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Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

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● (1555)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): I call the meeting to order.

Welcome, everyone. It is a pleasure to resume our study of Bill C-78 with a very distinguished panel of witnesses.

Joining us today we have Professor Nicholas Bala from the faculty of law at Queen's University. Welcome.

[*Translation*]

We have Julie I. Guindon, a Lawyer, Mediator and Parenting Coordinator at Société professionnelle Julie I. Guindon.

Welcome

[*English*]

We have Mr. Robert Harvie, attorney, advisory board member at Huckvale LLP, National Self-Represented Litigants Project. Welcome.

We have Ms. Laurie Pawlitza, who is a Partner at Torkin Manes LLP. Welcome.

We will go in that order in terms of testimony, so we will start with Professor Bala.

Professor Nicholas Bala (Professor, Faculty of Law, Queen's University, As an Individual): Thank you. It's a pleasure and privilege to be here with you today.

As was mentioned, I am a law professor at Queen's University. I've been working on family justice issues for close to 40 years. I've written quite a few books and articles, and my work is cited by the Supreme Court of Canada, as well as by other courts.

I am a member of the board of the Association of Family and Conciliation Courts, Ontario, which is an interdisciplinary organization, and they support many of the positions that I have, or I support them. I think their brief is going to be posted for you tomorrow.

As will be discussed or referred to, I have also been working with professors Rachel Birnbaum, Michael Saini, Francine Cyr and Karine Poitras on a series of papers around this new legislation and related topics.

Broadly, I and all those with whom I work support the direction of this legislation very much, and there is a great need for change. The legislation was enacted in 1986, and in fact many of the terms and ideas come from 1968. Canada is one of the last countries to bring about reform.

We have already seen reforms in a number of provinces. Many of the provisions of the act, such as imposing duties on parents to try to resolve conflict and so on are very important. The provisions around views of the child are again very important and reflect present practice. The provisions around family violence I think are very important, as are the provisions around relocation as well. I have written about many of these topics.

You have my brief. I would certainly be happy to answer questions. As you know, my time is limited, so I am just going to touch on a few points.

First of all, in regard to proposed subsection 16.1(6), family dispute resolution, the definition of that refers to negotiation, collaboration, mediation. I would submit to you—and I know many others would—that it should also refer to counselling, and perhaps parenting coordination. Certainly one of the things that courts should be able to do is refer or order the parents and child, if necessary, to go to counselling. Often that's the best way to resolve matters, and there is a large amount of research about the value of counselling—not for everybody, but it certainly should be an option.

Right now there is a division in case law. Some judges say that of course we can do this and others are saying, no, we can't, because there is no explicit provision; we can't send people to counselling in criminal court, so why should we be able to do it here? Therefore I would urge you to include counselling.

The second thing I would specifically say is that in proposed subsection 16.2(1) refers to “maximum parenting time”. I would urge you to change the title. The title is actually a relic there. The present legislation, as you know, reads “maximum contact” time. Now you've called it “maximum parenting time”, and those are very different concepts, and indeed the actual provision does not relate to the title. The title has been used by courts in previous cases, so I would urge you to change the title, perhaps saying what reflects the section, which is parenting time consistent with best interests. There may be other words, but “maximum parenting time” may be misinterpreted as equal parenting time, and I'm going to come to that. I think that's very problematic, so I would urge you to change that.

One more specific comment is about relocation. I think it's very welcome that the bill has a scheme for dealing with relocation cases. Largely, I support it. I know that my colleague Professor Thompson was here, and I endorse much of what he said.

One thing that wasn't said was in regard to one parent wanting to move and giving the other one written notice of moving. The way this is drafted right now, the parent who is not moving has to file an objection with the court. That means that you've begun a court proceeding right away, which is both difficult and expensive, and it may be unnecessary. While it could be useful in some cases, I would suggest that it would be sufficient to file a written objection, perhaps in a prescribed form, rather than actually having to go to court.

In my remaining time, I would just like to focus on an issue that I know you've been dealing with, which is the argument for a presumption of equal parenting time. I would urge you not to go in that direction. I know you've had some witnesses come and testify about that. I think their research is very problematic in many respects, and I can get into the details of that.

The work of professors Kruk and Fabricius does not reflect the majority of social scientists in North America, or really in the world.

● (1600)

Most people who have worked in the field and done research, including the people I've collaborated with, do not support equal parenting. They support shared parenting. They support the idea of equal parenting in appropriate cases. However, they're very concerned about the effect of a presumption of equal parenting.

I should say that although you've heard things suggesting it's being done around the world, there's only one jurisdiction in the world at this point that has a presumption of equal parenting, and that is Kentucky. Every other jurisdiction that's looked at this has resisted those kinds of words, and jurisdictions that have moved in that direction, like Australia, have actually come back. There are many concerns about it in terms of its effect on cases, and in particular the experience....

I should say that although he didn't highlight it in his presentation to you, the article of Professor Fabricius—again, I think if you're going to look at social science research, you have to go back and look at the original study—points out that even in Arizona, which has a very weak form of an equal parenting approach, there's been an increase in litigation. I think there would be a widespread concern that if you go a presumption, it will increase the amount of litigation. It will expose women in particular, but also in some cases children, to unnecessary risk.

While there are many situations in which equal parenting time is appropriate, there are also many situations in which it's not appropriate. For example, there could be a situation—and there are many of these situations—of people having a child out of wedlock, or the child is born before they separate, and only one parent has lived with the child. When the child is two, the father comes along—often it's the father—and says, “Parliament said that I have a right to equal parenting time.” I think that would be highly problematic. It's exactly in those kinds of cases that I think it would be used.

I know that as a value, many Canadians—and you've heard about the public opinion polls—support the role of both parents in the lives of their children. If you want to, you can call that equal parenting, in the sense that they're both parents and they both have a role, for example, in naming the child, and they both should be involved, but to start with that presumption—particularly in the high-conflict cases, in which that presumption will make a difference—I think is highly problematic. It's not a coincidence that every other jurisdiction except Kentucky has rejected this.

We've had discussions, and in fact I can give you data. The vast majority of Canadian family lawyers, who I think are very much settlement-focused, are opposed to this kind of presumption. I know there are some lawyers who take a different view, but we did a study, and over 80% of family lawyers have a concern about a statutory presumption of equal time.

I could certainly go on, but my time is up, so thank you very much for your attention.

The Chair: Thank you very much, Professor.

We will now move to *Maître* Guindon.

[*Translation*]

Ms. Julie Guindon (Lawyer, Mediator, Arbitrator and Parental Coordinator, Société professionnelle Julie I. Guindon, As an Individual): Thank you very much, Mr. Chair.

[*English*]

Good afternoon, everyone.

[*Translation*]

I'll be continuing in French.

The Chair: I would ask everyone to put in their earpieces.

[*English*]

We'll start your time when everybody has them on.

[*Translation*]

Ms. Julie Guindon: Thank you.

[*English*]

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

[*Translation*]

The Chair: Now that everyone is ready, you may go ahead, Ms. Guindon.

Ms. Julie Guindon: It is a privilege to be here today to discuss certain elements of the bill.

Like my colleague Mr. Bala, I have worked in family law for a few years now and I've practised law for nearly 30 years.

My comments today will focus on dispute resolution, since that is the core of my practice. I am a parenting coordinator, mediator and arbitrator. I represent children, so I have some idea as to how things work and I have a sense of what goes on in families.

As Mr. Bala explained, the proposed amendments are very welcome. To some extent, they bring the act up to date with respect to parenting orders, contact orders and parenting responsibilities.

I think it's wonderful to begin moving away from the notion of custody and towards the idea of responsibility. When it comes to parents, sharing responsibility is what matters. Time is one thing, but responsibility is another. That is usually the focus when setting up a parenting plan.

The bill refers to responsibility, providing a guide that encourages parents to work together in a meaningful way on these issues. Parents tell their lawyers they want *x* or *y* and go into mediation with that mindset. That's fine, but numerous responsibilities flow from that, ones that are sometimes overlooked.

Proposed new section 16 of the Divorce Act seeks to put the best interests of the child at the centre of the process. That's a positive thing because it forces us to view the situation from the child's standpoint. The explanation often given by children is that, when their parents were together and fighting all the time, the parents would tell them everything would be better after the separation or divorce. Once the parents separate and divorce, though, the situation gets worse, leaving children to wonder why they separated or divorced in the first place given that it just made things much worse. Clearly, things can become adversarial.

