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Monday 16 January 2006

Journal des débats (Hansard)

Lundi 16 janvier 2006

Standing committee on general government

Family Statute Law
Amendment Act, 2006

Comité permanent des affaires gouvernementales

Loi de 2006 modifiant des lois
en ce qui concerne
des questions familiales

Chair: Linda Jeffrey
Clerk: Tonia Grannum

Présidente : Linda Jeffrey
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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON GENERAL GOVERNMENT

COMITÉ PERMANENT DES AFFAIRES GOUVERNEMENTALES

Monday 16 January 2006

Lundi 16 janvier 2006

The committee met at 1007 in room 151.

FAMILY STATUTE LAW AMENDMENT ACT, 2006

LOI DE 2006 MODIFIANT DES LOIS EN CE QUI CONCERNE DES QUESTIONS FAMILIALES

Consideration of Bill 27, An Act to amend the Arbitration Act, 1991, the Child and Family Services Act and the Family Law Act in connection with family arbitration and related matters, and to amend the Children's Law Reform Act in connection with the matters to be considered by the court in dealing with applications for custody and access / Projet de loi 27, Loi modifiant la Loi de 1991 sur l'arbitrage, la Loi sur les services à l'enfance et à la famille et la Loi sur le droit de la famille en ce qui concerne l'arbitrage familial et des questions connexes et modifiant la Loi portant réforme du droit de l'enfance en ce qui concerne les questions que doit prendre en considération le tribunal qui traite des requêtes en vue d'obtenir la garde et le droit de visite.

The Chair (Mrs. Linda Jeffrey): Good morning. The standing committee on general government is called to order. We're here today to commence public hearings on Bill 27, the Family Statute Law Amendment Act. Committee, I bring to your attention that we have a summary of recommendations, which were produced by Mr. Kaye, in front of you. Should you require any additional research information, you might want to let the researcher know as soon as possible. We have a very short timeline, so if you require additional information, you'd need to let him know quickly.

I understand, Mr. Zimmer, you have something to add to this morning with regard to clause-by-clause consideration of the bill.

Mr. David Zimmer (Willowdale): Yes. There is an issue about the deadline for final submissions of any proposed amendments. I'm going to ask my colleague Deb Matthews to speak to it.

Ms. Deborah Matthews (London North Centre): The deadline for submissions is tomorrow after clause-by-clause has already begun, so obviously that's inappropriate. My suggestion is that we delay clause-by-clause until Wednesday morning, that we leave the deadline where it is, allow people to make submissions and then meet for clause-by-clause Wednesday morning, which means we'd finish up quite early on Tuesday.

The Chair: Any further discussion? Is everybody okay with that?

Mr. Peter Kormos (Niagara Centre): Our job is to serve. As long as it's okay with Mr. Zimmer, as long as it gets his seal of approval, I'm onside.

The Chair: Thank you, Mr. Kormos.

Mr. Zimmer: It has my seal of approval.

The Chair: So the agreement is that we will begin clause-by-clause on Wednesday morning, as we were originally scheduled to do. Is that right? Okay.

Mr. Kormos: That gives us all more time for campaigning.

The Chair: We have more time for other activities.

I'd like to welcome our witnesses.

Interjections.

The Chair: Committee, we have lots of people waiting to chat with us this morning.

I'd like to welcome our witnesses and tell you that you have 30 minutes to make your presentation. When you do come up to the microphone, if you could identify yourself and the organization that you're speaking for so that we can capture it for Hansard.

CANADIAN COUNCIL OF MUSLIM WOMEN

NO RELIGIOUS ARBITRATION COALITION

The Chair: Our first delegation this morning is the Canadian Council of Muslim Women.

Ms. Alia Hogben: Good morning. Can you hear me?

The Chair: I can hear you well. If you could identify yourself, and when you do begin, I'll give you 30 minutes.

Ms. Hogben: My name is Alia Hogben. I'm representing the Canadian Council of Muslim Women and the No Religious Arbitration Coalition.

The No Religious Arbitration Coalition and the Canadian Council of Muslim Women commend and thank the Premier of Ontario for the decision to amend various acts so that no religious family laws can be used. We are grateful to the NDP for their courageous statement that arbitration and religious laws have no place in our civil laws, and we know that the Conservatives support the principle of one law being applied to all of us. Thank

you, and we hope that the bill, with the changes we are proposing, will be passed with all-party agreement.

The last two years have been extremely difficult for us as believing Muslim women. Some Muslims have felt that public attention has led to an increase in the ever-present anti-Muslim and anti-Islamic sentiment, and we know that it has divided the Muslim communities.

We regret that the decision to correct the Arbitration Act took so long, when all we had asked for was to be treated as equals under the law of Ontario regardless of ethnicity, race or religion. There would have been an uproar if anyone had advocated for differential treatment under the law of any racial minority women and their families, and yet the government took so long to acknowledge that religious women's equality rights under our laws must also be protected. It is a great relief, not only for us in Canada but for religious women all over the world, that the state has confirmed its recognition of women's full citizenship and equality before the law. We heard concerns from many countries that are watching closely as to what is happening in a western democratic country, a country which is known for its Charter of Rights and Freedoms.

CCMW has distinguished between sharia and Muslim family laws. For Muslims, sharia has a more profound meaning, while what is being discussed here is jurisprudence. Our plea to all of you today is that we not use the term "sharia," which upsets Muslims and focuses on them, and focus rather on the fact that the Premier is correctly eliminating the use of all religious law, not just Muslim laws.

We would like to recognize the strong coalition of organizations and individuals who have so actively supported us and have done so much of the advocacy work on the basis that this issue was not about Muslim women but about the erosion of women's equality rights. We submit to you our joint declaration and the list of signatories so that their achievements are recognized by the committee and recorded in the annals of the Legislature.

The No Religious Arbitration Coalition and CCMW support the amendments which will guarantee that family law arbitrations in Ontario will be conducted using only Canadian law. Most importantly, the bill ensures that other principles and laws will have no legal effect and will amount to advice only. These amendments meet the overall objective of our coalition in that they reinforce one law for all of us, and this law is open to changes through the democratic processes.

While the No Religious Arbitration Coalition and CCMW strongly support the bill, there are some concerns and we request that these be considered as part of the amendments; otherwise, we will have created other gaps and loopholes which will haunt us in the future.

