any presumptions in this area, which can only muddy the primary focus on the children's best interests. Given this primary focus, any presumption with respect to parenting of children and any concept of parental rights is misguided. Equal time with both parents is an option. It's already an option and is an increasingly popular option, but it is only appropriate if that arrangement is in the child's best interests. With respect to the social science, I would refer you to the tool kit the CBA has produced on parenting after separation and the “Child Rights Toolkit”, which provide good summaries of the social science in this area.

We support the list of factors relevant to determining best interests under proposed subsection 16(3). We offer suggestions to further improve and clarify those factors, including adding more direct language to protect a child who's been exposed to family violence.

We also support the bill's focus on the use of parenting plans, but we believe it could be clearer that they're not intended to be mandatory.

We also find that the bill could provide added clarity about how courts should assess parenting plans to ensure they are in the child's best interests, particularly when a parenting plan is on consent of both parties. We suggest that the parties at least be given an opportunity to respond to any of the court's concerns before a plan is varied.

Family violence is very relevant to determining a child's best interests. We commend the bill for including it in the best interests factors. We offer some suggestions in our submission to strengthen the family violence proposals. In proposed section 7.8, courts would have a duty to consider existing protection orders to facilitate a coordination of proceedings. Different rules and processes are in place across Canada and we note that some efforts are going to be required to ensure appropriate cross-referencing.

We appreciate and have also called for a list of factors in considering relocation applications. We recommended a few additions to the list in Bill C-78.

We also propose that a simple notice form be provided for relocation applications, perhaps with a place for a responding party to also note any objection or their consent. An even-handed approach to the process is only fair. The requirements for a party wishing to move should be similar to those for a party objecting to the move. We also support a longer notice period than that proposed in the bill to increase time for a mediated or negotiated solution and also to provide more time for people living in remote or rural locations to be able to access services. The ability to apply for a default order in cases where there is no objection should also be considered. Otherwise, we see a situation where a person could have a statutory right to move that could then be inconsistent with an existing order or agreement.

We also support the shifting burden of proof as proposed in the bill and the idea that a move is presumed to be in the best interests of children who have little to no relationship with the non-relocating parent. However, we note that children can have significant attachments to both parents even without equal parenting time. As such, the CBA sections recommend that the bill provide that relocation be presumed not to be in the child's best interests when it would likely damage the attachment to the left-behind parent.

● (1555)

We note that adequate funding must be available to ensure that federal, provincial and territorial governments can provide the services required by the bill, such as mediation, supervised access services and the communication between various levels and jurisdictions of courts with respect to civil protection orders.

My colleague will now highlight some other suggestions we have for improving the bill.

Ms. Sarah Rauch (Chair, Child and Youth Law, Canadian Bar Association): Thank you.

Good afternoon. I am currently the chair of the child and youth law section of the Canadian Bar Association. We are the newest—or maybe I'll say the youngest—section of the Canadian Bar Association. We consist of experts from across Canada: legal practitioners, advocates, and others who are experts in seeing things from a child's perspective. We have a section of professionals who are expert in children's rights as seen through the United Nations Convention on the Rights of the Child.

It's from that perspective that we say this bill is a great and positive step and we support it fully. There's a diversity among the profession, and that diversity includes, in our section, those who practise regularly in family law and child protection.

The United Nations Convention on the Rights of the Child was ratified by Canada 25 years ago and provides a foundation for a perspective that is shifting slowly and surely in Canadian family law. That foundation focuses on the rights and interests of the child.

This submission especially welcomes an explicit reference to the UNCRC in the Divorce Act provisions. That was done in the Youth Criminal Justice Act in 2002, so there's precedent for it. It works on a number of levels in terms of applying the UNCRC to family law, especially given that on this issue of the rights of the child and the UNCRC there's a limited awareness among legal professionals and the judiciary and so on.

There is also the CBA's "Child Rights Toolkit", which our section as a committee was instrumental in forming. My colleague just referred to it. There are references to social science and other expertise that has been drawn upon to illustrate and enhance the understanding of the application of the UNCRC.

The UNCRC in its preamble recognizes that for children and youth there are special safeguards and special considerations that all children are entitled to without discrimination. These special considerations are founded in the knowledge that each child who is affected by decisions concerning them made under the law is unique, and that without exception each child is entitled to have that unique circumstance be fully assessed and considered in keeping with their rights and their best interests. It's a shift in perspective.

Our CBA sections strongly support the focus on the child's best interests in Bill C-78. We support the submission that there be no presumptions regarding what is best for children. The example is the allocation of parenting time. The CBA section stresses the importance of assessing each child in all of the provisions—that one by way of example—regarding the point of view of the child, the interests of the child and how to apply all of the provisions from that perspective.

In the section related to parenting time, decision-making and contact, any suggestion of a presumption has been eliminated, which we support. We are pleased especially in light of the reference to family violence that there will no longer be a presumption that fails to fulfill an individual assessment of the child's best interests.

Our submissions seek to avoid confusing or misleading language. For example, the proposed heading "Maximum parenting time" could suggest that a maximum amount of parenting time is always a desirable outcome. We submit that this undermines.... It's not always the case that maximum parenting time will be in the child's best interests. That current heading risks being inconsistent with a strong and clear approach that mandates the primary consideration of the child's best interests in each case. We recommend changing that heading to "Allocation of parenting time".

There is an inextricable link between the best interests of the child and keeping their individual circumstances the central focus of every decision being made about them. We support including proposed changes to the Divorce Act that will clarify all considerations made in resolving disputes regarding the day-to-day lives of children and youth and their futures, decisions that are important to them in a different way than they are to their parents or to adults.

● (1600)

A child-rights approach provides a consistent manner of making decisions that affect children from all backgrounds across Canada. Bill C-78 provides an opportunity for the kind of careful consideration and safeguards that are noted in the UNCRC, both broadly and specifically, in the articles and in the comments.

Thank you for the opportunity to present our perspective, and we welcome any questions.

The Chair: Thank you very much.

Now we'll go to Mr. Ludmer.

Mr. Brian Ludmer (Advisory Counsel, Canadian Association for Equality): Thank you very much, and thanks for having me.

I'm a co-founder with Mr. Colman of Lawyers for Shared Parenting, and I'm here today on behalf of the Canadian Association for Equality.

In 2014, I participated in the drafting of Bill C-560. I was the one who came up with the operative language of a presumption, unless it could be established on evidence that the needs of the children would be substantially enhanced by a different parenting plan. That remains, in my view and the view of many you're hearing from, how to advance the best interests of children.

The fact of the matter is that adding a list of other criteria and continuing to hear about a unique and individualized approach in each case will subject the children of this country to a continuation of the litigious environment that results in the conflict that all the studies say is the principle damage to the children. They won't be damaged by equal parenting. They're damaged by the conflict over two parents, one of whom wishes to be the primary parent, hence the litigation, and the other one who is willing to share the child and co-parent.

In a sense, while you've heard from an organization representing 36,000 lawyers, you should hear from your constituents.

For over 20 years, public opinion poll after public opinion poll has reiterated that the Canadian public has a terrible experience with the current system, and that is on par with public opinion polls across North America. The current system does not work to advance the best interests of children. It says that's the goal, but in practice, if you're a family lawyer seeing what happens out there, the current system damages children. It forces parents to triangulate the children. It causes conflict. It is maintained at immense cost, billions and billions of dollars.

There is no science that substantiates that anybody, including a judge, can say that a particular parent should see the children 37.2% of the time. The only science...and I'll differ from Ms. Landau on this. Peer-reviewed journal research, very robust, almost indisputable, and ratified by experts from around the world, substantiates that the closer you get to two primary parents after separation, the better the outcome for children. That research is thorough and cannot be minimized on sample sizes. You have to see it yourself.

The committee is getting submissions from Professor Fabricius, who drafted Arizona's legislation, from Professor Kruk and from Professor Nielsen. The joint submission of which CAFE is a part also highlights some of the leading research.

The current system is built on a series of assumptions that don't play out in real life. It produces arbitrary results depending on what judge you get, what their background is, and the day. Are they young? Are they from an urban centre? Is your case being litigated in the countryside? Which province is your case being litigated in? Those produce arbitrary results that are contrary to the goals of the legislation.

The legislation is premised, and you can tell that from the presentations you've heard today, on all the facts getting before the court and a judge somehow having the ability, in a three-day trial or a four-day trial, to figure it out.

In practice, it's not what happens. Budgets are limited. Over half of family law litigants are self-represented. When people represent themselves against a lawyer, the true family saga will never make it to the judge. Judges themselves, when they are polled and when commissions and studies are done, say they also doubt about whether they're getting it right. There are no retrospective studies of families coming through the system to determine whether today's system is working or not. Look at child outcomes three years out or five years out. The only science that's there supports equal shared parenting.

In terms of public opinion, over half or close to half of families today will get separated, so you're talking over 10 million people who will be affected, and millions and millions of children. Their actual experience with today's system trumps the experience of 36,000 lawyers.

● (1605)

For 20 years the public has been telling us it's not working. You're either going through a separation yourself, or a sibling or a cousin or a best friend is. No one is satisfied with the current system.

The proposed changes in Bill C-78—the technical ones—are pretty good. You can't argue with a lot of the stuff that's there, but it was put forward as a means of advancing the best interests of children, and it fails to make any fundamental change. If you start with a system that's broken, because it's built on a series of failed assumptions, you can't rescue it with technical language. You have to try to understand the better way to do it.

If you have a rebuttable presumption of equal shared parenting.... Domestic violence issues live harmoniously today with the maximum contact principle. It doesn't stand in the way and doesn't impact on that. Same with equal shared parenting—it can live harmoniously with provisions designed to capture and separate situations where that's a concern, like alcoholism or absenteeism or a parent who is an investment banker travelling all the time.

Equal shared parenting is not for everyone, but it is for about 90% to 95% of the families who litigate. When you look at what they're asking for, they're close, but one wants to be the primary parent. We taxpayers of Canada are all paying for that. It's a very expensive system with no science to determine that it produces optimum results or even results that can justify the cost. The only science and the views of the public who live with the system.... The true experts are the public. They really don't like it and they don't like it right across North America.

There are currently proposals for equal shared parenting in at least half the States. Kentucky has introduced the first true rebuttable presumption of equal parenting. The public opinion polls and the experiences are great. Arizona had something similar about four or five years ago, and from all their polling and the results since, everybody's happy with it. Australia has been put forward as an example but maybe that's not the case. That's not what happened there. There was no problem with the equal parenting. There was a political dynamic.

No matter how you look at it, there's no meat, no evidence behind the objections to equal parenting, and there's so much for it. It will save our children from conflict, it will accord with the will of the public—that's why we're here—and it will fit the science.

I will have a printed presentation. It will be filed within the next day or two, and then I know it has to be translated, but I'll respect the time allotment today and any questions you have.

● (1610)

The Chair: Thank you very much.

It's a pleasure to hear from all the witnesses. All of you were very helpful, and I appreciate the recommendations you offered, which is what we really want to hear.

We'll now go to Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you, Mr. Chair.

Thank you, witnesses.

Mr. Ludmer, I'm interested in the comments you made about the arbitrary decisions that are made from judge to judge, from province to province. Are you able to elaborate on some of the differences that you see from jurisdiction to jurisdiction? In other words, perhaps in Alberta you might be more likely to have a shared parenting arrangement than in British Columbia. I don't know. Could you comment on that?

Mr. Brian Ludmer: Certainly. Thank you for that.

Canada has some fairly robust jurisprudence because the provinces will look at other provinces' jurisprudence, but there is no doubt that certain provinces like Ontario have a much more well-developed body of law on equal parenting, with the application of the maximum contact principle to its ultimate end. In other provinces, it's very thin.

It shouldn't depend on where the family lives to get that benefit. Urban centres versus rural centres—in rural centres, sometimes there's only one or two judges in a centre, and you don't get diversity of views. They may be of a prior generation, prior to the latest social science research, or they haven't been trained in what we now know today.

Ultimately, the biggest arbitrariness is whether you're represented or not.

Mr. Michael Cooper: Thank you for that.

Ms. Landau and Ms.—

Dr. Barbara Landau: It's Dr. Landau.

Mr. Michael Cooper: In any event, I'll be sure to refer to you by that.

Both of those witnesses made references to a lack of an individual assessment based upon a rebuttable presumption.

Could you comment on that? To me, it seems to not make a lot of sense.

Mr. Brian Ludmer: There still is an individual assessment, but it's put in proper context.

The state doesn't get involved with families, absent child protection concerns, when the family is intact. When a family separates, you don't have to micromanage it and do a whole university thesis on the family for the purposes of studying everything. The evidence, the public's views and the social science world tell us that if you have a normal parent who loves their children and is prepared to devote the time, that's basically all you need. You don't have to micromanage it and, as I say, get down to that detail. If there's anything material, if there's a child who has special needs, that's why it's a rebuttable presumption. A particular parent may have to go and get some training, maybe it's a health need....