Having factors that outline the best interests of the child helps us view the needs of the child in much more detail and move away from the powers of parents. When it comes to custody and rights of access, the problem always revolves around decision-making power. One party is given decision-making power, and the other ends up being much less involved in the child's life, often to the child's detriment.

Now I'd like to comment on the dispute resolution changes in proposed new section 7. I want to begin by saying that I am glad to see the courts encouraging parents to participate in a dispute resolution process. When the family unit breaks up, the financial resources are split between two households at least. It's very difficult at that point for each person to rebuild their financial capacity. The money goes to the lawyers, and so a lot less goes to the child. By encouraging this avenue, the courts will make people more receptive to dispute resolution.

● (1605)

Dispute resolution may not be appropriate for everyone, of course. It's said that, sometimes, it's better to wait until more suitable opportunities for mediation or negotiation arise. That may be true, but I can tell you that mediation often results in swift measures.

For instance, in the case of a parenting plan, it's important to start with a temporary plan. It could cover a period of a few months, three weeks or whatever is appropriate. After that, the parties come back together and review the plan. It's good for parents, and it's good for children because it lessens the feeling that they aren't being loyal to one parent or the other. They don't feel as though they absolutely have to say a certain thing, otherwise, they won't be welcome the next day. It can give the child greater flexibility in that regard.

On the whole, that's what I wanted to say. I see that the dispute resolution provisions don't really refer to parenting coordination. That may be something worth including. Since parenting coordination to some extent combines mediation and arbitration, I assume it would prove valuable in high conflict situations. I can tell you that parenting coordination is sought when the parties do not want to have to deal with an issue in court. It is commonly used in high conflict situations resulting from an order or a separation agreement.

That was my opening statement. If you have any questions, I would be happy to answer them.

Thank you.

● (1610)

The Chair: Thank you very much, Ms. Guindon.

[*English*]

We'll go to Mr. Harvie now.

Mr. Robert Harvie (Lawyer, Advisory Board Member, Huckvale LLP, National Self-Represented Litigants Project, As an Individual): Thank you for inviting me today. I'm awed, flattered, and humbled, particularly because of the other members of this panel.

I am a lawyer. I've been a lawyer in family law for 32 years. In the context of that practice, I've seen how family law impacts families in dysfunction and hurts children. As a result of that, I became involved as a mediator. I had training as a collaborative lawyer. I later became a bencher with the Law Society of Alberta. I was the chair of their access to justice committee for two terms, and I became involved with the self-represented litigants project through the University of Windsor and Dr. Julie Macfarlane.

The pain that I feel for my clients and that I see for children is real and is what motivates me to do things like being here today.

My comments, in general, are that my concern about Bill C-78 is that it doesn't fundamentally change the problem, which is that the way families matters get resolved is still seen through the spectrum of litigation. Litigation doesn't work for families in disputes. It's a terrible way for people to resolve problems.

We have a clear two-tiered system in which people with money and resources can abuse people who don't have those resources. The process itself is premised on an adversarial approach to resolution, whereby two parties who are already in dispute are actually encouraged to dispute more.

My fundamental concern is that Bill C-78, while having good intentions, laudable intentions, doesn't really make any fundamental change to the process. It's in that context that I've provided a brief to this committee.

I embrace the positives in Bill C-78. I think it's very helpful that we refer to “parenting” instead of “custody” and “access” and that we have stopped referring to children as “assets” or “property”. I think it's very positive that we have better support variation and enforcement provisions interprovincially in the new legislation. I think that expanding and focusing on what the considerations are for the best interests of children is helpful, particularly for self-represented litigants. I think having a more detailed examination of how domestic violence should impact parenting decisions is also helpful.

My concern is that they change the “what”, but they don't change the “how”. That's always been my concern as I've become more concerned with access to justice, and it's in that context that my recommendations are made. I'll just touch on them; I won't go into them in detail.

My first concern—and to some extent it mirrors Professor Bala's comments—relates to the presumptions inherent in the provisions relating to relocation of parents. I think requiring notice, if people are relocating and impacting the other parent's relationship, is good, but I think the extent to which we've created presumption in the legislation flies in the face of the case of Gordon v. Goertz, which I think was incredibly well reasoned by former Madam Justice McLachlin. She basically said that as soon as we create a presumption, we almost ask the court to start with a preference, and that avoids the necessity of looking in a nuanced way at what's truly in the best interest of the child.

Just as Professor Bala says, a presumption in favour of equal parenting will create a bias in favour of equal parenting. Creating a presumption in favour of a parent with the vast majority of time with children to be able to move creates a presumption. Likewise, a presumption against a move whereby parents would have equal access also potentially creates a bias and distracts the court from just looking at all the circumstances and asking what is really best for the child or children. I would strongly urge the committee to reconsider those presumptions in the legislation.

With respect to my second recommendation, consistent the United Nations Convention on the Rights of the Child, which the Canadian government adopted in 1991, we must and should inquire as to the wishes of the child. I think it's laudable that we've included that as a consideration, but we haven't provided any support as to how that occurs, and so we're inviting poorly trained lawyers and, with respect, poorly trained judges, and, clearly, self-represented litigants —who are a growing part of our experience—to put children in the position of picking which parent they like more.

● (1615)

After they've done that and a decision is made based on that information, that child then has to exist with the parent that they didn't prefer.

I think if we're going to invite children—and we have to invite children—to look at what their preferences and their feelings are, we need to provide some administration and some infrastructure to allow that to happen in a way that's consistent with the interests of the children. To not do that is to invite further abuse of the children in that regard.

With respect to encouraging non-judicial dispute resolution, again, I think the aims in the legislation are laudable, but there's no meat there. There's nothing there to compel people. There's nothing there to push people to actually do that, as opposed to engaging in a litigation process.

My experience is that most parties in divorce—maybe all parties in divorce—are in trauma, and they're not making the best decisions they can, so while it may make sense to encourage them and to require them to go through a consideration of alternate dispute resolution mechanisms, with the greatest of respect, I would make that mandatory. I would say, “You have to go through some alternate form of resolution prior to proceeding through a litigation stream”, because otherwise it's a good intention with nothing more.

Finally, related to that, it's my experience that people going through a divorce are not making the best decisions as their highest selves. I think that when we have legislation that implies that they can make reasoned decisions without providing an infrastructure for them to get the counselling necessary to make them functional, you're not likely to create any real change. You're likely to have damaged people who continue to make damaged decisions, particularly against the interests of their children.

Fundamentally, my concern is that we have legislation created by lawyers for lawyers and judges. There's an adage that goes, “When you're a hammer, every problem looks like a nail.” With the greatest of respect, we have laws that are created by lawyers, and to a lawyer, every problem looks like it needs a courtroom. My concern is that we need to do more to move people out of that.

I know that's difficult in a federal jurisdiction, because administration is provincial, but I would urge this committee to go a little bit farther towards creating infrastructure and process changes, not simply changes to the law.

The Chair: Thank you very much.

We'll go to Ms. Pawlitza.

Ms. Laurie Pawlitza (Partner, Torkin Manes LLP, As an Individual): Thank you.

First of all, thank you so much for the invitation to be here. It strikes me that as members of the committee, you probably already know that lawyers really like to give their opinions. I'm going to say that I'm no exception, so here I am.

I thought I'd just deal with a couple of micro issues first, and those are issues of clarification and interpretation. I'm going to concentrate my remarks on things that I think others have perhaps not mentioned. Those relate specifically to the legal adviser and to family dispute resolution. I'm going to concentrate on those things. Then I have a broader issue and concern that I'm going to raise with you as well.

Just by way of some context for making these remarks, like Rob Harvie, I've been practising family law for 32 years, and we've both lived to tell the tale. It is an area of law that is challenging. I have also been quite involved with the Law Society of Ontario. I served as a bencher. The law societies, as most of you probably know, regulate the profession in each province and territory.