Our recommendations are:

(1) It is vital that as this bill is creating change in the family law regime and arbitration is being strengthened, the bill include a clause requiring the government to monitor and evaluate the implementation of the law. We recommend that a full evaluation be done at the end of three years that includes a review of the processes, outcomes and impacts on families, especially on women and their children. To do such an evaluation, it will require the immediate development of records and forms which are to be submitted by arbitrators to the Attorney General. We recommend that this start within a specified and a quick period of time. We further request that the government ensure that the expertise of women's organizations, such as our groups, be part of the monitoring and evaluation, with the support of the government to do so.

(2) We recommend that the requirement of record-keeping and reporting to the Ministry of the Attorney General be sufficiently detailed to ensure a thorough evaluation of the processes, outcomes and impacts on women. To implement this, we ask that the process start as soon as possible so that there is no delay in the submission of records and the start of the evaluation process.

(3) We recommend that the language of the amendments is not weakened in any way, so that the strong requirement for the use of the laws of Ontario is clearly stated and no new loopholes are created. We support the government's position that "there is one family law for all Ontarians and that is Canadian law, and that resolutions based on other laws and principles, including religious principles, would have no legal effect and would amount to advice only." Please ensure that this is safeguarded. We ask this because we have already heard that some religious leaders and bodies are persuading women and their families that they can continue using religious laws for arbitration.

(4) We are pleased that parties must have independent legal advice for arbitration. But currently legal aid does not apply in arbitration, which means that many women will not have the means to pay for legal advice. Therefore, we recommend that legal aid be made available for women in need, and that this be included in the bill.

(5) As there are substantive requirements in the regulations, we recommend that these not be delayed, and be implemented within a specified short time frame. This is extremely important, as the regulations contain requirements for arbitrators, such as being members of a dispute resolution organization, or training, and the requirement to submit records to the Attorney General.

(6) As this bill is revising critical acts and as we do not want any family arbitration to occur at this time, we recommend that the act be implemented within 120 days from royal assent.

(7) We know that the justice system has obstacles and challenges and that easy access is lacking for many women. Therefore, we recommend that the public system have resources, training of personnel and cultural and language interpreters built into its infrastructure so that all Canadian women can truly access their justice system.

(8) We have often heard that the Family Law Act of Ontario has problem areas and requires amendments. We ask the help of all the political parties to ensure that the legislation is reviewed as soon as possible and that the

review invoke organizations which have experience in working directly with women and their families.

Our submission includes the coalition's joint statement, the list of signatories of the declaration, the booklet Behind Closed Doors, which was developed by Rights and Democracy (International Centre for Human Rights and Democratic Development) and the information kit developed by the Canadian Council of Muslim Women.

Thank you for the opportunity to speak with you directly. We are exceedingly relieved that our equality rights have been reaffirmed. It has been a frightening journey to realize how tenuous these rights are and to face the possibility of losing some of them in Canada.

The Chair: Thank you for your delegation. You've left about seven minutes for each party, should they ask questions, beginning with Mr. Runciman.

Mr. Robert W. Runciman (Leeds–Grenville): Ms. Hogben, we appreciate your being here this morning, travelling all the way from eastern Ontario.

Ms. Hogben: Yes, as you did.

Mr. Runciman: As I did. I very much appreciate it.

I'm just curious with respect to the approach that Quebec has taken versus Ontario. Would you comment on that? Would you see a preference if the Ontario government had proceeded, or perhaps still could proceed, in a manner similar to Quebec's? Would that be a preference of your organization?

Ms. Hogben: We did look at Quebec. We liked their laws, which just say that the family is of far too great importance to have its matters dealt with outside the civil law system. We also realized—I don't know if that's what you are talking about—that there was a presentation to their Legislature by two MPPs, or MLAs as they call them, where they focused on sharia, or Muslim family law. We agreed with the sentiment but we didn't like the focus on us as Muslims because, again, it created a lot of animosity in Quebec.

Mr. Runciman: Setting aside the sentiment issues and the challenges they pose, is that a preferred route for you or do you see strong distinctions between what's happening here versus Quebec?

Ms. Hogben: Now, with the bill, I have a feeling that this will do what Quebec does, which is a separation. If the Premier's statement is clearly understood, that only Canadian law will apply, then I think it probably will be very similar to the Quebec situation.

Mr. Runciman: When Marion Boyd conducted her review, I'm assuming you were afforded an opportunity to participate in that.

Ms. Hogben: Yes.

Mr. Runciman: What kind of opportunity? Could you give us some indication?

Ms. Hogben: We met with her as an organization and then we brought in some Muslim women, particularly in Ottawa, who spoke to her as well. I think those were the two occasions.

Mr. Runciman: Obviously, you were concerned with the conclusions she reached.

Ms. Hogben: The thing about Marion Boyd's report was that, first of all, she didn't stick with the mandate, with the terms of reference. She only seemed to focus on Muslims. Secondly, we felt that the body of the report contained all the worries and concerns I've expressed to her, but she makes an incredible leap from the body of the report to her recommendations. The very first one caused us a huge amount of anger, depression or whatever, when she said that because she found no proof that religious arbitration created any problems, therefore she recommended that it continue.

1020

The fact remains that she couldn't find any proof of it because no records were kept, and everyone who spoke to her told her there were problems in it. She ignored that completely, and when we tried to talk to her—I spoke at various sessions, at public meetings with Marion Boyd—it seemed to us that she ended up saying she was a religious woman and that she saw this as religious freedom, as opposed to women's equality or rights.

She made a number of comments, at public meetings, such as, "Well, you know, the public system is so poor; why shouldn't women or families go to an alternative?" Our response to that is that that's discriminatory.

Mr. Runciman: Right. You talked about anti-Muslim sentiment. I just wish you'd take a second—in terms of the public release of the Boyd report versus the time lag with the ultimate decision being taken by the Premier, apparently, did you sense or taste or feel that sort of growing sentiment as a result of that delay in making a decision?

Ms. Hogben: Yes, we did. We just felt that it has dragged on. I don't know if it was a more increased—some Muslims feel that there was an increase. I think for us it was far more that it was so focused on Islam and Muslims as opposed to the fact that we were saying, "No religious laws," and we meant no religious law for any group, whether they were Hindus, Muslims, Jews or Christians. I think it was the focus on Muslims that was negative.

The other part of it, which is more tragic for us, is that it has also divided the Muslim communities.