Those cases, where there's something of individual focus, present themselves quite easily and are dealt with quite easily.

Mr. Michael Cooper: Could you address the concern that was raised—and I think you did touch on it a bit—about weeding out instances where domestic violence is at play? The suggestion was made that the rebuttable presumption would somehow result in overlooking domestic violence. Can you comment on that?

You did rightfully point out that under the current bill and the current Divorce Act, in fact, there is maximum parenting time that the court is required to consider. But surely you're not ordering maximum parenting time to parents who are unfit.

Mr. Brian Ludmer: You're correct, Mr. Cooper.

You've effectively answered the question. One has nothing to do with the other. That's why the presumption is rebuttable. If there's some meat, if there's some proven allegation that has concerns for the future, that family won't have equal parenting. It's no different from today, where, instead of a presumption of equal parenting, it's a maximum contact presumption.

● (1615)

Mr. Michael Cooper: Dr. Landau made reference to social science data that she said was incomplete, had small samples, is biased and isn't reliable.

You made general reference to some of the social science evidence, but I would invite you to put on the record some of the social science evidence that you suggest supports the rebuttable presumption.

Mr. Brian Ludmer: Sure.

Professor Linda Nielsen at Wake Forest University has done a series of meta-analyses for many years—studies of studies—and those are now up to about 60 that she tracks from peer-reviewed journals around the world. The overwhelming majority, and I mean something like 55-plus of the 60 peer-reviewed studies, support equal parenting scientifically.

Richard Warshak of Texas, a well-known psychologist, has a study that he did in 2014, updated in 2018, that 110 leading psychologists from around the world have concurred in.

Professor William Fabricius of Arizona State University, who I mentioned, has written 30 peer-reviewed papers, speaks around the world, and is involved with the International Council on Shared Parenting. He has drafted Arizona's legislation, and then was hired to do the follow-up study.

These are people of international reputation and it's all high-level, peer-reviewed journals. I don't accept any assertion that there is not robust science about equal parenting.

Mr. Michael Cooper: Thank you.

The Chair: Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you, Chair.

I guess I'll stick with Mr. Ludmer for the moment.

You mentioned peer-reviewed studies that cite that if the child can have two parents the better off the child will be, and that many studies speak of the virtue of shared parenting. I wouldn't disagree with that, but it's a far cry from that to presume in any given case that there is a circumstance of equal parenting.

This bill is founded on the principle of the best interests of the child. What's wrong with starting from that point and evaluating the circumstances as they play out?

Mr. Brian Ludmer: Because you'll have a continuation of the current system of non-stop litigation bankrupting families, continuing to drain tens of billions of dollars of taxpayer money to fund a system for people to litigate over children.

The point of a rebuttable presumption is the flip. You start with the scientific view and the view of the public. Remember what the public wants. You start with that view and say, unless it's disproved, we can be pretty comfortable that it will be okay. It'll be in the children's best interests. That's what the science tells us.

We don't need to worry and do these huge expensive studies. The average family can't afford a two-week trial. The public can't afford all these conflictual families to have two-week trials, so we say we know they're going to be fine. We can't do any damage with equal shared parenting for a normal family.

Mr. Ron McKinnon: I guess that's the problem with that hypothesis. We don't know that it's a normal family. If it's not, it seems to be a harmful presumption.

If you could answer that quickly, then I'd like to pass it over to Dr. Landau and—

Mr. Brian Ludmer: I'll rephrase the question. How do we know it's a normal family? How can we be comfortable?

The types of abnormalities that would impact on parenting time are starkly obvious. A very broad range of parenting produces healthy children. Your average person, if they love their children, if they try hard, if they're there for their children, do a little reading, they're normal. Any abnormalities will stick out like a sore thumb. It is that group of people—the vast majority of our population—that we say the exercise, the cost, the conflict, the stress on the children, is not worth the upside, because the end result might be that you don't get 50% but you get 37.2%. However, if you're not normal, you'll still damage the children.

● (1620)

Mr. Ron McKinnon: Thank you.

We'll let Dr. Landau, Ms. Rauch and Ms. Del Rizzo respond, if they would.

Dr. Barbara Landau: My understanding is that in Australia and in all the states that tried the presumption of shared parenting, they withdrew it. Only Kentucky continues to have that presumption.

Since the last time we reformed the Divorce Act, we've had a lot more encouragement of alternative dispute resolution and of professionals to screen for domestic violence. The result has been a tremendous increase in shared parenting, co-operatively among parents. There is nothing to prevent parents from working out an arrangement of equal parenting if that makes sense to them in their circumstances. Parents have gone from almost a minimal involvement of fathers to a far greater increase in fathers' involvement in the last 30 years. That's been a good thing, and it's largely been the result of consensual dispute resolution in cases that warrant it.

When we talk about the idea of all these trials, only 1% to 2% of family cases end up in trials, but they do spend an awfully long time and a lot of wasted money working their way through the court system. What I really like about this legislation is that it does put a focus on concern about safety and if you manage to get over that hurdle, encouraging people to use consensual dispute resolution results in lots of sharing, but sharing based on the unique circumstances of the family. What's the availability of both parents, based on their work schedule? What's the age of the children? Do they have mental health or addiction issues that need to be addressed? Do they have special needs children? It works out a parenting plan that is unique for the family.

Mr. Ron McKinnon: What's wrong with the idea of presuming equal parenting, shared parenting, and having to prove otherwise?

Dr. Barbara Landau: I think we have sufficient.... I think the very fact that this legislation has encouraged so much of a focus on safety and well-being shows we have some serious concerns.

Some 20 to 30 years ago in the House of Commons, they laughed at the issue of domestic violence. We don't laugh anymore. We take it seriously, and we also take seriously the experience and the ability and the motivation of people to parent, and encourage them to work out their own plans. I would emphasize mandatory information sessions for parents early on where they learn what a parenting plan is, how to address the different topics that are now in this legislation and about things that will reduce their conflict. Then I think the outcome will be far more sharing of parenting, of responsibilities, not the fighting over labels, which you've gotten rid of in this bill.

Mr. Ron McKinnon: Could we get a quick answer from the CBA?

Ms. Melanie Del Rizzo: I want to say first of all, the maximum contact principle that keeps being referred to is that the children should have maximum contact with the parents as is in their best interest. There is no such presumption now, nor should there be in future.

This crosses political lines. This has been something that the previous Conservative government supported as well, keeping the focus on best interests.

I would refer back to the federal government's Special Joint Committee on Child Custody and Access, which provided a detailed report, “For the Sake of the Children”. That concluded that children are not served by legal presumptions in favour of either parent or any particular parenting arrangement.

Again, equal parenting is open to families where it works for their children. What is wrong with the presumption is that it takes the focus off the child and puts it on the parent. We want the focus to remain on the child.

Mr. Ron McKinnon: Thank you.

The Chair: Thank you very much.

I'd like everybody to please put their earpieces on. Madame Sansoucy is going to ask her questions in French, and I don't want to take away any of her time.

[*Translation*]

Ms. Sansoucy, you have the floor.

Ms. Brigitte Sansoucy (Saint-Hyacinthe—Bagot, NDP): Thank you very much, Mr. Chair.

My first question is for Ms. Landau and the Canadian Bar Association representatives. My team and I found some very interesting points in your respective briefs concerning the place of children in the procedure. My question will therefore focus on representation of the child by a third party.

On the one hand, Ms. Landau, you discuss the views of the child in point 7 of your brief. You also talked about that today. You emphasize how important it is to include opportunities for children to express their views. You also add the following:

> However, we do not believe that judges are the best choice for interviewing children... Child specialists are more qualified...

On the other hand, recommendation 27 in the Canadian Bar Association's brief reads as follows:

> 27. The CBA Sections recommend adding the following to 16(3)(h-i):
>
> (i) protect a child from exposure to or involvement in parenting conflict.

We find these proposals entirely warranted and worthwhile. A person would thus express the views of the child rather than have those views transcribed in a report, as is proposed in certain briefs that we've received as part of this study.

Based on your recommendations, could you tell me whether it would be appropriate to provide in the act for the option of the child being represented by a third party, who would listen to the child, understand the child's view and represent him or her throughout the divorce proceeding?

I'll let you decide which of you will answer first.

● (1625)

[*English*]

Dr. Barbara Landau: I can take it.

I'm a lawyer as well, and I have been a children's lawyer representing children.

Very often in a mediation process or a collaborative law process, there is somebody who speaks to the child separately, depending on the age of the child, and listens to what their concerns are—any particular wishes. It isn't that the child is deciding the outcome, but it is finding out something about the child's particular personality, their needs, their fears and concerns, and about things they think would be helpful to them.

It isn't lawyers that I say shouldn't interview children; it's judges. I think bringing a kid to the courtroom and having a judge take a few minutes in chambers with the child is a pretty frightening experience. It perhaps should be reserved for older children in a parent alienation case that is really high conflict.

I think that mental health professionals are the best ones to be trained to work with children. Interviewing a child as part of the process is really helpful. Almost every case settles almost immediately once there is somebody to reflect the child's concerns and interests to the parents.

[*Translation*]

Ms. Brigitte Sansoucy: Thank you.

[*English*]

Ms. Melanie Del Rizzo: There is no CBA position on exactly how it is to come out, but I'll have my colleague speak on that.

Ms. Sarah Rauch: What we're focusing on are the best interests of the children, and they vary. They're evolving as the age of the child evolves. We're talking about them as though we already know....

I would refer back to the Convention on the Rights of the Child for some of those details. The best interests of the child include, in article 9, that when a child is separated from their parents, they shouldn't be separated from their parents against their will unless such separation is necessary for the best interest of the child. “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”

With the change of perspective, if we look carefully at the question you're asking, article 12 in the convention also talks about, “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

There are all kinds of different models for children to be heard. There are some of the things we've spoken about.

The important perspective that we want to advance is that it is in the child's best interests to be given that opportunity.

[*Translation*]

Ms. Brigitte Sansoucy: Thank you.

I'd like to ask Ms. Landau a second question.

You say in your brief how important it is to allocate the necessary funding to education, courses and non-adversarial mechanisms for couples who can afford private services, as well as funding for experienced professionals who will help direct couples and so on.

It's great to hear that. This bill has many good features but, to date, hasn't achieved all the objectives set for it, particularly that of reducing poverty.

[*English*]

Mr. Randy Boissonnault (Edmonton Centre, Lib.): There's no interpretation, Mr. Chair.

The Chair: We're going to stop the timer.

What Madame Sansoucy was asking you was with respect to the amounts that you said were very important to put into the education and training and stuff like that. She was then starting to talk about cuts that had taken away from that and she hadn't quite got into the question.

● (1630)

[*Translation*]

Ms. Brigitte Sansoucy: I'll continue by saying that all these settlement methods—mediators, psychological support and legal advice—represent additional costs that families must bear. I'd like to hear your comments on those recommendations.

How do we go about improving equal access to justice regardless of a person's financial position? What measures do you have in mind to enable all people, regardless of their financial situation, to be treated equally under the Divorce Act?

[*English*]

Dr. Barbara Landau: First of all, reinstating the family court clinics is the best way to do that. It's a wonderful way of doing it. They existed in Toronto, London, Kingston and I don't know if there were any elsewhere. These were wonderful opportunities. They were jointly funded across ministries that provided professional help, but had no cost to the families. You could have a sliding scale if you needed to.

The other thing is that there are court-based services now in Ontario, I think, Alberta, British Columbia, perhaps in Nova Scotia, and in Quebec that do provide publicly funded mediation services through the court system. They would have access to professionals who could come in for a period of time. The collaborative cases happen outside of court and they're privately funded.

Again, I'd be happy to talk about some public funding for that. They routinely have a team of professionals. They have lawyers, financial people and child experts, all of whom spend a portion of the time with the children. All of this is much more cost-effective than taking the amount of time and effort to get through a five-year trial.

[*Translation*]

Ms. Brigitte Sansoucy: May I ask a final question?

The Chair: You've already used up seven minutes. Can you make it very brief?

Ms. Brigitte Sansoucy: Yes.

Ms. Rauch often mentioned the International Convention on the Rights of the Child. That isn't currently in the preamble. Should it be mentioned in the body of the bill?

[*English*]

Ms. Sarah Rauch: Yes. We believe it should be, as well as in the preamble.

Dr. Barbara Landau: It's in the Ontario legislation, under the criterion, the best interests of the child—I think it may be here too—that where it's reasonable, you should be looking at the children's views and preferences.

The Chair: Thank you very much.