I was head of the Law Society of Ontario for two years, which governs, now, about 50,000 lawyers, and is the only jurisdiction in Canada to govern independent paralegals, who have scopes of practice that are circumscribed. That is why I want to first of all commend the work that's done on the definition of “legal adviser”. There is a significant access to justice issue in family law. Both Ontario and British Columbia are looking at the issue of whether properly trained and regulated independent paralegals, known by another name in British Columbia, may provide family law services in the future. It is very important to maintain the broader definition of “legal adviser” and not just limit it to lawyers.

With respect to another issue regarding the legal adviser, the legal adviser has particular requirements to fulfill certain duties under the new legislation, duties that are very broadly set out and are much more onerous than before. In that respect, I'd like to make two specific comments.

One is that it's not clear in the bill when the obligation of the legal adviser arises. It's really important, I think, if we are going to be obliged to ensure that the parties know what their obligations are, and we can rest reconciliation and other issues, that those things are done at the beginning and not when the parties are signing the divorce application. By then they have already reached an impasse with their spouse, and frankly, then it really is going to fall on deaf ears. I would strongly encourage you to make it clear when that obligation on the legal adviser arises.

The second thing that I'd like to suggest to you is that legal advisers ought to be subject to a sanction in the event that the court finds that there's been a breach. If they didn't advise their clients, then there should be some remedies for that, and lawyers and paralegals should know to take that obligation very seriously. They have an obligation now under section 9 of the act; in my experience, at least, it's honoured more in the breach than in the observance, so I strongly encourage you to consider some sanctions.

I'd like to touch on what I think is the most important portion of the bill, and that is the ability to order family dispute resolution. However, I have a couple of concerns with respect to that. Again, they're clarification issues, but I think they're worthwhile raising.

Because the definition of “family dispute resolution” is that it can be for any matter in dispute, but the only mention of it in the bill as to when a judge can make an order is under proposed subsection 16.1(6), which is the parenting section, it seems to me that there will clearly be, for parties who want to have a dispute, a dispute about whether or not that can be ordered for issues to resolve support. I strongly encourage that the legislation clarify that it can be ordered in any matter, not just in parenting matters.

The other thing that Professor Bala and Julie have already mentioned is the issue of adding the role of a parenting coordinator to the non-exhaustive list of things that can be in a family dispute resolution process. Once there is a parenting plan in place, it is very important for the mundane matters to be dealt with quickly and efficiently so that conflictual parents are not going back and forth to court indefinitely.

● (1620)

There is one much broader issue that I would like to raise: what happens before a court makes an order for family dispute resolution. There are three parts to this: one, the cost of those services; two, the issue of domestic violence and power imbalance; and three, if it does apply to all issues, including the financial issue, so that a judge can make that order with respect to the financial issues, we need to deal with the issue of financial disclosure being full and complete before people are sent off to mediation.

With respect to the issue of family dispute resolution, it is important for people who don't practise in the area to understand that this is mostly provided by private providers. Justice Bonkalo, the former chief justice of our provincial court, recently completed a study with respect to whether paralegals could provide some family law services. She cited in her report that 57% of all litigants in the Ontario courts were appearing on their own, without counsel, and when asked the reason, they said it's because they could not afford counsel. It is extremely important, before a judge makes an order, to clarify that services have to be available and they have to be available at either reasonable cost or no cost.

I appreciate that this is a shared jurisdictional issue between the provinces and the federal government, but in my view the centrepiece of this bill is the ability to order people to go to family dispute resolution. In the event that they can do that, we must make sure that the people who need it the most are in a position to access those services. Without some type of assurance with respect to that, the legislation will not have the effect that is intended.

I would add that there should be criteria for the judge, and frankly, for the lawyer as well, as to when a family dispute resolution order ought to be made. The criteria should include that anybody who is going to be ordered to go to family dispute resolution should be subjected, first, to domestic violence screening. Frankly, in my view, that is not something that is appropriate or a good use of a judge's time to do; it requires someone specialized. Again, we come down to who is going to do that and who is going to bear the cost. However, it is extremely important that people be properly screened before they're sent off to mediation.

The second issue is to consider what family resources are available to the litigants.

Lastly, I suggest that an order be made only after a judge is satisfied there has been sufficient financial disclosure to allow full and complete discussions with respect to support.

There is one last matter—because, of course, we always want to have one last thing. It is this: I urge the committee to consider how we're going to determine whether family dispute resolution is working and how we're going to determine when it works best. I can say, as someone who has been very involved for a number of years with trying to move ahead with family law reforms, that what we are sadly lacking is good research about which kinds of dispute resolutions work best, how the services are best delivered, at what stage they're best delivered, and the cost-benefit analysis.

Those things are always lacking when we're trying to make progress with family law reform. ln the event that we are able to track that information and that data, we will actually be able to move the system forward, as Rob suggests, in a much more efficient way.

● (1625)

I really encourage people to think about the partnership with the provincial government and what's necessary to do there.

The Chair: Thank you so much.

We will now move to questions. We will start with Mr. MacKenzie.

Mr. Dave MacKenzie (Oxford, CPC): Actually, Mr. Saroya will ask one question first.

The Chair: Okay. Go ahead, Mr. Saroya.

Mr. Bob Saroya (Markham—Unionville, CPC): Thank you, Mr. Chair.

Thank you to all the witnesses. I can see there's a ton of experience here.

I'll give you one example of somebody who came to see me a couple of months ago, and this was the case. Whenever something like this happens, it's always or usually the women who have been hurt the most. Most of the time, the men have the money and they buy the toys for the minor kids; they're always on their side. In many cases, the richer side doesn't come forward with disclosures on their financial situation. They hide the money. Sometimes mothers don't know the whole situation. When they run to the lawyer, they don't have the money, so they look for the cheapest lawyer they can find, who's no help either.

I'm giving you a true situation here of someone who came to see me. The minor kids were against the mother, and all that stuff. What can be done in a situation like this? Can any or all of you speak to this?

Thank you.

Prof. Nicholas Bala: I don't mind starting, because certainly you're right in identifying what we would call problems with access to justice, particularly access to family justice. There have been a number of reports written about it, and I have written articles with other people.

One thing is that it won't be one thing. It will actually be many different things. Some of the things we're trying now include increasing access to public legal education, and not just in English and French but in other languages as well. In Ontario we're talking about making use of paralegals for certain kinds of matters. Although it is controversial, I think it's a good move. It has to be very carefully monitored.

Another thing we're doing in Ontario right now, hopefully with the support of the law society, is encouraging what we're calling “limited scope” family legal services. Rather than hiring a lawyer for the entire family process, one would spend a couple of hours at a key point with a lawyer. There might also be lawyers at family court being paid by the hour, rather than being fully retained. That's another step in that direction. I think those kinds of things will certainly be moving us in the right direction, but justice will never be a low-cost undertaking. We have to think about that as well.

The other thing I would broadly say is that we've tried to simplify the law in certain areas. When you talk about financial matters and disclosure—you're exactly right that it's a big issue—the federal and provincial governments have simplified, for example, the child support guidelines and the spousal support advisory guidelines to help determine outcomes.

● (1630)

Mr. Bob Saroya: Could I ask a follow-up question, please?

The Chair: You guys have three more minutes.

Mr. Bob Saroya: How do you force the rich one, the husband or the wife or whoever it is, who keeps dragging things on, knowing that the other side doesn't have the money, to...? Can anything be done?

Prof. Nicholas Bala: Again, I've been privileged to write about this. One way is using what we're calling “cost sanctions”: a judge orders the person who's dragging the process out unreasonably or who is not accepting reasonable settlement offers to pay the legal fees of the other person. This is a bit of a moving target, but understanding around that kind of issue has certainly increased. I think we're seeing judges—more in some provinces than others, by the way, and certainly more in Ontario—make cost orders to incentivize people. For example, if you don't properly disclose, you will end up paying more at the end. If you drag this out, if you don't accept a reasonable settlement offer, that will increase the cost.

Many of these things I'm talking about are actually matters of provincial jurisdiction. They're very important. I think you've heard from all of us about the complexity. The federal-provincial overlap in jurisdiction here is significant.

I think the federal government does have a critical role. For example, I fully endorse the idea of research and public legal education. There are things the federal government can and should be spending its resources on that would help improve access to justice.

Mr. Dave MacKenzie: What I hear from everybody—and we've heard from a number before—is the importance of mediation and how it can reduce the trauma and the costs and so on.

Who is responsible for training the mediators, and how do we judge the effectiveness of them?