Mr. Runciman: I'm not attempting to drag you into a political debate, although it's hard for me not to, being political myself in this role. Certainly one of the criticisms I had with respect to letting the various groups twist in the wind with respect to this issue was the concerns that your organization had, and continues to have, with what was suggested here: the fact that it did take so long, and the fact that your organization and other Muslim women have to live with the end results of any decisions taken here. It seemed to me that Ms. Boyd, and subsequently the government's inability to make a decision for some period of time, were fuelling this anti-Muslim sentiment.

Ultimately what seemed, from my seat, to sway the government into making a decision was advertising and pressure from non-Muslim women: June Callwood, Margaret Atwood and others. It strikes me that the people

who are being impacted were left on the sidelines and it became more of a politically dicey issue for the government. That's why they responded, and not for the reasons which you've outlined, which are the right reasons to respond.

Have you taken a look at some of the implications of amendments that you're suggesting? I know this is difficult for you. I guess it's difficult, when you talk about legal aid—the record-keeping. There are, obviously, financial and manpower implications, but that's the sort of thing I don't imagine your organization has the resources to really assess.

Ms. Hogben: No. We don't—

The Chair: Just so you know, you have about a minute left, so you'd have a minute to answer that question.

Ms. Hogben: Okay.

Firstly, I just want to say that we, as a small organization of Muslim women, did like and wanted and have been very pleased with the support we got from all Canadian women. They lifted it away from focusing just on Muslims, because that was our concern. So when 100 or so organizations supported us—women, labour and individuals—we were very pleased, because that's exactly what we were saying. I think that that for us was a strength, not a weakness.

Mr. Runciman: No. I appreciate that.

Ms. Hogben: Secondly, about the finances, we're hoping very much that you will support us, Mr. Runciman. If this is going to go through, there has to be legal aid and something has to be done about the public system. We can't continue to say that the public system is bad, that there are backlogs and all the rest of it—it's not accessible, particularly to women who may not speak English as well, or whatever else—and then say, "Go somewhere else." That's just not moral, ethical, or correct legally.

Mr. Runciman: Thanks very much.

Mr. Kormos: Thank you kindly for your participation. I'm pleased about your last comment. I gesture to Mr. Zimmer because I know he's supportive.

One of the problems, as you know, is that even when people—and it's often women—get a legal aid certificate, the cap on the hours that is allowed a family lawyer is so low that lawyers won't accept the certificates. They don't do it out of malice; they simply can't sustain their practices and do justice to that client with the unconscionably and just totally nonsensical cap on the number of hours to devote to a legal aid client. That's across the province; I'm convinced of that. And as you point out very validly, it's going to impact on the purported access by a party to arbitration under this legislation to get independent legal advice.

You've hit the nail on the head, so I appreciate you saying that and I appreciate Mr. Zimmer's body language in response to it, which seemed very supportive of the proposition of adequate funding of legal aid. Thank you, ma'am.

Ms. Hogben: Shall I answer you?

Mr. Kormos: No. I yield the floor to Mr. Zimmer. I'm sure he wants to—

Ms. Hogben: So you're supporting us? That's great. That's all I need to hear.

The Chair: Can I ask that we go through the Chair? Do you have any further comments or questions?

Mr. Kormos: No, thank you.

The Chair: Okay. And from the government side?

Ms. Matthews: Thank you very much. It's a real pleasure to have you with us today. I do want to say thank you for your leadership on this issue over the past too long period of time. The final result is one that we're very happy with.

I want to ask you a little bit about your recommendation on evaluation. I wonder if you can just expand a bit on what you'd like to see measured. What outcomes would you want to see evaluated?

Ms. Hogben: I think we wanted the whole process to be evaluated, so I think what will be important is the setting up of the evaluation. This is why we are suggesting—not just our group; there are a lot of other women's groups out there that have had experience working directly with women and their children, and there are laws and so on. So to sit down—and the instrument or the tool or the format that should be used and have the information on it could be based on reality: What happens to families and women who go to arbitration? Is domestic violence taken into consideration? Are the decisions made in as appropriate a manner as possible?

It would still allow a lot of people—men and women—to become arbitrators. We want to make sure that their training, their processes, the way they conduct it are fair and equitable and that they are using the equality principle in it as much as possible. I think it's the whole process that we would be delighted to help set up. It's not just our group, but a lot of other groups that are working directly with women and children.

Ms. Matthews: Thank you very much. I will happily pass this on to any other members who have questions.

The Chair: Mr. Zimmer?

Mr. Zimmer: No, that's fine.

The Chair: Okay.

Thank you very much for your delegation. We appreciate your being here today.

Ms. Hogben: Thank you very much.

METROPOLITAN ACTION COMMITTEE ON VIOLENCE AGAINST WOMEN AND CHILDREN

YWCA TORONTO

The Chair: Our next delegation is the Metropolitan Action Committee on Violence Against Women and Children. Good morning. When you get yourself settled, are you both going to be speaking this morning?

Ms. Pamela Cross: We are.

Ms. Amanda Dale: It's actually a joint presentation with YWCA Toronto and METRAC.

The Chair: Okay. As you begin, if you could introduce yourselves and the organization you speak for. When you do begin, you'll have 30 minutes. If you leave time at the end, we'll be able to ask you questions.

Ms. Cross: Thank you. Good morning. My name is Pamela Cross. I'm the legal director with the Metropolitan Action Committee on Violence Against Women and Children, known in short as METRAC.

Ms. Dale: I'm Amanda Dale, the director of advocacy and communications with YWCA Toronto.

1030

Ms. Cross: We're here this morning to speak in favour of Bill 27, with some detailed concerns as the bill moves forward.

To set our comments in context, METRAC is a Toronto-based organization working for the eradication of all forms of violence against women and children. The mandate of our justice program includes law reform work as well as the development of legal information materials for women experiencing violence and those providing services to them. Through this second area of work, we meet and hear from literally thousands of women across Ontario each year who need our support because they do not have access to adequate, or indeed any, legal representation. Many of these women are involved in one kind of alternative dispute resolution or another, and most of them do not have happy stories to tell about those experiences.

Ms. Dale: YWCA Toronto is the city's only multi-service organization by, for and about women and girls. Since our national founding in the 1870s, we have grown to a member-based organization active in over 14 communities in Ontario. We have 38 member associations in Canada. We're also an international organization, and worldwide we have 25 million members in our association.

YWCA Toronto works in four main program areas: housing and shelter, girls' and family programs, employment and skills development, as well as advocacy on public policy. Across Canada, we are the single largest provider of shelter and housing for women and the largest provider of employment programs for women.