Mr. Boissonnault.

Mr. Randy Boissonnault: Thank you, Mr. Chair.

First to the CBA. I have a few short snappers, and then I'm going to go for some substantive answers from some of your colleagues.

Is it true that, among the 36,000 members of your association, there are parents?

Ms. Melanie Del Rizzo: Of course.

Mr. Randy Boissonnault: Is it true that, among the 36,000 members, some of those who are parents would have experienced divorce?

Ms. Melanie Del Rizzo: Absolutely.

Mr. Randy Boissonnault: Is it your opinion, and do you sit here at this committee and represent the interests of lawyers or the interests of children?

Ms. Melanie Del Rizzo: Both.

Mr. Randy Boissonnault: Great.

Ms. Melanie Del Rizzo: In our view, we are here to represent the Canadian Bar Association, but the Canadian Bar Association's position advances the rights of children.

Mr. Randy Boissonnault: Outstanding.

Would you agree with that, Ms. Rauch?

Ms. Sarah Rauch: Yes, I would, as a matter of law, not as a matter of interests of the lawyers but as a matter of advancing the clarity in the law.

Mr. Randy Boissonnault: Thank you.

Dr. Landau, it's possible for us to do a Google poll or to have a Twitter poll or to send out a SurveyMonkey. I'm wondering if you can point to any statistically valid social science research that supports the principle of equal shared parenting in Canada, which we should be looking at to inform our decision-making here as members of the House of Commons.

Dr. Barbara Landau: I'm not aware of any valid poll that's been done that supports the assumption.

I don't see why it's necessary, because we're encouraging parents to come up co-operatively with what makes sense for them. The experience over the last 30 or 40 years has been that, as we move to more consensual processes outside of court, parents are increasingly sharing the parenting because they're not being encouraged to fight each other and they're not writing horrible affidavits about each other. They're meeting with a professional who's encouraging them to think about their children and to think about the harm.

If I can quickly just tell you, my key line that I give to parents as a mediator is to ask them to think about what story they want their children to tell their grandchildren about how they handled their separation. That tends to sober them down pretty quickly.

Mr. Randy Boissonnault: That's very good.

I have a question for the CBA. Is it helpful, for the work that you're doing and for having more harmony in the system, that we're moving as a government on unified family courts, and that we've allocated funding for 39 more judges in that case?

● (1635)

Ms. Melanie Del Rizzo: Absolutely, that is extremely important. We've had resolutions on that from the CBA in the past, and we congratulate the government for moving ahead in that way.

Mr. Randy Boissonnault: Dr. Landau, would you concur?

Dr. Barbara Landau: I would absolutely concur if there are the services required. Changing the building—building new bricks and mortar—will not do it. You need mandatory education. You need triage. You need domestic violence screening, and you need the services of consensual dispute resolution processes. If you do that, you get a hug.

Mr. Randy Boissonnault: Okay. Good.

Let's pause there. However, I will ask you this question because for the non-lawyers at the table—and there are a couple of us—it sounds like we're debating the ingredients and the contents of an apple pie. We agree that apple pie is good, but what ingredients go into it? It's a little mystifying here, so let me ask this question.

The presumption of equal shared parenting, let's flip that on its head. In the system that we have now, what are the types of families for whom equal shared parenting isn't the best solution and isn't in the best interests of the children? Help me see what those families look like. What are some examples?

This is for the CBA or Dr. Landau.

Dr. Barbara Landau: I'll kick it off.

The ones that come to mind immediately, of course, are domestic violence, mental health, people who are feeling so angry at the time of the separation, so hurt and whatever. It doesn't mean that they won't gradually move toward a more co-operative type of thing, but at the time of separation, they are demoralized. Children with very high special needs, parents who travel extensively, people who don't live in the same community, people who have already started another relationship.... Automatically, that's a red file for me. If they've already started a relationship or within the first year, they're not going to get along well and they're not going to accept that other person. Maybe by the second, third or fourth year they will be in a better state to do that, but usually there's so much animosity.

I think that special needs kids, kids who don't have an experience of a really close relationship with a parent—the parent lacks parenting skills or they're just not particularly interested in being a parent.... There are all of those types of people. When people do show an interest and are involved with their children, they end up with—if not an equal shared—a parenting arrangement that reflects their availability and their ability to meet their children's needs.

Mr. Randy Boissonnault: Thank you.

Now I'll go to the CBA for a minute or less.

Ms. Melanie Del Rizzo: I guess the issue here is our definition of shared parenting and equality.

We say that a focus on equality is misguided. We need to look at what's best for the children in each situation, and we don't want there to be a focus on parental rights. Again, these types of presumptions don't really advance equality.

There are all sorts of reasons why an equal shared parenting arrangement would work, and there are all sorts of reasons why it would not work. It depends on the child. It depends on the family structure. It depends on who parented the children prior to a separation. It depends on levels of attachment. It also depends on the children and what the children's views would be, if it's appropriate to canvass them.

There are all those things. We want to put the children first. That's the focus of this bill and we'd like it to remain that way.

Mr. Randy Boissonnault: Thank you.

Dr. Barbara Landau: I just want to mention the age of the child because you can have infants, who really are not portable, going back and forth. You just disrupt them totally. However, they might be far more able to handle it at a later age.

Mr. Randy Boissonnault: You have all forgotten more than I have known about this area of the law and the law in general, so thank you all very much.

The Chair: I'm indulging my colleague.

I just have one question for Ms. Del Rizzo.

You practice family law in Newfoundland and Labrador. Can you obtain a divorce in French in Newfoundland?

Ms. Melanie Del Rizzo: No.

The Chair: Does the CBA have any suggestion with respect to whether we should be looking to the language of the Criminal Code that affords people the right to a trial in the minority language across the country to allow for minority language divorces? What is your suggestion?

Ms. Melanie Del Rizzo: I'm here to represent the CBA's position, and the CBA's position is expressed in my submission and in the comments. Language rights should be strengthened across the country, and with respect to divorce, French-speaking parents should be able to obtain a divorce in their language all across the country.

The Chair: And English speaking parents in Quebec....

Ms. Melanie Del Rizzo: This is inconsistent, and we are encouraging the government to look at that with respect to this bill.

The Chair: Thank you very much.

Mr. Colman, I see you're still with us. I know that you're on the screen and people may have forgotten that you were there, but thank you for joining us—and so late at night for where you are.

Thank you, all. You were all really helpful.

I'd like to take a brief recess and ask the next panel to please come forward so that we can start quickly.

● (1635)

(Pause)

● (1640)

The Chair: Thank you so much. We are reconvening with our second panel of the day. We have three more illustrious witnesses, or groups, joining us.

As individuals, we have Ms. Martha McCarthy, with Martha McCarthy and Company LLP; and Mr. Daniel Melamed, with Torkin Manes LLP. We have B'nai Brith Canada, which is represented by counsel John Syrtash and Ms. Orly Katz, assistant to counsel.

We'll go in the order of the agenda. We will start with Ms. McCarthy.

Ms. McCarthy, the floor is yours.

● (1645)

Ms. Martha McCarthy (Martha McCarthy & Company LLP, As an Individual): Thank you.

My name is Martha McCarthy. I've been a full-time family lawyer, since I was called to the bar. I'm not embarrassed to tell you, at least in this setting, that is 27 years of practice.

I am a full-time family lawyer. I act for men and women in equal proportion. I act for straight and all manner of not-straight former couples. I act in a pro bono way regularly with lawyers in my office for children, children whose parents are getting divorced, children who are in other challenging circumstances and children and youth who have problems in school.

I also have a practice now that has developed into something that I'm not sure anybody envies me for. I do a serious amount of very high-conflict custody and access work. I act for people whose husbands have tried to kill them, and who are asking for custody of their children after that. I act for grandmothers where there's been a murder-suicide and there are no parents left.

I act in situations that we would easily call 10% or less of the constituency. These are stories that, if you didn't spend every day doing the kind of work that the lawyers sitting here now—these are all my colleagues and professional friends.... If you didn't spend time with us, you wouldn't quite believe it.

That's what we do, and that is one of the perspectives I'm going to ask you to consider as you look at this bill—the question of who the constituency is. Who are the people who need to access this legislation? Who is it actually aimed at?

Before I say that, you'll have to forgive me for all parts of my paper, to the extent that it contains comments that you didn't ask me for. That's the cost of inviting me to attend. I did spend the first five pages of my paper talking about the current legal context. I wanted to talk about it because I think there is a perception in the public that family law is in crisis. It's all over papers. It's this old saw that people say.

What I want to say is this. Due to maybe a magic confluence of every star lining up or something, we are at the biggest sea change in the history of family law since I was called to the bar, and that is the unified family court.

The unified family court—and I go on about it, again you'll forgive me, in the first five pages of my paper—is without a doubt the greatest law reform effort we will see, once we get it off the ground. It's not an "if" anymore. We now have the budget. We have the commitment at four provincial levels on the first rollout. Ontario is going to be one of those four provinces. It's going to get four centres.

What does a unified family court get us? Why does it matter? It's a very difficult subject to discuss in public and for people to understand because there's this one thing of, "We shouldn't have families in two different courthouses," but actually that's just the little thing. A unified family court gets us a whole bunch of really huge things that we have not had and that will make a huge difference in access to justice for the average family and the average user of the system.

The specialized bench is huge. I have a part in my paper about it, so I won't repeat it. It's a massive change. It is a system where you can have all kinds of adjunct services. At a unified family court, the only place where family law is done, we can have mediation centres, a triage judge and some things that we don't have already, although we have many of them.

That's the second point in my context in this paper. We have rolled out across Ontario, and I think in many provinces—I can't really speak to specifics about other provinces—on-site services for mediation in every courthouse. Five years ago, that wasn't a thing.

What happens in the courthouses in Ontario right now? With or without the language.... I agree that it is totally appropriate that we should all have a duty to encourage and discuss mediation in the appropriate cases. What happens on the ground every day? You're in motions courts where judges are saying, "Hey, self-rep versus self-rep, or self-rep versus lawyer here fighting about a travel consent, did you know we have on-site mediation? Did you go down there? You can put your name in a line, and you can be heard in five minutes. Why don't you go down there? We'll hold your matter down." They are triaging all kinds of stuff right off their list into that system.

● (1650)

You can judge my analogy however you like, but here's my analogy that I'm going to give you today. With the unified family court, which we have a commitment for, which is happening, with on-site services and mediation centres available, for those of us who have worked so hard—and I include both levels of government, people who have lobbied for it and all of you—we are standing over a body in a surgery, an open body, we are fully engaged in that surgery, and it is going to change the life of the patient.

With the greatest of respect, the legislative reforms are not really about that. The legislative reforms are about a very modest medical change, like how somebody wants to talk about putting a cast on the finger. We are on the precipice of the biggest, most amazing thing that has happened. We're not sure about whether the temperature comes down or how much we cure the patient once we roll out the UFC.

My friend Mr. Melamed tells me that I've already covered five minutes in my intro, which is how lawyers roll—

The Chair: It's six minutes 50 seconds.

Ms. Martha McCarthy: It's six minutes and 50 seconds into my introduction.

My paper is divided into three parts. The most important thing I would like to say to you is that I have spent my life talking about what labels matter. I did a lot of gay and lesbian equality work that was all about putting the right labels on things, moving toward a functional vision of family. Despite that very significant bias that I have, labels matter in custody and access cases. The constituency is the 10%. Who are the ones we're worried about? They're the victims of domestic violence who phone my office while they are on the floor being kicked in the head by their spouse, with a child watching.

I'm not trying to be provocative. Those are the people who need access to the system, who do not, when we talk about mandatory mediation, need us to make them feel that they're doing something wrong if they need the court system, because those people do.

The other things I suggest that you look at, which aren't contained in my paper and I find incredibly compelling and important, are the DVDRC reports. The DVDRC is a committee, the domestic violence death review committee, that looks at what happens with fatal deaths in the domestic violence area on an annual basis. Those DVDRC reports tell us about the constituency. They tell us that those people are at the highest risk of actually fatal interactions. The number one time that you may get killed is at the time of separation. The number one time of murder-suicide is at the time of separation.

That's the constituency. Those are the people. Labels matter. Labels matter to third parties, to immigration.

All right, I'll wrap it up. You have my paper on why labels matter. We also have a paper that The Advocates' Society produced. I heard you talking about judicial interviews with children. We did a significant amount of work on a joint committee basis with the AFCC, which is an international, multi-disciplinary organization in family law. That paper is available. It's not in my materials, but it's available on The Advocates' Society's website. It talks about best practices for judicial interviews of children and provides a whole basis for training and discussion around it.