Prof. Nicholas Bala: Again, there are others who are well qualified, but mediation is a provincial responsibility.

By the way, you're right in identifying that it is to some extent an unregulated profession in Canada. At the high end, we have some wonderful mediators. At the low end, we have people who have gone through divorce themselves, have a certain view of it and say, "Now I'm a family mediator. I am ready to mediate." That's a big problem, and it is totally, I think, a matter of provincial responsibility.

In Ontario we have some mediation that is funded by the provincial government, and the provincial government requires that those mediators have certification from one of the professional organizations. There's the Ontario Association for Family Mediation and some other organizations that train and certify mediators as meeting certain minimum standards.

It's a very big issue, and I think you're right in identifying it.

The Chair: Thank you very much.

We will now go to the Liberal side and Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you, Mr. Chair.

Thank you all very much for being here. I appreciated your presentations.

Professor Bala, I would like to start with you. You talked a little bit about equal shared parenting, and you know some of the witnesses who have already appeared at our committee have taken a different point of view from yours, although many have agreed with you.

You mentioned that there's really only one jurisdiction that actually has true equal shared parenting, that being Kentucky. You said that in your estimation there has been perhaps an increase in litigation because of that scheme.

We've heard from other witnesses who actually support equal shared parenting, and who have said that it would avoid further litigation or more litigation. You say that's not the case, and I would like to hear why you think there actually would be more litigation if that scheme were implemented.

Prof. Nicholas Bala: It's a great question, by the way, and—

The Chair: Mr. Bala, I believe you mentioned that was with respect to Arizona and the testimony regarding whether further litigation occurred in Arizona after their change. When the gentleman who wrote the article testified before us, he said the findings were that the litigation was in the same amount, not more. You said it was more. Following up on Mr. Fraser's question, I am also interested in the discrepancy between what you're saying and what he said.

● (1635)

Prof. Nicholas Bala: There are a number of issues there.

In Kentucky there's been no research. They've had that about a year. Arizona does not have a presumption of equal time, although it does have something that looks a bit like maximum parenting.

By the way, I read his brief, and to be candid, if you read the research paper published in the *Journal of Divorce & Remarriage*, it indicates there's been an increase in the number of filings as a result. Having said that, certainly settlements go on; different cases are affected in different ways. You can go back and look at his study.

By the way, in his research—and this goes to the issue of funding of research—he's had limited funding. By far the best research about this issue is from Australia. Again, in my paper I cite a number of people in the Australian Institute of Family Studies, which is well funded by their federal government. If you would like a model for what you should be doing, it would be that. In 2006 they changed their law, and they moved much more in the direction of presumptions about time. They talk about presumption—not equal time, but they use the word "substantial" time, and they certainly found an increase in litigation.

The reality is that once people are told what they are entitled to, they tell us that's what we should be doing, as opposed to saying they have the responsibility for their children and let's see the reality of their family and the reality of their family before they separated.

There are families in Canada in which the father is the primary caregiver. There are families in Canada in which the mother is the primary caregiver. There are families in which it's an equal time. It so happens that at this point in Canada's social history, mothers are doing significantly more child care in most intact families, almost by a ratio of two to one. That's roughly what we should be seeing after separation.

The other thing, of course, is that it should be changing over the course of a child's life. One of the things I like about the legislation is it talks about parenting plans. The idea is that this is a plan that's going to change over time; this is not a fixed court order. This is a plan as your child's needs change.

Another thing about equal parenting time is that we do have Canadian legislation. I've cited a paper by Professor Denise Whitehead. She interviewed children. By the way, Fabricius' research is all based on his talks with professionals, and I know why he did that methodologically: It's relatively easy to get lawyers and judges to talk to you. Let's find out what children think about this.

Denise Whitehead has done the only Canadian study that looks at children. Children like the idea of equality. If you ask them if they want both parents, almost all of them say yes, that they want to spend a lot of time with both their parents, but they'll say they actually don't like moving three times a week.

Mr. Colin Fraser: We'll have to leave it there just because I'm limited for time, but I appreciate that answer. Thank you very much, Professor.

Mr. Harvie, you talked about the issue of relocation and about Gordon v. Goertz. You talked about the presumption there in favour of the moving parent if it's a substantial time with them.

What thoughts do you have on the previous section to that, which deals with, as Professor Thompson told our committee, the double-bind question of whether it would be appropriate to ask the relocating parent whether they would move with or without the child? Whether they would move without the child, I guess, is barred in our legislation.

Professor Thompson told us that. From what Professor Bala said, I presume he would agree with Professor Thompson that it should be permitted, but it may not necessarily carry much weight when the judge makes the decision.

Do you agree that it's an appropriate question to ask a parent who is moving?

Mr. Robert Harvie: I prefer the legislation as it's proposed.

Mr. Colin Fraser: Okay.

Mr. Robert Harvie: The concern with that section, I find, is it too often creates an easy out for judges. You have a parent who's looking to move. Statistically this issue is most often going to be with the mother. I've seen this. They'll look at the mother and say, “Here's the deal. If I tell you your child is going to live with her father, are you still going to move?” In my opinion, that's an unfair question, because most mothers are going to say yes, they will stay; then the judge gets to say okay, then she doesn't get to move.

● (1640)

Mr. Colin Fraser: Yes, of course. That's the whole philosophical bind.

Mr. Robert Harvie: I think that's why that section is there. It's much more important to look at the other circumstances than to put her in that type of no-win situation. I'm in agreement with the current way it's proposed.

Mr. Colin Fraser: Professor Bala, if I have any more time, can I hear your thoughts on that, please?

The Chair: Please be brief.

Mr. Colin Fraser: Sorry to the others. I wish I had more time.

Prof. Nicholas Bala: I don't think it should be determinative, but it shouldn't be prohibited. The reality is that if the judge says you can't move with the child, she's going to be in that position anyway.

It's a relevant fact. For that matter, it's relevant to ask the non-moving parent whether they can move. One of the things we do know is that in a non-trivial number of cases, one parent gets to move and the other parent can actually follow. Obviously it depends very much on their personal circumstances.

I support the view of Professor Thompson, and that's in my brief as well.

Mr. Colin Fraser: Thank you, folks. Sorry I don't have more time.

[*Translation*]

The Chair: Thank you.

It is now over to Ms. Sansoucy.

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

Mr. Bala, you made quite clear the importance of making sure that the child has a voice in the divorce process and that it is heard. In your brief, in fact, you make that point saying, and I quote:

> …the importance of taking account of the perspectives and preferences of children who are the subject of parental disputes, as this promotes better outcomes for children, respects their rights, and often facilitates settlement.

I agree with you, and I wonder whether we shouldn't take it further by providing for a third party to represent the child, in the same way that parents are represented by legal counsel. The third party would listen to and understand the child's views and be responsible for conveying those views and always ensuring they were at the heart of the discussion. The idea would be to really make sure the child's interests came first and foremost in the divorce process, which is the primary goal of this legislation.

A number of witnesses have called it a good idea, which has the support of numerous specialists, psychologists and legal experts. Some even said that judges were not the best people to interview the child.

I'd like to hear your thoughts on that. I see people nodding their heads, so I'd like to give the other witnesses a chance to comment afterwards.

Prof. Nicholas Bala: Thank you.

[*English*]

Concerning the issue of the child's views, it's extremely important that this legislation recognize that, although the practice in Canada already is to take account of the views of children. The real issue is not whether in theory we do take account of the views of the child; the issue is how it is done. In fact, the biggest issue is the resources. It is largely a matter of provincial responsibility; the federal government could well support that, but it's primarily a provincial responsibility.

That said, it is going to vary by the nature of the case. One thing I did talk about in my brief that could well be here is to allow judges to meet with children—which, by the way, happens a great deal in Quebec. Judges meet with children. It can be very effective.

Is it the only way? Absolutely not, but it's something I'd like to see more of. It requires some education and training of judges, but Quebec judges are actually very good at it. In fact, we bring judges from Quebec who might have been real estate lawyers and they say, “Gee, I wasn't sure how to do this. I had a bit of training from some psychologists. Now I do it. I feel comfortable doing it.”

Children really appreciate meeting the judge. It's very important for children that they feel they've been heard, although it's not a complete solution.