In Toronto, we see more than 49,000 individuals a year. We normally work with them to help them make significant changes in their lives through finding work, counselling, shelter, permanent affordable housing and a number of family programs that address parenting issues. In all of these programs we've seen women who go through formal and informal processes around separation and divorce, and our intervention on this matter comes through that program experience.

Each of us here—both Pamela and myself—represent the broader concerns of our organizations and their membership. Our membership's spontaneous and overwhelming outpouring of concern for the equity guarantees of a secular, public and universal system of law has motivated and fuelled the campaign to end religious arbitration of family law disputes in Ontario; that is everyone from our volunteer boards of directors all the way through to individual women in our programs.

Ms. Cross: We're here today to speak in support of Bill 27, because it will guarantee that family law arbitrations in Ontario will be conducted using only Canadian and Ontario law. It also ensures that other principles and rules, including religious principles, will have no legal effect and will amount to advice only.

We realize this has not been an easy issue for the government, by which we mean all three parties, and individual politicians as well as all Ontarians to grapple with. It has required a balancing of different and at times apparently conflicting interests. This has often been posed in the public debate as the rights of women versus the rights of communities to diverse religious and cultural values.

We want to clarify this morning that we and our membership hold these two Canadian values equally strongly. There is nothing in this bill that in and of itself limits religious freedom; it simply clarifies the role of the religious leader and the role of the state. In a secular liberal democracy, religious beliefs have an important role to play in civil society, community and the private lives of citizens. However, they have no place in the enforceable laws of the land. Bill 27 clarifies this confusion in the existing Arbitration Act of Ontario, an act that we believe was never intended for anything but commercial disputes.

Ms. Dale: Our boards of directors and our membership bases are made up of women of many faiths. The questions they brought to this debate were:

How do we respect the rights of women to make autonomous decisions for themselves, including faith-guided life choices, while ensuring that the most vulnerable are protected from abuse, manipulation and coercion?

How do we ensure universal access for all women to equality, regardless of belief or community affiliation?

We believe that Bill 27 answers these questions, with some provisos.

Interruption.

Ms. Dale: I'll just wait till the distraction ends.

We are very pleased that the government has seen fit to address the issue of religious arbitration in a general way, rather than focusing on any one or two specific religions. You may recall that the issue of arbitration and religious settlements in divorce and child custody has been a very big issue in British Columbia among fundamentalist Christian groups. This is a concern that our BC association brought to us, so it is not simply a matter of Muslim women.

We know that it has been challenging to frame the debate and the legislation in an anti-racist way, especially in a time of global Islamophobia and rising anti-Semitism. However, in and of itself, the bill makes no comment on existing religious freedom to solve any dispute according to any system of belief. Bill 27 simply prevents the waiving of individual rights that exist under the public system of law and in the Family Law Act of Ontario when doing so.

Ms. Cross: When passed, Bill 27 will ensure protection for those with the least institutional power in Ontario, and for this we applaud the Premier, the Attorney General and all those who support it. It is clear the drafters of this bill have worked long and hard to create legislation that will be effective. A great deal of legal expertise has gone into the drafting of the language—language that we would be concerned to see adjusted in any way. We believe, after careful reading, technical briefing and community consultation, that tinkering for political appeasement would only serve to open loopholes that undermine the intent and effect of the bill.

We're pleased to see the guaranteed right of either party to appeal an arbitral award. Certainly, one of the positive aspects of arbitration is its finality, so we can appreciate that some would want to see the present regime, under which the right to appeal can be waived, maintained. However, our focus in reviewing this legislation has been primarily on women in abusive situations, in which they can be very vulnerable to being intimidated, coerced or otherwise manipulated into agreeing to waive this right, when that is not in their best interests or even what they really want to do. We urge the government to maintain the clauses relating to the right to appeal as they now appear in the legislation.

Ms. Dale: We do, however, have some concerns that we would like to see addressed, either by way of friendly amendment or through regulations.

The first is that the absence of changes to legal aid to support the legislation is a serious gap. Bill 27 requires mandatory independent legal advice for anyone using arbitration to resolve a family law dispute, which is a very good thing. However, legal aid is not presently available for arbitration. Many women in Ontario cannot afford to pay for a lawyer, and certainly that's true for all of the women who use any of our programs at YWCA. So this is a serious problem for us, and I think it structurally enforces an inequality that's not intended by the written word of the bill. This is not acceptable, so we're asking that changes be made to the Legal Aid Act to mandate and budget to ensure that legal assistance is available for arbitration.

Because this bill essentially codifies family law arbitration in Ontario for the first time, we also believe in a mandatory review after three years, which we think would be a sufficient amount of time to see how it's working. We believe, because of our experience with vulnerable women, that women's equity-seeking organizations should play a role in the monitoring and review process, with appropriate financial support.

While it is true that we believe women are better served through the system of public laws in Ontario, it is also true that those laws and processes continue to reflect outdated principles and values that make them culturally inaccessible to many. We strongly encourage the government to take steps to ensure that the laws and processes governing family breakdown achieve cultural competency by requiring and supporting appropriate services and by training those involved in the justice system to understand cultural difference within an equality framework.

Finally, we would like to see this government undertake a review of the Family Law Act, especially those provisions dealing with domestic contracts, to ensure women's equality rights are not compromised in ways that Bill 27 is meant to overcome.

1040

Ms. Cross: I'm going to leave the topic of religious arbitration for a moment to speak to another section of Bill 27. We also want to note our support for the amendment to section 24 of the Children's Law Reform Act, which will require judges to consider family violence when hearing custody and access cases. This amendment will have a positive impact immediately on women seeking custody after leaving an abusive relationship.

Just as we have some concerns about the sections of Bill 27 dealing with arbitration, we also have some concerns about the CLRA amendments. The language of the amendment dealing with violence is gender-neutral, which does not reflect the reality of violence within most families. At present, violence at the hands of their husbands or common-law spouses is the single major cause of injury among women in North America, more frequent than auto accidents, muggings and rape combined. We're seven times more likely to be killed or hurt in our homes than by a stranger. Unfortunately, women are increasingly being what is called "dual-charged," in cases of domestic violence, when police fail to conduct a thorough investigation to determine the primary aggressor. Making the legislation gender-neutral contributes to a climate of inaccuracy, and therefore ineffectiveness, in the policing and prosecution of this crime.