At the end of my paper, I did say some things that you didn't ask me about. If I were going to change the Divorce Act, what would I do? I would repeal section 9 of the federal child support guidelines, which is the single most disgusting amendment in any family law area anybody ever did, since at least Mr. Melamed and I were called to the bar, which is inserting economic interests into custody and access cases. Now, if you have 40% of the time or more—and that's since 1999—you automatically don't have to pay as much child support. This creates messed up incentives in the same way, with respect, that your draft mobility provision threatens to do. That mobility language about who's going to have substantially equal time, or whatever, that's all just the same thing.

That's why changing the labels, with respect, is a bit like lipstick on the pig. Changing the labels doesn't change the conditions under which humans fight. Humans are the users of this system. There are people who need it. I agree that if we had always started, way back, with words that didn't denote ownership, it would be better, because that's one of the things that people are offended by. The word “custody” sounds like I own the kid, that the kid's a piece of my property.

I agree that if we'd started with different language, way back, it would be nicer. That would be great. Don't change it now, unless you want to just create uncertainty. Look at what happened in the other provinces. It's all set out in my paper. It's not a fix. If you polled people...it's not a fix, I think.

Finally, on presumption of joint custody, that whole discussion, I didn't know you were going to do that. I would have written another 10 pages in my paper about all the ills of the presumption of joint custody. I will say, in response to somebody's question, that there's excellent academic literature by a woman named Jennifer McIntosh, out of Australia, and by Alastair Nicholson, former chief family law justice in Australia, and the woman who followed him, who's also the current family law chief judge in Australia. All of that is very interesting.

Jennifer McIntosh is a psychologist. I once saw Jennifer McIntosh do a slide show with all the drawings of all the children put into a presumption of equal time. The slide show had these children's drawings of their suitcases—

● (1655)

The Chair: Ms. McCarthy, you're at 11 minutes and 40 seconds.

Ms. Martha McCarthy: Great.

The Chair: I have to get you to wrap this up.

Ms. Martha McCarthy: That's a child whose life is defined by living out of a suitcase. Don't do this to those kids. There's great academic material about why you shouldn't.

Thank you for the opportunity to come. I hope you read my paper, most of which I didn't cover.

The Chair: As long as your brief gets to us translated, we're going to read it.

Mr. Melamed.

Mr. Daniel Melamed (Torkin Manes LLP, As an Individual): You can imagine what it's like to practise against Ms. McCarthy. She's a challenge.

To follow up, I'm going to talk about mediation.

I've been practising for 30 years, and like Ms. McCarthy, I have done high-conflict custody cases. I've focused on my mediation practice for the last number of years. I didn't write a long paper. I tried to focus on a couple of things that I thought I could bring to this table to consider when talking and thinking about the mandatory requirement of the adviser to raise alternative dispute resolution with individuals, which leads to mediation as one of the options.

My practice now is about a third to a half mediations only, where I'm the mediator. After you hear the witnesses, when considering changes to the legislation, I'd like you to think about a couple of things that I've learned that relate to two things. One is the family violence content and the second is to timing. I'm referring specifically to what I see in Bill C-78, proposed subsection 7.7(2). Let me just describe a bit about how practice actually works, so that you can appreciate why those two things interplay as a recipient of dispute resolution mechanisms that are outside of the court process that Ms. McCarthy has spoken about. I actually agree with her comments.

When a client comes into my office, the first thing we talk about is their problems, what they're thinking about and their worries. If it's an extreme situation—perhaps an assault or perhaps the possibility that money will be taken out of the country or will disappear—as an adviser, I immediately start a proceeding. Under the legislation now, we're required, as advisers, to address alternative dispute resolution. I'll do that, because I have a signed certificate that requires me to do it. Then we're in the throes of litigation that sometimes goes on for years.

This is the thing I want you to think about: There's no secondary requirement to revisit that provision as the process is undertaken. That should be something you should consider. I could imagine the legislation saying that at various stages in the proceedings the adviser is required to do the same thing again. The initiation is the starting point, and perhaps after every step in a court proceeding—that seems a little extreme—or at various times, or at what we call the settlement conference.... It's different things across the country. Things get very hot at the beginning of lots of files, and the advice isn't really thought of at the time. An important function of our adviser responsibility is to talk about how now that we've had all this fighting, should we stop? Should we talk to each other? Should we go to someone who could help us sort these things out?

I'd like the committee to consider whether there should be some ongoing obligation of the adviser to consider that option for discussion, maybe in some general way. Again, not all cases are appropriate for mediation. Some of them should be just settlement. Ms. McCarthy and I can talk across the table. We don't need a third person to understand the issues and the problems. Can we problem-solve together to create a solution maybe as effectively as a mediation? That's not always the case, so sometimes you need that third party.

Regarding family violence, as you describe it in the legislation.... Let me tell you a story of what happened to me last week to highlight why you should very seriously consider what FDRIO has put forward in their brief, as well as what we call a screening of domestic violence before mediation occurs. I'm sure Dr. Landau spoke about it. Two weeks ago, a mediation came into my office.

● (1700)

How it works in my office is that lawyers—very rarely individuals—call me and say, “Hey, Danny, do you have time to do a mediation in the next couple of weeks?” They call me up, they talk to my assistant, and we do a conflict check to make sure no one else in my office has met with them. If we are conflict free, they talk about dates. Sometimes I'll have a phone call to do what we call a pre-mediation conference with counsel to explain what the fight is about, although sometimes I don't. Then, all of a sudden, I get briefs on my desk.

Two weeks ago Wednesday, the briefs land on my desk. The husband's brief talks about the issues in the case. They're the usual things. The kids are older, so there's no custody. It's just money, money, money—all good things. In the other brief, the first two paragraphs are about the vicious assault on the wife and the criminal conviction of the husband. I'm looking at these briefs and I'm wondering how I am going to mediate this. Everyone talks about power imbalance—

Ms. Martha McCarthy: [*Inaudible—Editor*]

Mr. Daniel Melamed: Right. Thank you.

Ms. McCarthy just asked what is my safety plan, and that's the safety plan for her but also for me. What's my responsibility to these two individuals who have chosen mediation? No one compelled them.

What happened was that they all came to my office—I luckily have four floors in my office—and I put the husband on one floor and I put the wife on another. The wife was behind what we call our security barrier, because that's just our office. Not all mediators have that in their office and I'm fortunate to be able to do it. I had to shove a corporate closing into another part of the building.

Anyway, at the end of the day it was fine and everyone was able to do it. I ran up and down the stairs. I solved the case about a week and a half later, because it took some extra time to do it. Both parties were quite well represented, so it wasn't a problem of a power imbalance in respect of counsel's knowledge. They were on the eve of trial and they had about a couple of million dollars in the bank to fight about, and it was literally in the bank and all held, so there wasn't this power problem of either of them not having money to fight with their lawyer.

There was an opportunity, and it was a case where, despite the awful beginning, it was an appropriate case to mediate because the parties had proper power in the process. However, as the mediator, it was quite galling to receive these materials without any background thought to “Danny, you should know there's going to be domestic violence.” You should plan for it.

We are ready to do it. We screened these people.

There's a process of screening that I've been trained in and anyone who's a mediator and arbitrator in the province of Ontario must be trained with. The advisers, in my view, if they're recommending or considering mediation, should either be required to be trained in screening or, equally so, be required to send them out for screening by professional services. The legislation lacks that. By just saying advisers should consider it and use it.... I think the legislation says, “Unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so”.

While we can describe extreme situations.... The one I gave you was an extreme situation, but it was successful because the conditions had been met personally in my office, given they were physically apart, but also because counsel had done their work beforehand. I would urge you to very seriously consider that in my process.

I have two quick things to finish up, because I know Ms. McCarthy tells me I'm at seven minutes—

● (1705)

The Chair: It's eight.

Mr. Daniel Melamed: It was a minute ago that she put down seven, if I could just have your indulgence.

The Chair: Yes.

Mr. Daniel Melamed: The two quick things are about disclosure.

You don't talk at all about disclosure. I know that I'm not a constitutional lawyer, but I'm married to one and she tells me there's something called the Constitution Act, which has federal and provincial jurisdiction. Anyway, I know that the federal government has jurisdiction over divorce and the provinces do property, so a lot of the disclosure component tends to go into the rules—I remember the rules committee of the Province of Ontario—so you don't see that. But we need something that talks about it, because I can't do a mediation or dispute resolution properly without proper disclosure.

I can't tell you the number of mediations where I start the mediation and the other side says, “I don't have proper disclosure.” I say, “What are you doing here? How can I solve the case if you don't know that the wife has hidden assets in the Bahamas. How am I supposed to settle it?”

My main points, to repeat, are as follows. One, when it comes to family violence, we need a process in the legislation to consider how I'm going to get the information if I am a mediator in that process.

Two, when you're doing the adviser responsibility, it's very important for us to do it not just once, because by the way, we often do our adviser responsibilities so that we fought, we settled and at the very end if someone wants to bother getting a divorce, then we give them the adviser information of the alternative.

The third point, which is a very minor point, is what I just listed to you.

Thank you very much for your time.

The Chair: Thank you very much.

Now we'll go to B'nai Brith, Mr. Syrtash and Ms. Katz.

Ms. Orly Katz (Assistant to Counsel, B'nai Brith Canada): Good afternoon, and thank you for the opportunity.

I want to say that I'm not a lawyer, but I'm here on behalf of B'nai Brith to assist Mr. Syrtash and to represent people who have been part of high-conflict divorces, as I have. Mine recently ended, having lasted 13 years in the courts. It caused great suffering to my family, partly because of the law and its needless procedures, at an expense that was extraordinary.

I ask you to please listen to Mr. Syrtash's comments this afternoon. They are designed to reduce the costs and lead to more certainty and predictability. Thank you for that.

I'm going to introduce Mr. Syrtash.

Mr. Syrtash has 37 years as a family law lawyer and mediator in Toronto, having been called to the bar in 1981. He is currently a senior associate with the Toronto firm Garfin Zeidenberg LLP. His several publications include hundreds of family law articles in the Syrtash family law net-letter for LexisNexis Quicklaw, the Canadian Jewish News and the National Post, and he regularly appears in the media for interviews on family law issues.

He was instrumental in B'nai Brith's lobby for remedial legislation to help obtain religious divorce in 1985, and in 1992 called to get legislation.

Thank you.

Mr. John Syrtash (Counsel, B'nai Brith Canada): Thank you very much, Orly.

Mr. Chairman and members of the committee, thank you very much for the invitation.

First I want to say that B'nai Brith, which I represent, has a long and wonderful history of addressing human rights. This includes helping average income-earning people who struggle with their lives to make them better. They've been doing it since 1875.

As its representative, I've carefully read the proposed amendments, and I've given you an extensive brief, recently amended.

I have a few main points. I'm sure the legislation is very well intentioned, but there are certain aspects of it that we have some reservations about, which I'd like to review with you briefly.

First, I accept and adopt everything that has been said here by Ms. McCarthy and Mr. Melamed. The only thing that perhaps I don't agree with is the issue of the rebuttable presumption issue, which has been already debated here. I'll get to that, but I completely adopt everything both of them have said and urge you to consider what they've said.

First, I want to mention that changing the words, as Ms. McCarthy said, to enact true reform may be not only irrelevant and wasteful of time, but be harmful. I'll get to why in a minute. I can tell you, as an experienced lawyer with 37 years behind me, nothing could be further from the truth. I don't think that changing the language from “custody” and “access” to “parenting orders” achieves anything.

Anybody in a high-conflict divorce situation—it's not necessarily violent; it can be about money; it can be about all sorts of things—really won't care less what you call it. What they want is custody and access. They want those words. They mean something. Those words do matter. They do not want something different, because that's what governs this kind of dispute. Changing the language will do nothing. Spouses intent on fighting over decision-making for a child or primary care control will continue their battles. Irrespective of whether they are fighting over how much time to spend with the child or how much money they have to pay, they will be doing that, so I don't agree with some of the solutions you heard earlier or the fact that this enacts true reform. I think it achieves absolutely nothing.

Secondly, I totally agree with Ms. McCarthy—it's in our brief—that it's very critical that you reform section 9 of the child support rules, which deals with the 40% rule. I can tell you of the number of times I've had payers of child support come to me who are seeking a change in custody or a change in time with their children only to save money. Many times I oppose such people, because I act for men and women equally. Quite often, people will apply for that change in parenting merely to get beyond the 40% threshold so that they can maybe pay less child support. If they somehow get that parenting provision, they don't exercise it. They just wanted to do it for the money. I'm not saying this happens all the time, but it happens sufficiently in my practice and my experience, on both sides of the fence, that I'm suggesting we do away with it.