A second thing is what we call “views of the child” reports. You have a social worker or a lawyer meet with the child and report what the child is thinking. They actually usually do it twice: once the mother brings the child, and once the father does so. It gives you a picture of what the child is thinking. This is something we're starting to do. A number of provinces have already done it, such as Nova Scotia. It's starting in Ontario and British Columbia. It can be very effective, because one of the problems is that children might be telling the parents slightly different things, and the parents are hearing different things. Each parent is getting a different message. A “views of the child” report is relatively inexpensive and relatively quick, and it really helps. We also have full psychological assessments that can be useful.

Is there a role for lawyers for children? Yes, although in my view it's much more so in child protection cases in which the child has been removed from both parents and the state is involved.

Is there a role for lawyers for children? Yes, but it would be somewhat limited in that when it happens, the primary thing that good children's lawyers do is negotiate with the parents. It goes back to the issue of dispute resolution. A lawyer for the child can be the most effective person to mediate the dispute, but if they're actually going to have a trial, bringing the child in as a party or a litigant can be problematic. It doesn't mean it should never occur, but it should be limited in the family context—

● (1645)

The Chair: She wants to ask another question; sorry.

[*Translation*]

Ms. Brigitte Sansoucy: Indeed, having a limited amount of time to talk to legal experts can definitely be a challenge.

My next question has to do with dispute resolution, Ms. Guindon, but did you want to comment on the notion of giving the child representation throughout the process to ensure their voice is heard?

Ms. Julie Guindon: I would simply like to add that the child's age and maturity level should always be taken into account

Ms. Brigitte Sansoucy: Very good.

Ms. Julie Guindon: When someone works with a child, they have to adhere to the principles that apply to the lawyer-child relationship, in other words, ensure that the child's wishes and preferences are consistently heard and accorded due weight. The most important thing, however, is independence, because we sometimes see that children are influenced.

Ms. Brigitte Sansoucy: I'd like to use the remainder of my time to talk about access to justice as it relates to dispute resolution.

Ms. Pawlitza was very clear on that point, in both her brief and her remarks. Not every family has access to dispute resolution because it's a costly process.

In her brief, Ms. Pawlitza also pointed out that family dispute resolution was even harder to access in many small communities, forcing people to travel or subjecting them to long wait times. Many of you mentioned that people represent themselves, as a result.

Ms. Pawlitza, do I understand your brief correctly in that you're calling on the committee to make sure subsidized mediation programs are put in place and that program funding keeps pace with demand?

I'd also like to hear what the other witnesses have to say. What can the federal government do to support those who are least well off as they cope with lengthy proceedings? The minister was here, and she told us that one of the goals of the bill was to reduce poverty.

The Chair: You are out of time.

I'm going to let Ms. Pawlitza answer, but there won't be enough time for the other witnesses to comment.

Is that all right?

Ms. Brigitte Sansoucy: That's life.

The Chair: Please go ahead, Ms. Pawlitza.

[*English*]

Ms. Laurie Pawlitza: I think the dilemma always is that the programs that usually deal with mediation are dealt with by the provinces.

And yes, it would seem to me, among other things, that we need to consider—as we are lucky enough to have in Toronto—the provision of mediation programs that can be accessed, depending upon your means, at a low, medium or high rate. It is affiliated with the court. The judge can remind everyone that they can go out and access the mediation services that are available in the courthouse.

Unfortunately, obviously that is mostly within the province's domain, although there is, as I understand it, a funding package that relates to legal aid that comes from the federal government to the province. I understand that has been an issue of dispute for a number of years. Obviously if that envelope were larger, it might be something that might be available.

The Chair: Thank you so much.

Ms. Khalid is next.

Ms. Iqra Khalid: Thank you, Chair.

Thank you to the witnesses.

[*Translation*]

Ms. Guindon, sorry, but I don't understand French.

[*English*]

Please excuse me; I'll ask you my questions in English.

It's 16 days of activism against gender-based violence, so I'd like to keep my questions around family violence.

You spoke at length about the importance of family dispute resolution. Mr. Harvie indicated in his remarks that he is of the opinion that this type of dispute resolution should be mandatory before going into the courts.

When we're talking about domestic abuse and a family that is broken down because of this abuse, how does this form of dispute resolution impact those families, and especially children, as we're keeping in mind the best interests of the child?

Ms. Guindon, perhaps you want to go first, and then Mr. Harvie.

● (1650)

Ms. Julie Guindon: Yes, and I will answer in English. Perhaps this will facilitate the time as well.

Family violence and ADR—or alternative dispute resolution—is somewhat controversial in a lot of ways, because there's a train of thought that says you shouldn't have ADR when there's violence, and another train of thought that says you should.

There are mechanisms, and I think that will depend on the facilitator or the mediator in a lot of ways, in the sense that there could be mechanisms in place to perhaps ensure the exchange between the parties and a negotiation between the parties. They could be in different rooms. It could be on different days. Something could be put in place to facilitate the exchange. This might be more difficult, more challenging for the facilitator, but that can happen, I believe.

One of us raised the point of the screening, and I believe that this is also very important. Having somebody who is specialized screen the parties beforehand can be very helpful in determining what type of environment can be put in place to perhaps facilitate the ADR. I'm thinking of, for example, an arbitration that is done within a very confined place. We have courtrooms that are very small as well, and the intimidation is right there, so we see it as well.

I think the important aspect depends a lot on the facilitator as well as on the mechanism that can facilitate the process without damaging the family even more, and most importantly without damaging the children even more. In some cases, it can be done by way of Skype in one room, and the other party may be present but not seen. We have to be mindful that sometimes there are probation orders, or some orders preventing contact.

Ms. Iqra Khalid: Thank you.

Mr. Harvie, did you want to comment on this?

Mr. Robert Harvie: Sure. The best way for me to respond to that is to describe the two scenarios in which that woman is going to find herself, and it's typically a woman in domestic abuse and domestic violence: Either she's going to be in a form of dispute mechanism that can be tailored and structured to be sensitive to her needs and the needs of the children or she's going to submit herself to a litigation process.

When I'm a litigation counsel and that unfortunate woman is in front of me as the opposing party, my job is not to be a nice guy. Unfortunately, what frequently happens in litigation is that this woman is going to be abused again. Her husband is going to be sitting beside me, and I'm going to be cross-examining her, and her situation is going to be very uncomfortable and relatively unconstrained by the judge, who needs to remain neutral.

On the other hand, when I do dispute resolutions as a collaborative lawyer, to be effective, my job is to be empathetic and understanding. In my opinion, that structure can be made, through different mechanisms that have been commented on by Ms. Guindon, to make her safe and to allow her to be heard in a way that's much less traumatic than the litigation process.

Even with domestic violence, I think special arrangements need to be made, but it's still a better process than saying, "Alternative dispute resolution doesn't work for you. Go into a courtroom and let the lawyers have at it." That's my opinion.

Ms. Iqra Khalid: Thank you.

We've heard testimony before with respect to having mandatory screening in place to look for domestic violence, and you've spoken about the alternatives in terms of how to deal with domestic issues in the courtroom or out of the courtroom through alternative means.

Do we have the resources? Is our justice system equipped to deal with this more collaborative approach, to really provide that support to a person who's going through a really difficult time, not only in having to recover from domestic abuse but also in having to go through a process for the best interests of their children and also for themselves, and to separate themselves out of the situation?

● (1655)

Prof. Nicholas Bala: I think that because of the underfunding of the family justice system—and many of you have already identified it—we don't have enough specifically trained judges and we certainly don't have enough counselling available for people. We don't have enough access to legal aid and we don't have enough access to mediation. You've heard a lot of that.

Indeed, many of the issues that are being raised in the questions are extremely important and very valid, and unless the resources are put there, we're not going to be able to address them. In that sense, I agree with some of the comments that have been made earlier. The legislation is progress; without the resources in place, we're not going to see nearly as much as we should in terms of protecting children.

On the question you ask, there's a tremendous amount of research about how children are affected by spousal violence, and that's an overlapping concern with a lot of this.

I'm sorry to have interrupted my colleagues.

Ms. Iqra Khalid: Do I have time?

The Chair: You have time for one little quick question, absolutely.

Ms. Iqra Khalid: Very, very quickly, I'll ask all four just to answer in one word.

The Chair: Oh, it's one word.