We urge the government to include a definition of abuse that explicitly excludes acts taken in self-protection or in the protection of other vulnerable family members such as children.

Ms. Dale: We hope the parties that make up the government of Ontario can work together to enhance this legislation and to ensure its speedy passage into law. We do not feel that a longer debate will change the principle at stake. It is the very cornerstone of a secular, rights-based legal code: one publicly accountable, universal set of laws for all, a common bond for public life, in a society that fosters tolerance and support for a multiplicity of private beliefs.

Our members have galvanized a common purpose on this matter across differences in profession, religion, race, culture and ethnicity. New loopholes, if created, will renew only their determination. In the meantime, you can count on our support, in the implementation of Bill 27 to strengthen what is, overall, a solid piece of legislation.

The Chair: Thank you, ladies. You've left about six minutes for each party. I apologize for the banging and knocking that you heard in the process of your deputation. We are attempting to prevent that from happening with future delegations.

We'll begin with Mr. Kormos.

Mr. Kormos: Thank you very much for your submission, for your participation in this debate, and, I'm confident, in your provocation of the government to bring this matter forward.

The previous submitter made reference to the reality or unreality of primarily women having access to legal counsel. It's a matter of finances. In our experience, or in mine, at least, even a legal aid certificate is not adequate. Family lawyers simply won't accept them because of the practicalities, the impossibility of doing a service to that client.

The other issue, then, of course, is paying for the arbitration. I have a perspective on this. Do you expect to see low-income, even middle-income, people accessing arbitration? I spoke with an arbitrator yesterday who charges $2,500 a day, and then of course you have to rent the facility. If it's going to be an appealable ruling, there has to be some consideration—I'm going to ask questions of the parliamentary assistant on clause-by-clause about this—of doing a transcript so that there's a record to appeal.

That's not to say that litigation in the public courts isn't expensive too. But there it's the legal fees. People in arbitration presumably will still have lawyers representing them. Is this going to be accessible to low-income people, when it's a pay-as-you-go process that is, in and of itself, very expensive?

Ms. Cross: I'll speak to that. I want to answer it in two parts.

First of all, our focus in looking at Bill 27 has been the need to eliminate the use of religious laws in the resolution of family law disputes. That's really, in our opinion, what Bill 27 was created to do and what it does.

The whole issue of arbitration more generally is a much hotter potato. It's not really what we're here to talk about today. Some of our organizations have a broader position opposing arbitration, period, much more like the Quebec position, which Mr. Runciman raised earlier. That's another debate.

Our concern with Bill 27 is that when people, primarily women, as you have identified, decide—and I use that term even a bit tentatively—to use arbitration, they have access to legal aid to assist them with that. That means there has to be not just more dollars, there has to be a change to the mandate of Legal Aid Ontario now, because presently arbitration isn't one of the matters that's covered by Legal Aid Ontario. It means that, indeed, things like the cost of the arbitration, the rental of the facility—all of that's going to have to be looked at. The availability of dollars for legal representation has to be looked at. The ceiling, as you pointed out earlier, has to be looked at.

I know how complicated it is. I'm a lawyer; I used to have a family law practice. I know that—and this is going back a number of years—when I represented a woman in an abusive relationship on a legal aid certificate, I was probably paid for about a third of the hours that I put into the file. There are many lawyers who do that.

The legal aid question is enormous, but I think it's important for the purposes of these hearings today to focus, at least for our organization, on the measures that would eliminate the use of religious law in the arbitration of family law disputes.

Mr. Kormos: I spoke to another arbitrator recently who told me what she says is a real-life example: two French citizens—spouses—living and working, for the moment, in Canada, who want to end their marriage and resolve all the property issues etc. and have French law apply, because their assets—the home, the matrimonial assets—are in France. Of course, under the existing regime that would be possible, because litigants in arbitration can choose any legal scheme they wish. This law would preclude them from dealing with that, notwithstanding that they were using a public law of their homeland, if that's not an unfair statement. Again, I present this to you without any preconceived judgment on it. What do you say to those folks?

Ms. Dale: I think you need to look at the broader principles at stake and measure what is most crucial: a convenience or the principle of separation of religious and state law? We've repeated it several times here, not to be annoying but because to us it is the principle that gets lost when we get into debates that pander to other bigotry or to inflammatory statements. Not that I'm saying that's what you were doing just now, but I—

Mr. Kormos: They're talking about French law, the law of France.

Ms. Dale: Yes. To me, when you start picking and choosing between forms of law outside of the one that your own electorate has agreed on, you're into a principled difference, and that's the crucial switch for us. This is a democratically elected government that's supposed to oversee the public laws that are accountable to that same electorate. We have the guarantee of protection under those laws. Those are the ones that we are governed by.

Ms. Cross: I think it's also worth pointing out very briefly that it hasn't escaped our notice that the only issues that have been debated here are family-law-related issues, which have a profound and particular impact on women and children. Nobody has proposed, for instance, allowing two citizens from a country where the smoking of marijuana is legal to argue the law of that country if they're charged in Canada with that offence. So it's offensive, I think, to try to argue that we should open ourselves up to letting laws of other countries apply here when we're only talking about the one area of law which has more impact on women than any other one, and that's family law.

Mr. Kormos: Thank you kindly.

The Chair: Thank you. Mr. Zimmer.

Mr. Zimmer: Your submission clearly makes the point that you're in favour of one law for all religious and faith-based groups and so on. At page 2, you also make the point on the need to understand and accommodate

cultural difference within an equality framework. At first glance, that might appear to be a conflict to some people thinking this exercise through. Can you elaborate on how you see the right balance being struck between the one-law-for-all theme of your presentation and accommodating and respecting cultural differences in an arbitration system?

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Ms. Dale: I don't think it's a contradiction simply because I think the context of people's lives is critical to a true access to that one universal system. We see it all the time in the context of a woman whose immigration status depends on the partner who's also abusing her. That context limits the choices she's going to be making to access her rights, because she fears that her immigration situation will alter unfavourably if she exposes the abuse that she's subjected to, even though the laws of Ontario would, at first glance, protect her.

That's the kind of context which needs to be understood to be able to allow citizens to access their rights in a truly democratic and equal way. It doesn't mean you have to change the law; it means you have to change the access to the law, and that access is actually the cultural competency that we're talking about: to understand the power differentials of people who are coming into your courtroom.

Mr. Zimmer: Thank you.