The reform that B'nai Brith suggests is very simple. Make it simple. The child support payable should apply in all cases where parents' comparative standards of living are radically different based on the incomes earned by each parent. If there is no significant difference in income, no child support should be payable. This principle is summarized in the famous Contino decision, which the lawyers here will remember, that says that the court will generally be called upon to examine the budgets and actual expenditures of both parties, so there's no need to put in this 40% business. I would definitely take it away.

The third thing is something the legislation doesn't address at all. One of the greatest paradoxes we have is that judges will tell you in court all the time that they have no power to compel a parent to see their child. This is a really major problem. At least one judge has come up with a solution, which I'd like to suggest we codify. If there's been one year of non-compliance with an access agreement or order or there's someone who just doesn't see their kids when they're supposed to, the primary caregiver should be permitted to ask for a retroactive 25% increase in child support.

● (1710)

Why is that?

I hope it's obvious, but if somebody's planned vacation is cancelled because somebody didn't show up for access or they don't show up regularly for access visits and the primary caregiver is compelled to pay for meals or for entertainment, then this increases the whole cost of parenting. It may also encourage some parents to actually see their kids and to show up for access. That's something that hopefully this panel will seriously consider as a good proposal that I've made.

The third point I want to make is that another reason not to change the terminology of parenting is that the courts have now developed important jurisprudence as to what words like “custody” and “access” mean. Therefore, they currently provide guidance to parents and their lawyers, without their having to relitigate every dispute.

This is what Ms. Katz was talking about. There are hurdles in family law already, like all these case conferences and all sorts of procedures. Now, we're possibly going to have a situation where someone, like Ms. Katz, will be compelled to go and relitigate an issue like relocation, for instance. I mention that in my paper. In relocation, there's already a trend in the law—and I showed that in my brief, I'm not going to bore you with the details—in which primary caregivers are permitted to move, subject to access provisions that mean something and that will assist children, and if they have a good reason to leave.

I'm giving you a very broad summary of the law, but there are many exceptions. The point I'm making is to ask, why are we dispensing with decades full of jurisprudence, just for the sake of changing some words because they may be politically correct? It doesn't make sense.

The fifth point I'd like to make.... I would like to say something in general, before I get to my next point. As you may recall and all of you know, we have a rebuttable presumption of shared parenting that we've suggested, but what nobody's talked about here is what I've added to that, which is that it should be a rebuttable presumption of shared parenting that is subject to unconscionable circumstances. What that effectively means is that every time there is a case where there's the kind of violence that Ms. McCarthy talked about, then someone has the ability to ensure that it's rebutted. There are lots of studies, including the one by the social policy research centre of the University of New South Wales that made it clear through their exhaustive study that they are doing well and such children are doing well in shared care.

The last thing I'm going to say because I'm running out of time—but I want you to read the paper—is that there are two problems. The definition of family violence cheapens the language and cheapens the term “family violence”, by including words like financial abuse. B'nai Brith is particularly concerned about this because, while financial abuse is a very serious problem, what happens is that you cheapen the actual physical abuse of spouses, in particular, through a mistaken attempt to broaden the definition. It trivializes the suffering of such victimized spouses, who are often hospitalized by such conduct. We don't wish to do that.

Also, regarding grandparent rights, for some reason, you have a proposed section 6.1(3) that reads, “For greater certainty, if no parenting order has been made in respect of a child, no application for a contact order may be brought under this Act”. That means that a grandparent has no rights. If there's been no parenting order, a grandparent can't make an application. I have a real problem with that.

As far as family dispute resolution is concerned, I'm all in favour of everything that was said by everyone today, as long as it's optional. Once again, if you make this mandatory—and there's language in the act that says it's mandatory—it means that it's another hurdle in those cases where there shouldn't be hurdles, especially for abused women, to get into court quickly.

I just want to finish by saying that there are a lot of undue delays and costs that we have in this legislation and currently in law, which I'm asking you to avoid. Please read my paper. It has a lot of hopefully constructive suggestions, as to what you might consider.

● (1715)

The whole purpose of our proposals are to create certainty in the law, predictability in the law and fairness. Some of those things are inadvertently missed in some of these provisions that I've mentioned here.

The Chair: Thank you very much.

Mr. Cooper.

Mr. Michael Cooper: Mr. Syrtash, on that point, could you comment on how a rebuttable presumption would increase certainty, predictability and fairness?

Mr. John Syrtash: Section 19.1 of the Ontario family law says as follows, and you may be shocked to hear it, because I mention it in my provision....

Pardon me, this is subsections 20(1) and 20(7) of the Children's Law Reform Act of Ontario. It says, “Except as otherwise provided in this Part, a child's parents are equally entitled to custody of the child.”

Right away, we have an Ontario law that speaks to former spouses and to parents that already has this principle in it. Now are we going to have a different principle at the federal level than at the provincial level? It doesn't make sense, because the children of former spouses may be in a different legal context, because there is presumption already in Ontario legislation, than at the federal level. That's one reason.

Another reason is that the presumption really does address the issue of certainty in the law. If you have one principle, some overriding principle that can be rebutted if there's something unconscionable, then that gives more certainty and predictability for people who are approaching this and thinking, perhaps from the wrong point of view, that maybe they'll apply for some frivolous reason such as not having to pay as much child support or some such thing. They'll think twice before they try to rebut the presumption.

You have more certainty in the law with that.

● (1720)

Mr. Michael Cooper: Okay. Thank you for that.

In his testimony, Mr. Ludmer talked about the fact that there's a lot of inconsistency from judge to judge, from jurisdiction to jurisdiction, as a result of uncertainty surrounding what is in the best interests of the child. Has that been your experience, and would you agree that rebuttable presumption would help address that?

Mr. John Syrtash: I think it does help judges a great deal. I completely commend the comments of the Canadian Association for Equality for that same reason. Once again, the word “rebuttable” is very important here. If you have a rebuttable presumption, it sets a standard. It means that people know what to do when they break up with their spouses. They know that there's a challenge ahead of them if they really want to go against it.

Those who can rebut the presumption will be easily able to do it, notwithstanding that I've suggested the word “unconscionability” be put down as the test. Why? It's because if a woman is truly abused, they're going to be able to rebut the presumption.

In other situations, right now—I'll tell you the law—there's something called the “tender” infants principle, that a nursing mother should have a child a lot more than the father, maybe almost exclusively.

I can tell you that in the past few years there has been an embrace of more generous schedules, even whether they're nursing mothers, because the social scientific studies have proven that, in fact, equal connection between both parents is critical to a child's future development.

Mr. Michael Cooper: Are you aware of any social scientific studies that are Canadian?

Mr. John Syrtash: I'm aware of none that are Canadian.

Mr. Michael Cooper: None that are Canadian, but there are—

Mr. John Syrtash: They are from Australia and from the States.

I mentioned one of them.

Mr. Michael Cooper: Right. Thank you.

The suggestion was made, when I asked a question about maximum parenting time to Mr. Ludmer, that it's something the courts already consider. Obviously issues around family violence and other reasons one parent might not be suitable are already considered. It was suggested, I think by the Canadian Bar Association, that the language is consistent with the best interests of the child, but isn't that the purpose of a rebuttable presumption?

Mr. John Syrtash: The problem with the word “maximum” is that it's a malleable concept. As I said, my biggest job here is to try to urge everyone to consider the need for more specificity and more certainty in the law. The concept of “maximum” is a wonderful one and nobody would disagree with it. That's not the issue. It's what if you get to narrow situations? There are no presumptions, really. When you come to the issue of best interests, everybody agrees with all of these concepts that are written down, but the problem is how you apply them. What's the practical tool to apply them?

The presumption does give a judge at least a hook where he can say that there's some certainty in the law now as to where the normal family falls into it.

Mr. Michael Cooper: Right. Perhaps I didn't phrase my question clearly. Just to clarify, what I was suggesting is that there's no inconsistency between having a rebuttable presumption and the best interests of the child.

Mr. John Syrtash: No, there's none whatsoever. It makes perfect sense.

Mr. Michael Cooper: Thank you.

The Chair: Thank you very much.

Mr. Ehsassi.

Mr. Ali Ehsassi (Willowdale, Lib.): Thank you, Mr. Chair.

Thank you very much to all our witnesses. I'm very grateful that you appeared before us. It's been very helpful listening to you.

I should say, Ms. McCarthy, just so you know, we did not receive your brief, so we haven't had the benefit of reading that yet. It's currently in translation. I understand that in the next few days we'll have an opportunity to review it.

The first question I have is for Ms. McCarthy.

As you know, there's a very high incidence of family violence. As you testified, you work with some of the most complicated ones. I was wondering if, in your practice, there is a screening process that you have in place to deal with the possibility of violence having occurred.

● (1725)

Ms. Martha McCarthy: Yes. In terms of a formal screening process, the way any lawyer runs an intake meeting, for the lawyers who have been trained by me in our office, that kind of thing is just a part of what happens at the beginning.

In terms of what Mr. Melamed was talking about a bit, we have in Ontario a screening tool, a screening education system. We have a bunch of rules for people who are in mediation and arbitration that are already contained in legislation. It actually requires two full days of training with a domestic violence trainer. If anything, I personally think it's a little long.

If we're going to go to mandatory, it's really quite onerous but that's a good thing. There is a significant amount of screening training that all lawyers have if they are going to participate in mediation and arbitration. That's a model that you could look at in terms of the statutory form.

Mr. Ali Ehsassi: You would say the Ontario model is working fine.

Ms. Martha McCarthy: Yes, I think the Ontario system is working fine. I think that as long as we stay away from any suggestion that we have "mandatory".... There's a negative connotation. "Mandatory mediation" is a sort of dirty word, but "encouraging".... I don't think that any of us here would have any difficulty if we had a positive obligation in every case, because that's already what we do.

Mr. Ali Ehsassi: Okay.

Ms. Martha McCarthy: I think all good lawyers.... The mediation arbitration practice across Canada, the concept of mediation in family law has totally taken hold. You don't need to take steps to talk anybody working in family justice into the concept that mediation is good. We had that Kool-Aid a long time ago.

Mr. Ali Ehsassi: Excellent.

Mr. Melamed, since you brought up screening, is there anything you would like to add to that in terms of the type of screening that should be considered preferable, or any improvements we could make to the Ontario system, for example?

Mr. Daniel Melamed: I have just one thing to add to what Ms. McCarthy said.

We have to do two days of family violence—I'll use your language—in the legislation training. That's the initial one. Then every two years we have to go back for a full day. Actually, I think it's about 10 hours, which anyone who is in the practice of mediation or arbitration tends to do in one full day. That's an additional thing you should consider.

As Ms. McCarthy says, in the screening process of intake, if you don't talk about what's going on in the home.... That's usually how you introduce it. People are embarrassed. They don't want to talk about family violence, whether it be a push or a shove. Not to minimize it, but sometimes it's a heated moment that both parties, if you really reflected on it, would never have imagined themselves in. Then there are the extremes—murders, terrible things that can happen.

We all just do it if we're good at it and trained well at what we do. Should we be trained more deeply? Possibly, but I think that's more in the provincial realm of the training of lawyers and understanding our responsibilities. I'm not sure it needs more in the formal legislative function, other than when you talk about mediation, or alternative dispute resolution, which is how you refer to it in the legislation. That's when the screening certainly has to happen, so the recipient and the person who is going to be doing it have the information to either create a safety plan, as Ms. McCarthy said, or to maybe ask, "Is this really right? Should we do it?"

Ms. Martha McCarthy: The DVDRC has a really good screening tool in the DVDRC reports as a schedule to the annual report.

It's a screening tool that was developed for police, for people in emergency rooms, to screen out DV. It's a super useful tool.

Mr. Ali Ehsassi: That's excellent. Thank you.

The Chair: You have 50 seconds left.

Mr. Ali Ehsassi: That's fine.

● (1730)

[*Translation*]

The Chair: Ms. Sansoucy, you have the floor.

Ms. Brigitte Sansoucy: Thank you very much, Mr. Chair.

I just wanted to thank the witnesses for their contributions to the work of our committee. Their presentations were very clear, and I have no further questions after the questions my colleagues have asked.

Thank you.

The Chair: Perfect.

Mr. Virani, the floor is yours.

Mr. Arif Virani (Parkdale—High Park, Lib.): Thank you, Ms. Sansoucy.

[*English*]

First of all, I wanted to thank all the witnesses for being here and for your very helpful testimony.

I wanted to direct some questions to Ms. McCarthy and to Mr. Melamed.

First of all, Ms. McCarthy, thank you for your contribution to family law jurisprudence, and I'm referring to the M. v H. case, which is a seminal piece of jurisprudence. You spoke to my law class probably in 1996, but you probably don't remember that or didn't want me to—

Ms. Martha McCarthy: Let's not all date ourselves here.

Mr. Arif Virani: Exactly.