Ms. Iqra Khalid: It's one word each. Do you believe that we should have mandatory screening for domestic abuse as part of the process or as part of this legislation, yes or no?

Prof. Nicholas Bala: Yes—not to necessarily exclude people, but to get the information, for sure.

Ms. Julie Guindon: I concur with that.

Mr. Robert Harvie: Yes, but you need an infrastructure to respond to it.

Ms. Laurie Pawlitza: That's correct. I agree with Mr. Harvie.

Ms. Iqra Khalid: Thanks very much.

The Chair: Thank you. That was excellent, the way you all answered in one word or close to it.

I want to thank this panel of witnesses. Your testimony has been invaluable to us.

[*Translation*]

It was greatly appreciated by everyone.

[*English*]

I will call a brief recess and I will ask the people from the next panel to come forward. We'll start again in a couple of minutes.

● (1655)

(Pause)

● (1700)

The Chair: We are reconvening the meeting with our esteemed second panel of the day. It is a pleasure to be joined by teleconference from Fredericton by Professor Linda Neilson, who is a professor emerita at the University of New Brunswick.

Welcome, Professor. Can you hear me?

Dr. Linda Neilson (Professor Emerita, University of New Brunswick, As an Individual): Yes, I can. Thank you very much.

The Chair: Perfect.

We're joined by the Canadian Coalition for the Rights of Children. Kathy Vandergrift, who is the president and chair of the board of directors, is here with us.

Welcome, Ms. Vandergrift.

Ms. Kathy Vandergrift (President and Chair, Board of Directors, Canadian Coalition for the Rights of Children): Thank you.

The Chair: Each of you has eight minutes to testify. We're going to start with Professor Neilson, and then we'll go to questions from the panel.

Professor Neilson, the floor is yours.

Dr. Linda Neilson: Okay. Thank you very much.

I'd like to thank the committee for taking the time to really examine Bill C-78, and I also thank you for the opportunity to comment.

I'm a legal academic. I work at the intersection of law and social sciences. Much of my career has been devoted to attempting to correct problems in the legal system in family violence cases. Among many of the others you have heard from, I applaud some of the changes proposed by this bill.

I worked on the joint NAWL and Luke's Place brief, and particularly on the LEAF brief. You'll find that many of my comments are connected to those briefs. I commend, as have many others, the absence of parenting presumptions in this bill, and particularly the direction to courts to take into account only the best interest of the child.

Many children are blessed with two parents who do not engage in abuse and are supportive, caring and co-operative. This bill doesn't discourage parenting of children by more than one parent. Other children face enormous stress and adversity: violence in the home directed at mothers, stress from parental conflict, child abuse, mental illness, substance abuse, and poverty. These children require a range of responses from the legal system in accordance with their particular individual needs.

We can't anticipate the diverse experiences of all families. Presumptions—any presumptions, such as maximum contact—are beneficial only to the extent that families are the same. When contact increases child adversity, that kind of presumption can cause harm. Removing presumptions frees courts to respond to the needs of children in accordance with individual circumstances.

Also welcome is the direction to give priority to the child's physical, emotional and psychological safety, security and well-being. That provision is long overdue. The hope is that the term "priority" will counter a failure to investigate domestic violence and child abuse that we see in the case law, forceful removal of children from preferred parents, and the ordering of children against their will to comply with punitive orders that may not be beneficial or safe. That "child safety first" provision has been recommended by family academics for decades. That's a very positive change.

As others have said before me, many problems are the result of limited understanding of family violence. The less one knows, the simpler it looks. Family violence is a gender equality issue. It is a child human rights issue too. Every child is directly harmed when coercive control, abuse and violence are directed against the child's caregiver.

Some children will experience long-term fear responses and emotional and even developmental harm. Participating in abuse against mothers is often combined with abuse directed against children. The patterns of behaviour associated with family violence are: demeaning domination; monitoring and surveillance; excessive physical discipline; risky or sexualized parenting; undermining; and coercive control. Those patterns that we associate with family violence commonly continue in the parenting practices against children after separation. Failure to protect impairs children's recovery from fear and reduces child resilience. The new focus on safety, security and well-being will help, particularly if false assumptions are disallowed.

● (1705)

I share with others an enthusiasm for proposed paragraph 16(3)(e), the duty to consider the child's views and preferences. Children have the right to insist that family courts and experts listen more respectfully to their experiences and views, particularly when it comes to parenting and their own safety. I would also, however, confirm what some of your other witnesses have said: that it's really important to hear from children in a way that doesn't put them in the middle of conflict.

I have some concerns about the definition of "family violence". Inclusion of coercive and controlling terminology is welcome, as is harm to animals and property, but the definition misses an important opportunity to identify family violence as child abuse and to articulate clearly the distinction between dominant aggressor abuse or violence and targeted person resistance violence. That kind of clarity could have helped with what will probably become problems with interpretation in connection with self-protection.

Proposed paragraph 16(3)(j) is framed incorrectly. The central concern is what engaging in family violence tells us about a person's capacity to co-parent effectively and supportively. Please refer to the list of considerations to be included in proposed paragraph 16(3)(j) and in proposed subsection 16(4), as recommended in the LEAF brief.

I have very serious concerns about the new “best interests of the child” consideration in proposed paragraph 16(3)(c)—the duty to consider “each spouse's willingness to support the development and maintenance of the child's relationship”—if, from the child's point of view, the relationship is non-existent or harmful. The provision places the responsibility on the wrong parent. In my view, it's potentially harmful to children. Removal of that provision would be best. At the very least, it requires a “best interests of the child” qualification.

I share the concerns that others have mentioned that proposed subsection 16.2(3) imposes parallel parenting. This can be a serious issue in a family violence context, given that we know that perpetrators often engage in frightening, lax or coercive parenting in order to harass or frighten. The suggested modifications in the three briefs would help to correct that problem.

Others have noted the need for additional clarity in the relocation provisions. There's also a need to ensure that proposed section 16.9 (3) clearly allows *ex parte* applications in family violence cases. Proposed relocation has—

● (1710)

The Chair: Professor Neilson, you're at over nine minutes now. I have to ask you to try to wrap up.

Dr. Linda Neilson: Okay.

I was going to talk about the need to rebalance professional duties and alert you to a problem with the Family Orders and Agreements Enforcement Assistance Act.

What I would like to emphasize, most importantly, is the critical importance of specifying in this bill professional obligations to engage in family violence education and professional obligations to use screening tools endorsed by experts, and to ensure in family violence cases that risk and danger assessments for women and children are conducted prior to referrals and decisions.

Thank you.

The Chair: Thank you.

We'll now go to Ms. Vandergrift.

Ms. Kathy Vandergrift: Thank you very much for the opportunity to contribute to this important legislation.

The Canadian Coalition for the Rights of Children is a national network of groups and individuals committed to promoting and implementing children's rights. It started in 1989 when the Convention on the Rights of the Child was adopted. Next year we celebrate 30 years.

Canada is currently undergoing a review of how it implements the convention. That implementation is weak, but Bill C-78 is an important step toward realizing children's rights, and it will benefit many children.

Before I make specific remarks, I want to speak to the high priority of passing this legislation.

Improvements to better protect the rights of children have been proposed and debated for over 20 years in the area of family law. During that time, I have witnessed and met with too many children who had barriers to their development that they shouldn't have had because the systems we created did not adequately protect their rights. Please don't let this opportunity to make those changes pass.

My first comments relate to the best interests of the child. Making this paramount is consistent with the convention. Providing guidelines is something that Canada was asked to do in each of the three previous reviews of how it implements the convention. The change in language is positive. Best interests must be done on a case-by-case basis, with no presumptions.

I would suggest that you might wish to strengthen that best interests of the child section by adding explicit reference to the convention in proposed section 16. Best interests should be framed in terms of all the rights of the child, including things like the right to education and the right to develop their potential. Some of those things become particularly important for adolescent children who are involved in family disputes. If you add the reference to the convention, it means that all the rights of children will be taken into consideration.

Several MPs spoke about the need for public education during the second reading of this bill. We agree, and we would urge the committee to make a recommendation that training in best interests be based on the convention and on general comment no. 14 by the UN Committee on the Rights of the Child, which is guidance for states on best interests of the child.

My next comments relate to consideration of the views of the child.