Mr. Runciman: I appreciate your submission. I'm curious about a couple of things you mentioned. You talked about requiring judges to consider family violence and then you talked about gender neutrality. Could you be a little more specific in what you're suggesting along those lines?

Ms. Cross: What we would like to see in that provision, as we've indicated at the top of page 4, is simply that there be a definition of "abuse" contained there that explicitly excludes acts taken in self-protection or in the protection of other vulnerable family members. For instance, in a situation where a women is leaving an abusive spouse and making a claim for custody, assuming these amendments pass, the judge now says, "I'm required to look at family violence, so I want to hear evidence from both of you about that," and he says, "On one occasion, she took a swing at me, too." We want her to be able to say, "Based on the legislation, my act is excluded from consideration because I was acting in self-protection," or, "I took a swing back at you because I was holding the baby when you were coming toward me." We want the legislation to set out that distinction, that there will be occasions when women—I don't even like to use the phrase, but I will, just for speed here—make an act of violence. It's really an act of self-protection or to protect another vulnerable family member. We don't want that to be used against her in a subsequent custody hearing.

Ms. Dale: What we've seen in the United States, just to clarify this a bit, is some distinction made in the prosecution of these cases between the primary aggressor and a subsequent or isolated act of violence. The primary aggressor theory and the use of that framework has really helped weed out those situations where policemen are saying, "I can't make a determination, so I'm going to counter-charge the woman because it's a he says/she says." But the pattern of domestic violence which we have, unfortunately, 30 years of good research on actually shows patterns of primary aggression and defence. Without the use of that knowledge base, we get these kinds of equalizing of any act of physical contact, which in fact are not equal.

Mr. Runciman: If there's a question surrounding primary aggressor, what you're suggesting is the requirement of a judge to make a determination based on testimony before him or her. You're not suggesting—you referenced, and I think you supported that in the comments you just made, that police in some instances fail to investigate and determine who the primary aggressor is. Is that what you're suggesting? Is that the proposal you're making?

Ms. Cross: I think it's important to keep the two processes distinct. We know that only about 25% of women who experience abuse in the home ever call the police, so the presence or absence of any police record is irrelevant to proceedings in Family Court, or ought to be. There's a very different standard of proof, as you all know. In criminal court, the standard of proof is beyond a reasonable doubt; in Family Court, the standard of proof is on a balance of probabilities.

What we're suggesting is that in a Family Court proceeding, if family violence is a factor, the complexity of that issue be provided for in the legislation. That can be done relatively simply if the legislation, when defining abuse, says these kinds of acts and excluding acts taken in self-protection or in the protection of other vulnerable family members. Again, whether or not there's a police record in play, the judge can look at the evidence and determine, as judges have to all the time, particularly in Family Court, whose evidence is more credible.

Mr. Runciman: You're not talking about any specific reference to gender or gender bias? You referenced gender neutrality before, so that's why I'm raising that.

Ms. Cross: Well, there's the world of what we'd like and the world of what we think we can get. We'd love to see a lot more gender-specific language in a great deal of legislation. We think that's unlikely to happen and we think that a definition such as the one we've included in our submission would be very helpful.

Mr. Runciman: Thanks.

The Chair: Thank you very much for your submission today. We appreciate you being here.

Mr. Kormos: Chair, on a point of order: In response to the comments made by these submitters with respect to language used in other jurisdictions addressing the same matter, I wonder if legislative research might kindly give us some assistance, because their point is perhaps well made in terms of "shall" consider, as mandatory.

Ms. Cross: I can say, specifically with reference to the self-protective clause, that that information is

contained in the federal bill dealing with custody changes to the Divorce Act and it's very well crafted.

The Chair: I think you're asking for legislative counsel also to provide you with some background, as well as research?

Mr. Kormos: Yes, ma'am, please.

The Chair: Thank you very much, ladies.

CANADIAN JEWISH CONGRESS, ONTARIO REGION

The Chair: Our next delegation is the Canadian Jewish Congress, Ontario region. Good morning. I have a record there that there are four speakers, but there are only three?

Mr. Stephen Adler: Correct. There are only three.

The Chair: Okay. Are you all going to be speaking this morning?

Mr. Adler: We are.

The Chair: Great. As you begin, if you could identify yourself and the organization you speak for. You have 30 minutes when you do begin speaking; if you leave time, there will be questions afterwards should you have a comment that we'd like to ask you more information about. Welcome.

Mr. Adler: Chair, members of the committee, my name is Stephen Adler. I'm the director of public policy for Canadian Jewish Congress, Ontario region. Thank you for the opportunity to speak to you today on this significant piece of legislation. I'm joined by my colleagues Dr. Rachael Turkienicz and Mr. Mark Freiman, who I'll introduce in more detail in a moment.

Canadian Jewish Congress is a non-profit human rights organization concerned with the rights and freedoms of the Canadian Jewish community and all Canadians. We were organized in 1919 and act as the national organizational voice of the Jewish community on issues affecting the quality of Jewish and Canadian life. We speak on a broad range of public policy, humanitarian and social justice issues, including the status of women in Canada, family issues, and the concerns of the disabled, the poor and the elderly.

I'm also joined, behind us, by Mr. Steven Shulman, who is our regional director and general counsel for Canadian Jewish Congress, Ontario region.

To my immediate left is Dr. Rachael Turkienicz, associate chair of our national executive. Dr. Turkienicz is a professor of education at York University, as well as being a faculty member at the Centre for Jewish Studies at York University. She holds a Ph.D. in Talmudic and Midrashic literature and is a frequent commentator on radio and TV and in print on issues regarding the interpretation of Jewish texts. Dr. Turkienicz is also a board member of the North York Women's Centre.

On my extreme left is Mr. Mark Freiman. Mr. Freiman is the honorary legal counsel for Canadian Jewish Congress, Ontario region. He is a constitutional lawyer at McCarthy Tétrault. He holds a Ph.D. from Stanford University in modern thought and literature and has taught in the United States and Canada. Mr. Freiman served the people of Ontario from 2000 to 2004 as the Deputy Attorney General for the province of Ontario.

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Dr. Rachael Turkienicz: Good morning. I'm Rachael Turkienicz. I just want to thank you again for the opportunity to share our views for your consideration on the Family Statute Law Amendment Act of 2005.

As stated, I'm an officer of the Canadian Jewish Congress on both the national and regional levels. I am also personally active in the protection of women's rights and in assisting women who find themselves in vulnerable situations.