Mr. Melamed, thank you for being here. Your expertise is well known in the family law bar in Toronto. I also salute your astuteness in recognizing the expertise of your better half, Ms. Kraicer, who is indeed quite a constitutional force .

I had a few questions. We have about six minutes, so I'd ask you to keep your responses somewhat brief.

We've had a bit of a discussion about equal parenting over the last several days and the equal parenting provision. You've heard some of the submissions that were made just now.

There was a committee called the Special Joint Committee on Child Custody and Access in 1998. It specifically said that a presumption in favour of a particular parenting arrangement would not likely be in the best interests of children. I want to have your comments on that 1998 finding and your reflections on the direction of the statute as it sits before you now. It does not contain an equal parenting presumption, and that was quite deliberate.

Mr. Daniel Melamed: Should I go first?

The Chair: Whoever wants to go first.

Mr. Daniel Melamed: I think it's a mistake to consider equal parenting as a principle because human beings are, by our nature, very messy. At the beginning of a divorce—I'll be quick—people don't like each other, and then some people can get around to liking each other and they might formulate a better outcome over time, as Dr. Landau says.

My experience in high-conflict cases—and I've done enough of them to know—is that what Mr. Ludmer said, I think his evidence was that when parents love their children, then shared parenting or equal parenting can work, is not the problem. The parents hate each other at times. The idea that you have a presumption of equality, using that language instead, is a mistake because it undermines what's really going on. The adults are fighting about the children, so sometimes judges have to make hard decisions and that's okay, because they usually try to do what's best for the kids.

That's my view.

Mr. Arif Virani: Ms. McCarthy.

Ms. Martha McCarthy: I think it's very interesting that you reference that old report. It feeds into what I thought when I got here today, which is that issue is not in the proposed legislation. I thought we'd debated that and we'd all moved on to an acceptance that a presumption of equal time didn't work in Australia, was incredibly problematic and promoted conflict. I joked about it earlier, but had I known there was going to be a major amount of this discussion on a presumption of equal time, I would have spoken to it. It's not possible for me to be more strongly opposed to it. I think it's nothing but trouble.

If what we're working on is giving fathers a sense of equality in our justice system or propping them up to a place where judges or mediators now look at them as full and equal parents, that has happened. If anything, they are the strongest, most powerful interest group in Canada. They have affected, depending on your perspective, the mindset of judges at the Court of Appeal for Ontario, at the highest court in the land. I think they're a massively successful interest group, and we don't need to worry about that. We have 50% of people who don't go to court, who settle their cases without separation agreements, without anything. Then we have people who argue, and for those people, if you put a presumption on that, you'll just increase the amount of litigation and arguments.

● (1735)

Mr. Arif Virani: Thank you.

Can I just ask you another question that relates to something that wasn't discussed directly, but it's certainly a key part of the statute, which is about addressing the inability of people to access assets and understand where the assets may be located on the part of separating spouses, or divorcing spouses?

What I mean by that is the pursuit of actual enforcement of income support, child support and spousal support. What this legislation is doing is empowering different parts of government to talk to one another so that the CRA can talk to the adjudicators so that you can find where assets may be erstwhile hidden. Could you comment on that and what it does to alleviate some of the poverty that we've seen amongst spouses? I'm particularly thinking about the feminization of poverty in that context because the statistics we've seen are that among all the people who are in enforcement arrears situations 96% of those people are women who are owed money by men.

Mr. Daniel Melamed: It's about time. Given the fact that CRA doesn't speak to other groups or whatever the various groups are that need to exchange that information, the ability to gather that information by us, as private lawyers, is a real challenge unless we've got well-healed clients. If the government at all levels is prepared to step up and say, “We're going to act responsibly and despite privacy considerations have that communication”, it's about time.

Mr. Arif Virani: Ms. McCarthy.

Ms. Martha McCarthy: Yes, I agree completely. There's another thing that builds on that, which is fully connected to the feminization of poverty and to disclosure difficulties and the two governments speaking, and that is, when the child support guidelines were introduced, a concept that went hand in glove was an idea of annual adjustments to child support. Annually we pick the scab. Annually people fight.

The concept of it was that they were going to go to a recalculation centre, in capital letters, in the regs, that we were going to put in every courthouse across the country that would help people have auto.... They would get CRA information to a bureaucrat who would possess the stuff, help them with all this and it would all be run in a subsidized way. It never happened. Not a single one of those ever happened, and it's a major failing of the legislation. We have annual reviews with no assistance to people. Those recalculations centres, that would be a great thing we could roll out in the UFCs.

Also, to the same point about the UFCs, it's just like a sweep of the pen, no? We already have the building, we have the people there, so let's put a recalculation centre in somewhere, along with the law help, along with the pro bono students, etc.

The Chair: Thank you so much. I really want to thank the members of this panel. It was really appreciated. On our next panel we have two people by video conference so I would like to get them set up. We'll do a brief recess. I would ask whoever is here for the next panel to come forward.

Thank you again so much.

● (1735)

(Pause)

● (1740)

The Chair: It is a pleasure to resume our meeting with our third panel of the day.

[*Translation*]

I'd like to thank all the witnesses.

[*English*]

We are joined by video conference by Professor William Fabricius, who is an associate professor of psychology at Arizona State University, and he's joined us from New York. We're joined by Leading Women for Shared Parenting and Ms. Paulette MacDonald, who is coming from Lindsay, Ontario. In the room with us we have from the Elizabeth Fry Society of Greater Vancouver, Ms. Shawn Bayes, who is the executive director.

Welcome.

We want to make sure that we don't lose the people on video conference so we will start with them.

Everybody, it's eight minutes. I will probably cut you off if you reach nine because we have to get to questions.

Professor Fabricius, you're first.

Professor William Fabricius (Associate Professor of Psychology, Department of Psychology, Arizona State University, As an Individual): Thank you very much for inviting me.

I'll say a couple of words about my background. I have a Ph.D. in developmental psychology from the University of Michigan, obtained in 1984. I'm an associate professor of psychology at Arizona State University, as you mentioned, and I've taught child development for over 30 years at the university level. Before that, I was a preschool teacher.

My research includes basic child development research. I'm principal investigator on a 10-year longitudinal study of the role of fathers in adolescent development funded by the National Institutes of Health, and I also do applied divorce research on parenting time, parent relocation and overnight parenting time for infants.

My experience with the practice of family law includes service as a board member of the Arizona Association of Family and Conciliation Courts, a governor's appointment to the Domestic Relations Committee at the Arizona State Legislature for 10 years, and expert witness testimony in parenting time cases.

I have also spent a considerable amount of time working with others on translating research into child custody policy. I chaired the committee at the Arizona State Legislature that wrote the major reforms to the Arizona child custody statutes in 2010 and 2013. I was an invited participant in two international working groups: Senator Cools' round table and symposium on family dynamics there in Ottawa in 2011, and the Association of Family and Conciliation Courts think tank on shared parenting in Chicago, Illinois in 2013. I've given over 30 presentations of research to family law associations.

By way of personal disclosure, I am a divorced father of two. Their mother retained legal custody, but we had shared parenting time and we always lived in the same school district.

In my brief, I review four sources of evidence that equal parenting time is in the best interests of children. First, the evidence now strongly suggests that equal parenting time causes benefits to children. Second, there is widespread public endorsement of equal parenting time. Third, the 2013 equal parenting law in Arizona has been evaluated positively by the state's family law professionals. Finally, examples from Canadian case law show that the courts are responding to the new cultural norms by crafting individualized equal parenting time orders, often over one parent's objections and even in cases of high-parent conflict, accompanied by well-reasoned judicial opinions about how that is in children's best interests.

In my brief, I conclude that the overall pattern of evidence indicates that legal presumptions of equal parenting time would help protect children's emotional security with each of their divorced parents, and consequently, would have a positive effect on public health in the form of reduced long-term, stress-related mental and physical health problems among the children of divorce.

As others have pointed out, the current child custody statutes were written in the absence of evidence of how well they promoted children's well-being. The evidence that is now available is, in my opinion, compellingly in favour of legal presumptions of equal parenting time.

In the remainder of my remarks, I will touch on four additional points.

One problem with not having a legal presumption of equal parenting time is that many parents are likely to make parenting time decisions under the impression that the family courts are biased toward primary parenting time for mothers. We have found that this impression of maternal bias was universally held in Arizona before the law was passed. The mere impression of bias encourages parents to settle out of court for less parenting time with fathers, and it becomes a self-fulfilling prophecy. A legal presumption of equal parenting time is needed in most places to overcome this perception of bias among parents who bargain in the shadow of the law.

● (1745)

Two, some researchers repeat the line that the quantity of parenting time is less important than the quality of the father's parenting, but they count things like helping more often with homework, working on more projects together and putting the child to bed more often as higher-quality parenting. However, clearly divorced fathers who do more of those things necessarily have more parenting time in which to do them. Higher-quality parenting requires more parenting time. That's what the data in figure 1 in my brief shows. I do not have a good explanation for why some researchers continue to argue about which one is more important—the quality of parenting or the amount of parenting time.

Three, oddly, most researchers have not focused on what parenting time means to the child. Spending time together in and of itself communicates to the child that he or she is important. We were struck by this in interviews with about 400 adolescents about their relationships with their parents. They spontaneously talked about whether their parents spent enough time with them. We then used state-of-the-art longitudinal analyses and confirmed that the more time each parent spent with the adolescent child in daily activities, the more secure the child felt one or two years later that he or she mattered to that parent. For divorced fathers, this requires having enough parenting time to be able to spend enough time doing the things together to protect children from doubts about how much they matter.

Four, oddly, researchers have traditionally not realized that father-child relationships are just as important as the more traditional child outcomes of depression, aggression and school performance. The potential public health benefits of improving divorced father-child relationships could be substantial. An estimated 35% of children of divorce have poorer relationships with their fathers as a consequence of the divorce. Children who are less close to their divorced fathers have worse behavioural adjustment, worse emotional adjustment and lower school achievement. Evidence from the general health literature going back 50 years shows that poor relationships with either parent contribute in later life to accumulating risk for mental health disorders, major chronic diseases and even early mortality.

Our latest study in this line of work found that adolescents' perceptions of how much they matter to their father were actually more important than their perceptions of how much they matter to their mothers for predicting their later mental health. I'll stop there.

● (1750)

The Chair: That was much appreciated.

We will now go to Ms. MacDonald.

Ms. Paulette MacDonald (Member, Canadian Branch, Leading Women for Shared Parenting): On behalf of Leading Women for Shared Parenting Canada, I thank you, Mr. Chair and members of the committee, for this opportunity to address proposed changes in Bill C-78.

I am a family law reform advocate—

The Chair: Ms. MacDonald, your voice is trailing away now. You were coming in very clearly before and then you stopped. Can you see if you can move closer to the mike?

Ms. Paulette MacDonald: I am a family law reform advocate. That came to be in 2005 after meeting a “non-custodial” father and his two young children struggling in a custody battle. Becoming a second wife and stepmother, I witnessed first-hand the destruction of an entire family simply because mom and dad got a divorce. I was dumbfounded. I couldn't get my head around what was happening to this family and how our family law system seemed to facilitate the worst kind of parenting behaviour, with its bias and winner-take-all approach.

I previously had no idea that the custodial parent, typically the mother, could run rampant within our family law system and child protection agencies. I saw breaches of court orders, false statements of arrears to the family responsibility office, false allegations of physical child abuse, and verbal and emotional child abuse. I also saw that the non-custodial parent, usually the father, is automatically guilty until he has proven his innocence, and by then, the damage is done.

This all took place because the children wanted more time with their father and he was seeking equal parenting time. Mom wanted no part of that, and the family court process allowed her to just about destroy him and her children.

I can confirm to you first-hand that the family justice system is indeed broken. That's why I became an advocate, and that's why I am here speaking to you.

Regrettably, Bill C-78 is not intended as a much-needed and overdue overhaul. Instead, it's targeted as more of a legal housekeeping exercise. Still, through the action of this committee I believe that Bill C-78 represents the best opportunity in more than 20 years to make select changes in the Divorce Act, demonstrably supported by Canadians and backed by authoritative social science research.

My remarks address a presumption of equal shared parenting as being in the best interests of the child. Equal shared parenting should be the starting point for judicial consideration. If both parents are deemed fit while the marriage or relationship is intact, then both parents should be deemed fit when the marriage or relationship ends.

Social science informs us that children do much better with both parents. Conversely, children raised without both parents generally underachieve, are prone to more medical and social problems, and have significantly higher rates of incarceration, all at taxpayers' expense. Continuity of parental and family relationships to the maximum workable extent is what is in the best interests of the child. Hence, fit parents should not have to spend their life savings in family court simply to maintain a pre-existing relationship with their children, as is all too often the case.