This is a basic principle of the convention, but this is the first time it is being required in federal legislation. That's a good move for Canada. It begins to fulfill Canada's obligations under article 12 of the convention. Members of our coalition are very active in promoting good practices for considering the views of children in all areas of decision-making. There is a growing body of evidence that outcomes are better when children are informed about their rights and have input into the decisions that affect them. There are good practices also for younger children. These should be based on capacities, not arbitrary age. The challenge we have is to scale up those good practices with all stakeholders.

There will be benefits for children in other areas as well if we do that. Yes, there is a requirement for adequate support for the child in this process, and we would suggest that in some cases, but not all, separate legal counsel is warranted.

My next comments relate to the right to be protected from violence. The committee has heard testimony about the impacts for children of exposure to violence in the home. I would like to highlight, in addition, the safety of children returned to a parent with a history of violence. In the last review under the convention in 2012, Canada was specifically asked to ensure effective follow-up for children who are returned to a family member who has had an experience of violence. Since then, we have seen tragedies in Canada. It's very important that we implement that recommendation and pay special attention to that area.

Finally, concerning child support payments, putting the focus on children's right to support is consistent with the convention and it is specifically named in article 27. Canada continues to have high rates of arrears in parental support orders.

● (1715)

Canada has received recommendations to improve this in every previous review, with no action, so measures to strengthen enforcement are needed. I would encourage this committee to take a close look at that matter after you complete this bill, as part of the review of implementing the convention. In keeping with giving paramount attention to the best interests of the child, perhaps child support payments should have priority over all other payments, including crown debts.

In conclusion, passing legislation to protect the rights of children in family law is urgent as well as important. A program of public legal education for all parties and legal training for lawyers and judges is also necessary, but the convention provides a useful framework that will also make our federal system work better for children in the area of family law.

Thank you.

● (1720)

The Chair: Thank you very much.

We will now go to questions.

Go ahead, Mr. MacKenzie.

Mr. Dave MacKenzie: Thank you, Chair. Thank you to both of the witnesses for being here.

I think that this legislation, by and large, has good cross-party support. It's something that we all want to see to make things better for people going through difficult times in their lives. Certainly all of us have that huge soft spot with children because they seem to be the bartering tool for many of these people.

I guess what I'm concerned about or wonder about is that many of these breakdowns occur when the children are very young.

Ms. Vandergrift, I think you mentioned that it is capacity, not age, that is important. How do we make those determinations for children who are of a very young and tender age? How should they be represented? What should be there for them?

Part of what I worry about are the support monies. Obviously, they are typically paid by one spouse to another. How do we know that those children get the benefit of those support payments?

Ms. Kathy Vandergrift: Thank you. Those are good questions.

I think we have a growing body of good practice about how you can engage even young children to determine their views of the situation. Obviously with infants it's a different matter.

In 2009, we held a conference on the best interests of the child. We spent a considerable amount of time looking at good practices to get the views of children in family law, so I think that can be done.

Another thing I would mention is to change it over time. That's the benefit of parenting plans, so that it isn't a once-and-for-all decision. As the child ages, things can change. I would just caution making it an arbitrary age, saying, for example, that we only consider views after age 12 and not before. We should avoid that.

It says age and capacity. We would lean on the capacity and reduce the focus on age for considering best interests.

In terms of the child support payments, we need much stronger enforcement. I think that's the biggest problem. There are very high rates of arrears.

Mr. Dave MacKenzie: Professor Neilson, I see you nodding. Would you have some comments on those same issues?

Dr. Linda Neilson: I agree with Kathy's comments.

I think ensuring that we have good mechanisms to ensure that children actually receive the support they need is very important. I think there's a great deal of very good literature on how to interview children and how to obtain accurate information about their views. I think that many of those concerns should be addressed through education and training.

How do you support children? How do you put them at ease? How do you make sure that you have full information, without putting them on the spot? We don't want children being placed in situations where they have to choose between parents or anything like that.

Mr. Dave MacKenzie: How do we train the people who are going to make some of those decisions, inside or outside of the court?

Ms. Kathy Vandergrift: I think it requires a program of training. For some years we wondered whether there was enough good practice; I think there is good practice, and there is research showing that it's a benefit to the families. It's also a benefit to the parents if they can really hear and understand their children's wishes.

We need to invest some resources into that, but I think it can be done.

Mr. Dave MacKenzie: Would you agree that it's probably at a provincial level that we need to that? I'm not trying to dump on the provinces, but this would seem to be the appropriate level.

Ms. Kathy Vandergrift: It falls in the area of the administration of justice, but Canada also has a responsibility for implementing children's rights. That requires that we make substantive progress in hearing the views of children.

● (1725)

Mr. Dave MacKenzie: Professor Neilson, would you comment?

Dr. Linda Neilson: There's some really interesting research, particularly out of Australia, looking at children's experiences with experts and the courts. The children said, for example, “Please listen to our experiences as we experience them. Present our views. Don't make assumptions that you impose on us. We really need to be heard, particularly about our lives and what will happen to us in terms of parenting.”

Mr. Dave MacKenzie: Thank you very much.

Thank you, Chair.

The Chair: Thank you very much.

We will now go Mr. Ehsassi.

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

To the witnesses, allow me to thank you. It's been very helpful to listen to you.

I'll start off with you, Professor Neilson. I understand you're one of the leading authorities on system responses to family violence, so I'd be remiss if I didn't ask a question that has come up on a few occasions today.

As you know, some people think it's a good idea to have mandatory family dispute resolution. Others argue that it's not a very good idea, because if there is a pattern of family violence, it's definitely not a very fitting approach.

Would you share the benefit of your views with us?

Dr. Linda Neilson: In the past, I have been involved in designing professional standards for mediators around this issue. I've also written articles on how to make mediation safe, particularly in connection with judicial dispute resolution.

I'll go back to the first step that has to occur there, and that's adequate screening. Before one can make a referral to dispute resolution, and before one can design a dispute resolution process that's safe, one really needs to know what the dynamics are in terms of power imbalance, in terms of level of fear, and in terms of capacity to negotiate on an equal basis. You really need to know a fair amount about that before you can design a process that's safe.

Mr. Ali Ehsassi: Thank you for that.

Second, in your brief and in your presentation, you said that in the bill the definition of family violence could very much be improved. Would you be willing to draft improvements and perhaps submit them to the committee just so that we'd have the benefit of reviewing what those revisions would be in terms of the wording?

Dr. Linda Neilson: Yes. I would be very happy to do that.

Mr. Ali Ehsassi: Excellent. Thank you.

Ms. Vandergrift, thank you very much for your brief. It's very obvious that you have a keen interest in focusing on the interests of the child. In your brief and in your presentation, you said that it was imperative that we essentially cross-reference with the definitions provided in the convention.

From a legal standpoint, what significance would that have?

Ms. Kathy Vandergrift: My suggestion was that if you added to, say, proposed section 16.1 that it was as articulated in the convention, then the best interests of the child would be determined by taking into account all the rights of the child in the convention. The list is good, but there other rights in the convention. That's my suggestion about making explicit reference to the convention. The Youth Criminal Justice Act makes reference to the convention. I think it would be appropriate for a family law act to do the same.

You know, particularly as children get older, more of the rights need to be considered when you're doing a best interests determination. It would make it solidly rights-based. We have a mixed history of best interests, if you recall. It was actually best interests that started residential schools. We need to do best interests well.

● (1730)

Mr. Ali Ehsassi: Methodically. Absolutely.

Professor Neilson, would you comment?

Dr. Linda Neilson: I just want to say to Kathy and the committee that I love that suggestion. I think that's an excellent suggestion.

Mr. Ali Ehsassi: Thank you very much.

Do I have any more time?

The Chair: You have another minute and a half.

Mr. Ali Ehsassi: Ms. Vandergrift, you didn't really have sufficient time to respond to a question put to you by...I can't remember. I think it was Mr. MacKenzie.

We have heard that it's important to put the interest of the child front and centre; however, in practice.... If you can elaborate on what that would look like in practice and on what needs to be done, I think that would be very helpful.

Ms. Kathy Vandergrift: I think the criteria in the law go some way, so there needs to be a process to determine what the best interests are. If the direction to all the players in the court system is that the best interest of the child must be the top priority, and we hold them to that, then I think—maybe I'm not helping you enough—that can happen.