This committee has heard, and will continue to hear, various perspectives rightly concerned with the possible exploitation of women in our province. I am equally concerned with this possibility and I am therefore here as a representative of CJC.

Canadian Jewish Congress shares my concerns about women's rights and the vulnerability that can occur whenever there is a dispute involving people of varying power levels. CJC agrees that it is important to protect people from decisions that don't conform to Canadian principles, values or the Charter of Rights and Freedoms. We agree that these principles, values and laws need to be the common foundation upon which any conflict resolution must stand.

CJC also agrees that anyone who chooses to seek resolution from a faith-based panel of arbitrators must truly consent to participate. We are adamant that such consent must be real, and given freely and without coercion.

Although we all have common ground with these important aspects, Canadian Jewish Congress does not agree that the solution to these concerns is to remove the governmental support of faith-based arbitration.

A woman of faith may choose to resolve her marital status within a faith-based arbitration setting since she is familiar and comfortable with the language, the expression of values and the understanding of her faith and the unique place it holds in her life. Until recently, any woman of faith could also be assured that as a citizen of Ontario the government would support a decision that conformed with Canadian law and values. By removing the Canadian legal support, the government has removed her safety net.

Changes to the legislation are needed. These changes must ensure that the act doesn't focus on issues that effectively have the state controlling matters of conscience, faith or religion while doing little to advance protection against the abuses we all agree must be prevented.

If the concern of this legislation is to ensure that all parties are treated fairly and with one legal standard, the legislation should consider regulating the arbitration and family law to protect the rights of the potentially vulnerable and support their choices of expression.

Faith tribunals are empowered by their faith communities. They will continue to be sought after by people of faith as a trusted venue for resolution. As a Canadian,

it is important to support each person's personal choice of the lens through which they prefer to see Canadian principles expressed. Rather than removing the support of the government, CJC believes that the legislation should stand strongly beside any woman who chooses to express herself through her faith, knowing she need never compromise her Canadian sensibilities.

I now ask that you kindly turn your attention to Mark Freiman, honorary legal counsel for Canadian Jewish Congress, Ontario region.

Mr. Mark Freiman: Members of this committee, it's a pleasure to be back at Queen's Park, even briefly. You'll see that old habits die hard; we have produced what are technically called, in the parlance, slides, which may help with the presentation this morning.

I'm going to start on slide 5, if you want to read along. Alternatively, I think the slides might be useful as an aide-mémoire to specify exactly what it is that Canadian Jewish Congress wishes to emphasize today.

Let me just start by telling you that we are talking about arbitration; we are not talking about criminal laws. One of the previous speakers suggested that maybe we're talking about imposing foreign law to determine who is guilty of an offence. We are not talking about asking judges to use foreign law; we are talking about arbitration, and about family law arbitration.

Let me begin, because my purpose today is to take you through the legislation and to discuss with you just exactly what it is the legislation does and does not do, with an aim to persuading you that whatever high purpose and whatever legitimate concerns one might have about the use of arbitration in family law matters and the kinds of principles that might be applied in family law matters, this legislation overshoots those principles and leads to entirely unintended and, I think, clearly undesirable results.

Let me start with arbitration. The purpose of arbitration is to provide parties with an option outside of court to resolve their disputes, in an enforceable manner, by agreement. That is, they are allowed to agree upon who's going to resolve the dispute; where that resolution will take place; importantly, when it will take place, by whom and at what cost. They can also decide what principles and values they want to see reflected in the result.

The great benefit of arbitration is to allow parties to resolve disputes in a manner that's meaningful for them internally. It allows them to control the principles, it allows them to control the process and it allows them to control the cost of resolving a dispute. That's why in Ontario since 1991 we have held that in civil matters it is permissible—if you go to an arbitrator and have an arbitration that is genuinely voluntary, you may enforce the results of that arbitration as though it were an order of the court. The value is that the dispute is resolved in a manner that respects the autonomy of individuals, reflects their values and increases the probability that they will act in accordance with the resolution. That is, they will internalize it, act according to it and then move on with their lives.

There are, however, two key issues in any arbitration, and I'm talking about arbitrations in the field of construction law as much as I am in the field of family law. The first is voluntariness. Arbitration only works and is only fair if people really do agree: if they agree that this is the right way to resolve their problems; if they agree that these are the right principles they believe in that should be applied to resolve their disputes. If there is any coercion, if there is any element of involuntariness, if there is no true consensus about values, then the submission to arbitration is doomed to failure and is in fact unenforceable, should not be enforced. Arbitration only works, and is only morally, ethically and legally correct, if it's voluntary.

The second is compatibility with Canadian values, and especially the Charter of Rights and Freedoms. The result of an arbitration pursuant to the Arbitration Act is enforceable as though it were an order of the court. No court will, and certainly no court should, enforce a result that violates public policy, that is inimical to our fundamental values, and certainly should never enforce a result that is contrary to the charter. Again, under the Arbitration Act and under practice under the Arbitration Act, any party is free to go to a court and say, "This result is incredible. It violates Canadian values. It violates the principles of the charter. It violates good public policy," and a court can, will and does refuse to enforce such an order.

In family law, these matters are heightened. It's very important to bear these two principles in mind. The Canadian Jewish Congress supports these two principles.

First, genuine consent: We recognize that many relationships in a family context are marked by a power imbalance. Because there is a power imbalance, there is a threat, a danger, that the party suffering from the imbalance—usually the woman—will be compelled to give consent, will not freely agree, will be coerced, will be bullied into agreeing to something that she, first, does not really agree with and perhaps even that she does not really understand, in circumstances where she may not even understand that she has options. That is an extremely important issue.

For that reason, we say it is entirely appropriate—we're on page 8 now—to have special rules and special safeguards in family law arbitrations to ensure that consent is genuine and that it's based on full information about the process and full information about the alternatives to the process: You don't have to go to arbitration; you can go to a court. Those are legitimate concerns. Those are legitimate safeguards and responses.

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The second area is compatibility with Canadian values and rights. We believe that it is important that any result be fully compatible with Canadian values, with Canadian principles and with the Charter of Rights. What we do not believe, however—and we may part company with some of our colleagues talking to you today—is that it is inherently unacceptable to resolve family law issues on the basis of genuinely voluntary arbitration that is

informed by a faith. We also do not believe that faith-based arbitration is inherently and necessarily unfair. We believe it can be fair. We do not believe that faith-based arbitration inherently or necessarily is incompatible with Canadian values, with Canadian legal principles or with the Charter of Rights. From that perspective, it is our view that it's appropriate for the legislation to contain clear and effective safeguards to ensure that consent to arbitration is indeed voluntary, genuine and based on full information, but that it is not appropriate that legislation prevents parties from freely agreeing to have their disputes resolved by a qualified decision-maker of their choice.