Equal shared parenting is fully endorsed by social science research as the preferred child arrangement post-dissolution, barring issues of abuse, neglect or violence. In fact, 110 eminent researchers publicly endorsed this scientific conclusion in 2014.

Moreover, in a 2018 special edition of the prestigious Journal of Divorce & Remarriage, a panel of social science experts, went further by stating that the scientific body of research was sufficiently powerful to now justify a rebuttable presumption of shared parenting. I submit that this evidence-based consensus should be reflected in Bill C-78.

Not only is equal shared parenting supported by science, but it is overwhelmingly supported in many countries and jurisdictions, according to polls, as is the case in Canada. In polls commissioned in 2007, 2009 and 2017, Canadians supported a presumption of equal parenting by a ratio of more than 6:1. Notably, the strong support was generally the same, regardless of gender, age, geographical region or political affiliation. This is a non-partisan issue for Canadians.

In 1998, all parties endorsed the shared parenting recommendations of the "For the Sake of the Children" report by the Special Joint Committee on Child Custody and Access. Likewise, the Liberal government of the day commissioned a poll in 2002, which found that Canadians supported shared parenting even then.

The Conservative Party and the Green Party currently have shared parenting as part of their policies. Now is the time for the others to reaffirm their commitment to shared parenting as a non-partisan issue.

● (1755)

Moving towards my conclusion, I'd like to share with the committee the public perception of shared parenting after its adoption in other jurisdictions. A recent example is Kentucky, which became the first U.S. state to adopt an explicit rebuttable presumption of shared parenting in April, 2018. Subsequent poll results of July 2018 indicate favourable support of shared parenting by a ratio of 6:1, about the same as in Canada. The poll also provides valuable insight on children's rights versus parental rights.

As you know, detractors of shared parenting paint it as a parental rights issue on the erroneous assumption that parental rights and children's rights are somehow mutually exclusive rather than overlapping. Here's what the poll reported. Two questions were asked on children's rights, and two on parental rights.

For the children's rights, it is in the best interests of the child to have as much time as possible with their parents following divorce—a ratio of 12:1 agree. Children have the right to spend equal time or near equal time with both parents following divorce or separation—a ratio of 16:1 agree.

For parental rights, both parents, whether living together or living apart, should have equal access to their children and should share responsibility for raising their children—a ratio of 12:1 agree. Separating parents should have equal rights versus either father or mother having more—a ratio of 11:1 agree.

The results strongly indicate that children's rights and parental rights are not mutually exclusive but complementary—oftentimes flip sides of the same coin—while recognizing the primacy of the child.

In that respect, the Minister of Justice was badly advised by her staff for her testimony before this committee on November 5 when she framed shared parenting as a parental issue rather than a children's rights issue. Social science research and the public at large are telling you they are indivisible. To treat them as disjoint is not only scientifically incorrect. It is openly disingenuous.

Children's best interests are served by having both parents actively involved, while parental rights are satisfied by allowing fit parents to raise their children. Canada has no better example of the benefits of shared parenting than Prime Minister Justin Trudeau, who was raised by Pierre Trudeau and Margaret Trudeau.

I conclude by urging the committee to amend Bill C-78 to incorporate presumptive shared parenting to reflect social science consensus and the long-standing wish of Canadians of all persuasions.

● (1800)

The Chair: Thank you very much. Now we will go to Ms. Bayes.

Ms. Bayes, the floor is yours.

Ms. Shawn Bayes (Executive Director, Elizabeth Fry Society of Greater Vancouver): Thank you.

I work for the Elizabeth Fry Society of Greater Vancouver. E Fry is our registered trademark. We provide support services and programs for women, girls and children affected by the justice system. We are the oldest, most diversified and largest of the Elizabeth Fry societies in the country. We are also a member of Child Rights Connect. Child Rights Connect is the United Nations NGO working group on the rights of the child, and we're one of 80 organizations in the world who belong to that organization. Our programs address the intersection of justice involvement and women's daily lives. We understand that rights compete, and that the rights of the child come before all else. It is from that perspective we speak today.

Our programs support not only women exiting the prison, but also offer shelters, outreach for women who are homeless and a full spectrum of addictions treatment from detox to intensive intervention for women, including those pregnant with children. We offer counselling programs inclusive of traditional one-on-one programs; income support programs for people banned from accessing government offices so they have difficulty receiving their statutory and regulatory entitlements like every other British Columbian; and therapeutic access programs for families involved in child protection investigations or family custody disputes.

We enable children to see their parents for those reasons related to family violence and parenting deficits. In addition to that, we have programs for children impacted by homelessness, parental neonatal exposure to substances, and parental incarceration. In short, we see ourselves as a living laboratory provided with the opportunity to see where gaps exist within the current system.

As it would apply to domestic violence and family breakdown, those are the predecessors leading to homelessness for women. Because inevitably when we talk to homeless women in our shelters and we explore what led to that road of homelessness, we are talking about domestic violence, which is the most common pathway women eventually enter. This is inclusive of when we work with street women who are homeless, again through our housing first outreach program.

We see failures in child and spousal support payments that lead women in utter frustration to be labelled as difficult and uncooperative, and therefore, banned from receiving services in government offices or speaking to workers to access things like social assistance entitlements or to discuss problems. We see women struggle with those same frustrations when faced with representing themselves in court against a spouse of higher income represented by a lawyer, and the impact that has on both their ability to explain what they think is important for the court to consider and to orchestrate a response to a well-ordered opposing argument in court.

Lastly, we see the failure of government programs both provincially and federally, such as child support enforcement programs and the child benefit to enable children to receive benefits to which they are entitled.

My comments to the bill are directed to the lives of children. We believe that the Convention on the Rights of the Child would offer the viewpoint that all children in Canada, no matter where they live or who they live with, should enjoy the equal benefit and protection of the state. They do not in fact now do so because of the patchwork of differing provincial and federal laws addressing marriage, common-law marriage and provincial child support enforcement programs, and even income assistance programs and the treatment of child support payments that are paid for women on welfare.

Secondly, divorce disproportionately impacts women and their ability to participate in the process. According to the 2016 census, over a half of Canadian taxpayers who are women have an income of less than $30,000. For women with an income of less than $20,000, that's 40% of Canadian women, and that directly impacts their access to justice.

The federal government, under article 2 in the Convention on the Rights of the Child, should respect and ensure that the rights set forth and presented in the convention are there for every child within the jurisdiction, without discrimination. It says that state parties should take “appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status”.

While recognizing the limitations the federal government operates within, one of the ways it can at least influence and level the playing field over time for children, as provincial legislation is rewritten, is to ensure there is a higher benchmark than what currently exists within provinces. Therefore, we encourage it to identify from witnesses particularly those points where provincial legislation is higher—and we do so on a few.

● (1805)

As it applies to the definition of family violence, the bill sets out a limited definition when it says that “family violence means any conduct” and then goes on to list measures. Many of the women and children we serve can describe the forms of violence they have endured as inclusive of isolating a woman from her family and/or her religious community, and the erosion of her sense of self, connection to others and, therefore, her ability to seek help, which this has created. We would encourage the committee to include and consider a definition that is broader and not finite.

When it comes to understanding family violence and the best interests of the child, this change would not be inconsequential. The ability of women to participate in a process is linked to their experience of family violence.

Proposed paragraph 16(3)(c) states that, in determining the best interests of the child, the court shall take into consideration "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse". Although Bill C-78 proposes extensive considerations with regard to family violence, this factor may be problematic for women who are in abusive relationships or are afraid of what the court will say if they are unwilling to co-operate and accommodate their abuser. The provision may silence women because of fear of the impact on custody and access, and consequently, it may impact the full consideration of the best interests of the child.

Second, the provision is often used against women who have experienced family violence, when they are labelled as uncooperative. The mental health of women is affected by their experience of abuse, and it is demonstrated in their lives by their ability to manage stress and their emotions. These women are commonly labelled as personality disordered in the *Diagnostic and Statistical Manual of Mental Disorders*, the DSM, by mental health professionals. The importance of this is that those symptoms—anxiety, depression, intensive mood swings and paranoia—can cause a woman to be labelled as uncooperative, but they are also an expression of the situation in which she has been living, and they are used against her for the benefit of the person who has abused her.

In B.C., the Family Law Act is the act most often used by the women we serve because they are unmarried or unable to afford the legal fees involved in using the Divorce Act, which can only be heard in the Supreme Court. The Family Law Act sets provisions for mandatory family violence screening and education for all professionals involved in dispute resolution. Those same safeguards are not included in Bill C-78. Such training is imperative to understand and contextualize why one party may appear to be reasoned, rational and well resourced, while the other appears unable to order their thoughts, appears angry or hostile, and is unemployed. It is this understanding that can inform the dispute process and the requirements asked of the parties.

Second, Bill C-78 sets out that at least 60 days' notice must be given to the other parent prior to a relocation, and the notice must include the new address of the parent as well as a proposal for parenting time. Although there is an exception for family violence included in the legislation, the exception must be court-ordered prior to the relocation. Under proposed paragraph 16.92(1)(d), when deciding whether to authorize a contested relocation application, the court will take into consideration whether the person who intends to relocate complied with the notice requirement. That requirement may lead to abused women reconsidering fleeing a violent situation. It also places women in a difficult situation if there is child protection legislation in their province, such as in B.C., where, if you leave a child in that circumstance, you can be held responsible and it can impact your ability to keep your child with you.

Therefore, I would suggest that in considering this issue, consideration be given to whether or not you are ensuring that all children in Canada receive equal protection under the law. I suggest that you cannot do so, and therefore, I suggest this rule of looking to be a high water mark. Second, I suggest that you contextualize that information by ensuring training for staff on family violence and its impact. Third, I suggest that you consider the safety of children and women to be important, and ensure that their safety is not compromised by decisions related to custody and access.

● (1810)

The Chair: Thank you very much.

We will now move to questions. We'll start with Mr. Cooper.

Mr. Michael Cooper: Thank you, Mr. Chair. Thank you to the witnesses.

I'll start with Professor Fabricius.

One of the arguments that is often put forward about why Canada should not move towards a rebuttable presumption of shared parenting is that it didn't work particularly well in Australia. I was wondering if you might be able to speak to the Australian experience, as well as maybe, while you're at it, talk a bit about other states. You did make reference I believe—and if not, certainly others did—to Kentucky and Arizona.

Are you aware of any states that did pass equal shared parenting legislation that abandoned ESP?

Prof. William Fabricius: First of all, Australia did not institute anything like an equal parenting time legal presumption, their reforms basically said that courts should consider it, but it was not anything like an equal parenting time presumption.

In Arizona, we passed a law that directed the courts to maximize the parenting time between the mother and the father. Four years later, we did a statewide evaluation that showed that the courts were implementing that as a legal presumption for equal parenting time, and that the entire family law community statewide evaluated the law positively. After four years of experience with it, we asked about whether people thought it was in children's best interests, whether it affected allegations of domestic violence, or whether it affected frequency of parent conflict and legal conflict. Overall, the findings were positive.

As Ms. MacDonald just mentioned, Kentucky just this past spring passed a very explicit equal parenting time law and the public opinion polls about it are strongly supportive.

Finally to your last point, I know of no state or country that has passed an equal parenting time presumption that then rescinded it. In fact, in Arizona our law was passed unanimously at the state legislature and enjoys the full support of almost the entire family law community.

Mr. Michael Cooper: How many states have equal shared parenting legislation on the books?

Prof. William Fabricius: That's hard to answer. Every legislative session...quite a number of them, but I can't tell you an exact number. It's probably one or two dozen.

Mr. Michael Cooper: To shift gears, can you speak to any Canadian peer-reviewed experts on equal shared parenting?

Prof. William Fabricius: Yes, I think Professor Kruk, Professor Paul Millar and Professor Nicholas Bala have all done research on that.

Mr. Michael Cooper: Thank you.

In terms of the Australian experience, you said, Professor, that they didn't pass legislation for equal shared parenting. You said it was something the judge might consider. Could you maybe explain that a little more. A number of witnesses have appeared before the committee and have specifically said Australia passed equal shared parenting legislation and have used that as the basis to reject it.

What you're saying is inconsistent with what some of the other witnesses are saying, so could you elaborate a bit on what that legislation looked like?

● (1815)

Prof. William Fabricius: I don't know exactly what it looked like. As I said, it was a number of years ago, but my best understanding is that it was a law that directed the courts to consider shared parenting time, but it fell short of a legal presumption of shared parenting time. There may be other people who are more expert on the Australian law than I am.

Mr. Michael Cooper: Thank you.

The Chair: The good news is that the analysts have just sent a brief on the Australian law and what happened. We should all read it.

Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you, Chair.