What mostly happens in family law that I hear about is that there are warring parents, and the child's interests are lost. If the courts must put the best interests of the child front and centre—

Mr. Ali Ehsassi: As a matter of principle, I don't disagree with that, but in practice, how do you attain that? How do you make sure you do a very good job of ensuring that the views of the children are presented?

Ms. Kathy Vandergrift: When they make their applications, they need to speak to the best interests of the children first. If you have the views of the child reports—and those are taken very seriously by the judge—that's another way. We heard too that judges interviewing children themselves can be a useful tool sometimes, but sometimes not. I think there are different tools that can be used.

The importance here is that it's going to be very clear in the law and be mandatory, and it will be mandatory for their legal advisers to put their best interests first. If every player has to put the best interests first, hopefully it permeates the system.

The Chair: Thank you very much.

We're going to go to Madame Sansoucy now. Please put your headphone on for translation if you're not bilingual.

[*Translation*]

Ms. Brigitte Sansoucy: Thank you for your remarks.

Both of you agree that, in addition to a reference in the preamble to the act, the UN Convention on the Rights of the Child should be referenced throughout the act.

Thus far, we've been told that the convention should be explicitly mentioned in proposed new section 16. Do I understand correctly, though, that you think specific references to the convention should appear in other places as well?

[*English*]

Ms. Kathy Vandergrift: We were particularly interested in making the best interests strongly rooted in the rights of the children and so chose to recommend it for section 16. I could go through it and look at other places where that might be the case.

[*Translation*]

Ms. Brigitte Sansoucy: Yes, please, and if you see other spots where it should be added, kindly let the committee know.

[*English*]

Ms. Kathy Vandergrift: Yes.

[*Translation*]

Ms. Brigitte Sansoucy: That brings me to my next question. In your brief, you say the necessary measures should be taken to enforce child support payments under the act and thus respect children's rights. You point out that Canada has an unacceptably high level of arrears in parental support orders and that, despite previous recommendations to correct the situation, no improvements have been made.

I'd like you to elaborate on that. What recommendations were made and what more can we do within the context of the act?

[*English*]

Ms. Kathy Vandergrift: Are you referring to support payments?

[*Translation*]

Ms. Brigitte Sansoucy: Yes. I'm talking about child support payments.

[*English*]

Ms. Kathy Vandergrift: I think that a number of measures in this bill are going to help. Beyond that, I think it's greater attention to enforcement and really tracking enforcement and monitoring.

When we prepared for the review of children's rights in 2012, it was surprising that more than 50% of payments were in arrears. Somebody is not monitoring and pushing to make sure these payments are being made. I think it's a matter of enforcement and resources for enforcement, but a number of measures in the bill will assist as well.

● (1735)

[*Translation*]

Ms. Brigitte Sansoucy: When the minister appeared before the committee, she clearly stated that one of the main objectives of the bill was reducing child poverty.

One witness recommended adding guidelines for child support. The Quebec bar association countered that, even with such rules in place in Quebec, the issue was still a problem in cases where the parent required to pay support had limited means.

Child support payments can go a long way towards reducing the repercussions of divorce on the parent who has custody. However, support payment measures may have no effect in cases where families face social and economic challenges.

Has your coalition explored measures to address cases where the payer parent has meagre financial resources?

[*English*]

Ms. Kathy Vandergrift: I understand the desire to improve this area as one contribution to reducing child poverty, because certainly single parents with children are one of the biggest groups. It can't be the only one. When it comes to the poverty reduction strategy, we want to see multiple indicators for child poverty, and it will take other measures by states as well. This is one measure, but it's not the only one we need to ensure that child poverty is addressed.

[*Translation*]

Ms. Brigitte Sansoucy: I see. Thank you. I think a more reasonable approach is needed to achieve that goal.

Now, I'd like to revisit the child's prerogative to be represented. In your opening remarks, you said that a child should have legal counsel in certain cases. Some witnesses talked about the social worker relationship and the fact that the child could also be represented by a third party, which wouldn't necessarily be a lawyer. If medical or psychological considerations are involved, that third party could even be a social worker. The person would be present throughout the process, making sure the child's voice was heard every step of the way. Other witnesses told us that judges weren't the most appropriate people to question the child. A witness added, however, that that wasn't true in Quebec.

I'd like you to elaborate on how the act could be strengthened to ensure the child's voice was heard during the entire process.

[*English*]

Ms. Kathy Vandergrift: I think there can be a range of ways that the voice of the child is heard. When we had our conference in 2009, we highlighted a number of good practices that were of different kinds. It isn't just one way, but I do think that in some cases, perhaps particularly where there is high conflict, legal representation that is done well and done to lift up the views of the child in an appropriate way can sometimes play an important role. That person can also be an agent to lead to reconciliation. Those examples are there as well. I don't think it's just one tool, because legal representation is probably not needed and not appropriate in all cases.

We heard stories also of children included in mediation, and that was beneficial. That's a very interesting approach, and children were actually helpful in a mediation process. This is where I guess training and developing skills to choose the appropriate tools for the appropriate context is a question. I don't know that you can legislate one approach, but I think making the views of the child mandatory is a big step forward in Canada.

● (1740)

The Chair: Thank you.

We'll go to Mr. McKinnon.

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

Thank you both for being here. I appreciate your briefs and your comments.

I will start with Professor Neilson.

Professor Neilson, in your brief you mentioned that although Canadian case law is clear that the child's best interest is the only test, scrutiny of case law reveals that judges are imposing joint-care parenting presumptions. I guess I'm wondering why that is, because I would presume judges are familiar with the case law as well. Perhaps you could comment on that.

Dr. Linda Neilson: In some ways, I would like to ask judges myself.

What seems to be happening—and this particularly comes out of a review of cases in connection with parent alienation, but it also comes out of my review of cases in domestic violence cases—is that the maximum contact provision in the existing Divorce Act seems to be given so much priority that sometimes—and perhaps this is a result of family courts being under-resourced and not having adequate time—rather than fully investigating the parenting and the circumstances of the child, we see in the case law that judges will often jump to the maximum contact provision. They will prioritize that over the detailed analysis of all the facts of the case that we would really like to see in terms of the safety and best interests of children.

Mr. Ron McKinnon: Thank you.

In that same section, you give a list of things that shall not be presumed.

Is that a normal sort of thing for legislation, to say that we shouldn't look at these things? Is that directed at judges to make sure they are following...? I mean, the fundamental principle of this bill is the best interests of the child.

Could you comment some more on that?

Dr. Linda Neilson: That list comes out of analysis of domestic violence cases in which judges have imposed assumptions about domestic violence that are not consistent with the research and the evidence.

The reason that list is included is to attempt to ensure that those presumptions are corrected. There are two ways of addressing that problem: one is through legislation, and the other is through ensuring that there is extensive judicial education in the family violence and domestic violence field.

Certainly the safety priority will help, as will the focus on only the best interests of the child. Those are very helpful.

Mr. Ron McKinnon: Thank you.

I want to jump now to an early part of your brief. You said, “In the absence of extensive specialized education, researchers in Australia have documented limited change in child safety practices after new family violence legislation was implemented in that country.”

I believe you're talking about the need for specialized education. Could you outline who needs that education? Is it judges, lawyers, counsellors? What kind of specialized education are we talking about?

Dr. Linda Neilson: In my view, we need specialized education across the board.

One of the problems that judges face is that many of the experts who are testifying before courts don't understand domestic violence. There is a particular problem in terms of an assumption that family violence is just between the adults; in fact, it is very much a child's best interest issue too, and it affects children fundamentally.

That's part of what is needed in an education program. We really need everybody who is helping families: mediators, evaluators, parenting coordinators, judges, experts testifying before the courts, people who are interviewing children. All of these people need education in this field.

● (1745)

Mr. Ron McKinnon: It's education around family violence—how to identify it and that sort of thing—that we're looking for.

Dr. Linda Neilson: It's how to identify it, how it affects children, the long-term implications, how you assess risk and danger before you make decisions.

Mr. Ron McKinnon: Thank you. I think that's my time.

The Chair: Indeed.

I want to thank the witnesses for their testimony. It has been very helpful, and we really appreciate it.

We will now suspend. I am going to ask everyone in the room who is not on the committee or a staffer of the committee to leave, because we have an in camera session right now.

[*Proceedings continue in camera*]