Thank you to the witnesses.

Ms. Bayes, you spoke at length about family violence and gender-based violence within the home. Can you tell us the rates of women who report domestic abuse as part of their divorce proceedings?

Ms. Shawn Bayes: I don't know the Canadian one.

Ms. Iqra Khalid: In general, do or don't most women report domestic violence, and if so, how ?

Ms. Shawn Bayes: Most women report domestic violence in a divorce situation. Of the women we work with domestic violence is not uncommon.

Ms. Iqra Khalid: Ms. MacDonald and Mr. Fabricius, do you have any comments with respect to domestic abuse in how it's reported or how it's referenced within any divorce case as it goes through the courts? We'll start with Ms. MacDonald.

Ms. Paulette MacDonald: We find that, first of all, domestic violence in itself is a crime. I've been saying this for decades. It should be treated as such. It should be dealt with in criminal courts, where they have the resources to conduct a proper investigation, and not in family courts.

I can't remember the specific numbers offhand, but approximately 70% of domestic violence allegations that come up in the context of divorce are false. Even on the Kentucky survey that I spoke of, question number 10:

> Do you generally agree or disagree with the following statement: It is not uncommon for a divorcing parent to make a false violence or abuse claim to gain an advantage in child custody cases?

Ms. Iqra Khalid: Ms. MacDonald, is part of your brief, the source of the numbers you're quoting?

Ms. Paulette MacDonald: No, I didn't get the poll.

Ms. Iqra Khalid: Can you provide that for us?

Ms. Paulette MacDonald: Absolutely.

Ms. Iqra Khalid: Thank you.

Ms. Paulette MacDonald: I didn't get it translated in time.

Ms. Iqra Khalid: Okay. That's completely fine as long as you send it over, because we like to reference all this stuff we quote.

Ms. Paulette MacDonald: Absolutely. I'd be happy to.

Ms. Iqra Khalid: Mr. Fabricius, do women tend to report domestic abuse or bring it up within their divorce cases, especially in instances where children are involved?

Prof. William Fabricius: I can't tell you the rate in Canada or anywhere else, but of course it happens. I'm sure it's a minority of cases because most divorces are settled by the parents outside the court system. I know that's true in America, and I assume it's true in Canada. Perhaps 90% are decided by the parents maybe after consulting an attorney without going to court and without filing charges.

Clearly, domestic violence is a problem, but I can't tell you the rate of allegations of it. I do know that in Arizona there was a perception of a slight increase in rates of allegations of domestic violence and substance abuse and child abuse, but a very small indication, which we took as a good sign, in that our presumption of equal parenting time didn't suppress allegations of those things. If anything, there was a slight increase. From the data and the actual evidence I have, our judges, our attorneys statewide, mental health professionals and our conciliation court staff didn't see any evidence that the equal parenting laws suppressed those kinds of allegations.

● (1820)

Ms. Iqra Khalid: Ms. Bayes, do you have any comments on that? Do you believe that equal parenting would suppress, or not, domestic abuse matters within a home?

Ms. Shawn Bayes: In the work that we do with the Ministry of Children and Family Development as it applies to supervised access, those do not appear to be and we've not been involved in any discovery of unfounded allegations. In my experience with those we work with, I take their complaints and the issues they raise to be legitimate. I think they're able to reasonably demonstrate that to us fairly easily in terms of what we see.

We see in our shelters older women who have no access to marital resources, single women whose children have grown, or younger women with children who, as well, are struggling just with the basic things of even entitlements to programs such as the child benefit.

Ms. Iqra Khalid: Thank you. Those are all the questions I have.

The Chair: Thank you very much.

[*Translation*]

Now we'll move to Ms. Sansoucy.

Ms. Brigitte Sansoucy: Thank you very much, Mr. Chair.

My question is for Ms. Bayes.

I'm going to pick up on the family violence issue. Various studies show that the risk of serious family violence that can have lethal consequences is much higher among Canadian women of indigenous origin than among non-aboriginals. It is therefore essential that the bill take cultural differences into account in the fight against family violence.

Ms. Bayes, based on your organization's experience, do you think the bill should contain elements that enable you to provide assistance more specifically to Canadian women of aboriginal origin who must deal with family violence?

[*English*]

Ms. Shawn Bayes: Yes. I will contextualize it by saying, in the last year and a half, the Elizabeth Fry Society has been doing a lot of work in northern B.C., where we see that the majority of reasons indigenous people are entering the criminal justice system have to do with domestic violence and the lack of resources that exist there, inclusive of inadequate housing, no shelters, no transition houses and even limited supervised access programs.

It's fair to say that resources have to be made available to support families and to enable them to move past. The obligation is to enable children to be as whole as possible in their relationship with both parents, and to enable parents to interact with children in a manner that's safe and puts the child's interests first.

[*Translation*]

Ms. Brigitte Sansoucy: Your answer leads me directly to my next question.

We have heard from several associations and organizations like yours that take in, support and assist women experiencing divorce and family violence. There are several organizations of that kind in my riding.

We know that divorce and family violence are major factors in rendering women vulnerable, hence my sensitivity to the work you do in your organization.

What measures could we add to Bill C-78 to support all the associations that play a fundamental role in supporting families going through divorce?

● (1825)

[*English*]

Ms. Shawn Bayes: The first thing in terms of resources to support children is to ensure that there are equitable resources available to women. That has not been our experience of what is provided. Women who have been victimized don't represent themselves well. They aren't articulate. They are angry. They are hostile. They are unpleasant to deal with, and rightly so, having been through a difficult experience.

What is needed is an opportunity for that woman to move past that, to do her best to be able to speak and articulate for herself and her child. What we see is that women are not given that opportunity to have space to recentre themselves in such a way that they are able to fully participate. In terms of resources, the place to resource it is to be able to provide that space. We see women often being pushed quickly to move through a process. I take that as a lack of training on the part of family counsellors who are involved in that.

Secondly, and I will speak unguardedly, part of the problem is that, in some ways, this is a piece of legislation that is available to people who are affluent. The cost of being able to use the benefits of this legislation are difficult if you have no money. As I said, over 50% of women, 55% of women, have an income of less than $30,000. That prohibits you from affording a lawyer to be able to represent yourself. That's really one of the barriers, so I'd like to see anything you are able to consider in terms of resourcing that to make it more accessible. Supreme Court fees are even difficult for women who represent themselves to be able to afford that.

Those are some of the barriers that get in the way of women being able to go back to court when they know there is a difference potentially in income or other factors that they believe should be considered in light of ensuring the child's interests. In terms of those fees, you do control that. The administration of justice is provincial, but I understand that's the one place where you have some access to address it.

[*Translation*]

Ms. Brigitte Sansoucy: Do I have any speaking time left, Mr. Chair?

The Chair: Since you took virtually no time last time, I'm going to allow you some.

Ms. Brigitte Sansoucy: That's kind of you.

Ms. Bayes, you mentioned support. Another witness told us that federal support guidelines should be amended and we should have a framework or basic formula to increase the stability and predictability of support. However, representatives of the Barreau du Québec told us that, even though there's an equitable mechanism proportionate to the amount involved that is easy to understand and to implement, it's hard to apply in the case of a debtor who simply doesn't have the wherewithal to pay support.

One of the bill's purposes is to reduce poverty. What mechanism should we put in place regarding support, particularly for couples with very limited financial means?

[*English*]

Ms. Shawn Bayes: As it applies to couples with very restricted incomes, the capacity for redress over time is important. I will give you the example of students who go through something. Over time, we see men's opportunity and assets increase, yet there isn't an opportunity then to go back, because those assets are taken to have been earned outside of the relationship.

In terms of being able to provide for the care and protection of that child, we would hold that the child should have access to the benefits afforded to the adult. Whoever you are, as a mother or a father, if your income and ability to support and be involved in advancing your child's life increases, your child should benefit from that.

● (1830)

[*Translation*]

The Chair: Thank you very much.

Ms. Brigitte Sansoucy: Thank you.

[*English*]

The Chair: Mr. McKinnon, you have the last questions of the day.

Mr. Ron McKinnon: Good. Thank you.

My question is for Ms. Bayes, to start with.

Would you say that the requirement for giving notice in cases of relocation perpetuates women—particularly low-income women—in circumstances of violence and prevents them from getting out of those circumstances?

Ms. Shawn Bayes: I would.

In B.C., you are able to leave. The other party doesn't have to be present. You can leave and then go to court to make that attestation. I think that's important, particularly for low-income women. They are often very fearful of the state and of their children being apprehended. I've heard many women say that they are concerned about having endured these relationships and exposed their child to domestic violence because if they continue to do so, that's grounds for the ministry to come and apprehend their children. They feel caught in a situation where they don't have the resources to leave, but they understand that their child may be apprehended from them because they're not protecting their child from exposure to violence —either to the child themselves or to the parent.

Every provincial legislation across the country is constructed that way. I think it is important to allow women the opportunity to leave, to flee, to protect themselves and their child, and then to make that statement.

Mr. Ron McKinnon: You also made a comment about mandatory screening for violence. I believe you indicated that for low-income women, it was difficult for them to get access to those kinds of services. Is that what you said, and if that's the case, would you suggest that those kinds of services should be available from the court as a sort of court-supplied friend of the court kind of thing?

Ms. Shawn Bayes: The Family Law Act for B.C. provides that staff are trained and able to do those screenings. Elizabeth Fry Society has provided that training for the ministry for children and families, to enable them to do that screening as well. We have a particular expertise there. This act, however, does not set out that staff would be trained, and we would hold that they should be trained, similarly to that. The B.C. legislation is very explicit that people have to have that training in order to do this work and to understand the context of what they're seeing because, otherwise, you just think you're faced with somebody who's difficult.

Mr. Ron McKinnon: Thank you. I'm going to switch to Dr. Fabricius now.

Dr. Fabricius, I believe I heard you say that Arizona did not implement in their law a presumption of equal parenting. They implemented a maximum contact approach. Is that what you said?

Prof. William Fabricius: Yes. The wording of the law said that the court shall maximize the parenting time between both parents, and we defined children's best interests as frequent, substantial, meaningful and continuing parenting time. We found that the courts are implementing it, and they're implementing it as a presumption for equal parenting time. Most of the attorneys and judges agree that's the way it's being implemented.

Mr. Ron McKinnon: Okay. Thank you.

In your brief, when you expounded on a test case from Arizona, at the end of that section, you said that “there was no reported change after the law in rates of parent conflict or legal conflict leading up to the final decree.” We heard testimony earlier today from a lawyer who said that the presumption of equal parenting would actually reduce dramatically the amount of litigation, so this is kind of a conflict. If you could comment on that, it would be helpful.

Prof. William Fabricius: I just have to stand by our data. We polled the state family law community, and overall, they said there was no change in legal conflict or parent conflict leading up to it. That's based on a statewide poll of people involved in the legal community rather than an opinion.

Mr. Ron McKinnon: I guess I'm curious about the nature of the poll. How scientific was this poll?

Prof. William Fabricius: I worked with a committee of people including one of our state judges, one of our family law attorneys, the director of one our conciliation courts—which is the court mechanism in each county that provides services—and also one of our state mental health providers, who is involved with custody evaluations. Each one polled all of their colleagues in the state. We got an 82% response from the conciliation court, 40% from the judges and the mental health people just about, and we got 11% of the attorneys. It's a high rate of response from the entire state, so in my opinion, it was a very good survey of people who've had 40 years of experience with the law.

● (1835)

Mr. Ron McKinnon: In your testimony, you mentioned the value of shared parenting and the involvement of both parents as much as possible. I take that as given. I think it certainly makes sense. However, I think that it's another matter to go from there to the position of presuming that this exists in the particular circumstances in a given divorce. The law under discussion here is that the best interests of the child are the fundamental principle. Out of that we can use concepts such as maximizing parental time and so forth.

Can you connect those dots better—from the fact that it is a good idea to have shared parenting to the fact that we should presume it in any given case?

Prof. William Fabricius: It would be a legal presumption that's rebuttable. It would not supplant evidence of mental health problems, violence or any of those factors that are already in the law. That's the way that we thought about it in Arizona. It would communicate importantly to parents that the courts are predisposed towards equal parenting time unless there's very good reason against it. That would overcome the widespread impression that there is a maternal bias in courts, which we found in Arizona.

Mr. Ron McKinnon: I'd say that if we—

The Chair: Ron, you're at seven-something minutes.

Mr. Ron McKinnon: Sorry.

Thank you for your testimony.

The Chair: I want to thank each of the witnesses again. You've been very helpful. It is incredibly appreciated.

As Ms. Khalid asked, if you have the background of those polls that you cited, it would be great if you could send that to us, too, so that we have the source of the data.

Thank you so much everyone. The meeting is adjourned.