The issue of values: We do not believe it is appropriate for legislation to disallow enforceable resolutions to disputes based on freely agreed-to principles, including principles founded on faith, conscience or belief, so long as those principles are compatible with Canadian values and with the Canadian Charter of Rights and Freedoms.

Members of the committee, it is our submission to you that the text of Bill 27 raises serious concerns on each of these issues.

First, the issue of voluntariness: I've already said that the Canadian Jewish Congress accepts the need for clear, consistent safeguards to ensure voluntariness based on full information and genuine agreement as to principles. However, the text of Bill 27 leaves all of that to the regulations, and the regulations, I'm sad to say, have absolutely no specificity from the legislation. There is nothing to guide and there is nothing to inform us as to what the content of those regulations will be.

The Canadian Jewish Congress notes, to its dismay, that the run-up to the introduction of Bill 27 was marked by a failure of consultation. There was little, if any, dialogue with the interest groups, with what we call the stakeholders of this legislation, before the theory behind the act and then the language of the act was passed. That failure to consult, I respectfully submit to you, led to some of the defects in the legislation and led to its overshooting, as I'm going to show you, its actual purpose and landing in a very bad place indeed. It is our fear that simply allowing all these questions of voluntariness and genuine consent to be dealt with by regulation raises the probability, and at least the possibility, that once again the regulations will come out with no consultation, no prior discussion, and will themselves overshoot the mark.

The text of Bill 27 simply says that the Lieutenant Governor in Council can make regulations touching on a number of things, including what must be and what may not be in any arbiter document, what qualifications an arbitrator should have, what the arbitrator must set forth and what the arbitrator must be trained in. All of these are indeed extremely important issues, but we don't have a clue what's going to be said, and depending on how reasonable or unreasonable the regulation is, it will either lead to genuine consent or it will do, by indirect means, what the legislation could not do by direct means because it would violate the charter. So the Canadian Jewish Congress is extremely concerned that, without consultation, the regulations will follow the *[inaudible]* Bill 27 and overshoot their mark.

Bill 27, in our respectful submission—and this is the most important point I'm going to make today—overshoots what's necessary to ensure compatibility with Canadian values and with charter rights. Subsection 2.2(1) makes unenforceable any family law arbitration that is "not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction."

Members of the committee, those words are not going to give you the protection that you think they will, they are not going to lead to the result that you think they will and they will end up causing anguish and unnecessary hardship in faith-based communities. Let me tell you why.

First of all, the words in this section say it is unenforceable if it is "not conducted exclusively." Now, "exclusively" as a word suggests that any idea, any value, any insight, any principle that is not found specifically in the substantive law of Ontario can't be relied on in any way in a decision regardless of whether or not it's compatible with Canadian legal principles, Canadian values or charter rights. Let me give you an example.

Let us say that two people voluntarily agree to go to a wise elder statesman—not a religious figure, because this legislation, you'll notice, says nothing about religion. I heard Mr. Kormos asking a very important question. The law of France is just as alien to this bill as law based on ethical doctrines in any of the world's great religious bodies.

So let us say we go to someone who is not religious and not even a member of the court in France—because maybe that's not civilized enough in this jurisdiction—but a very civilized, well-respected person who two family members agree would be very well placed to resolve their family law dispute.

The elder says, "My belief is that a little bit of sugar goes a lot further than a lot of vinegar. So I'm going to make my order full of incentives to give rewards for good behaviour rather than structuring my award and my decision so as to punish non-compliance. So the more you abide by the rest of the decision, the more access you get, the more hours you can have."

The recipient of the arbitration says, "Hey, I don't like this," and goes to a court and says, "You can't enforce this. Show me anywhere that the law of Ontario says, 'A little bit of sugar goes further than a lot of vinegar.' That's not a principle known in Ontario law; it's not a principle known in the law of Canada. You can't apply it."

It's a silly example, but we have lots of important ethical principles that are entirely compatible with the law of Ontario. A reference to one of those, if the word "exclusively" is correct, means that the arbitration has not been decided and has not been conducted exclusively in accordance with the law of Ontario, even though it's in every way compatible with Canadian values.

Next, "in accordance with the law of Ontario or of another Canadian jurisdiction": The words "in accord-

ance with" are not terms of art. They are not legally known words. You won't find them in any law dictionary to tell you what they mean. What do they mean? Well, what I suggest may be an interpretation of these words is that the entirety of the proceedings have to be identical to the law of Ontario in procedural matters, in evidentiary matters and in substantive decision. This means, again, that if you have anything that is not identical with the law of Ontario in process, in procedure, in rules of evidence—in any aspect—it's out of court regardless of whether it's compatible with Canadian values and principles. On the other side, if you go to an arbitrator who comes up with a truly offensive concept that is inimical to Canadian values and Canadian legal principles, nothing in this bill says it can't be enforced if the arbitrator doesn't have reference to some foreign body of law or to some principle outside of Ontario law.

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This is important because Bill 27 has a disproportionate and unjustifiable effect on religious communities and on persons holding religious beliefs. The background of the bill is clear: It was designed—and witnesses today have told us—to prevent faith-based values and principles from entering into the resolution of disputes. If one assumes generally voluntary consent and one assumes no conflict and no incompatibility with Canadian values, there's no reason to do that. In fact, it is insulting to faith-based communities to suggest that their ethical principles and the wisdom they have accumulated over the ages is inherently unfair or incompatible with the just resolution of disputes. It is insulting to women, and especially to women of faith, to suggest that women can never freely, openly and genuinely consent to a resolution of their disputes that is consistent not only with their faith but with their community values, consistent with their standards of decency, importantly consistent with their standards of modesty and importantly consistent with their standards of privacy. All of that is being eliminated by Bill 27.

Do we have any suggestions? We have. We do not believe that this bill does what it's supposed to and we don't believe it's necessary. If it is the intent of the Legislature to pass such a bill, we believe that, at a minimum, two improvements are necessary.

First, we believe it is important, if we're dealing with the safeguarding of principles in the regulations, that those principles, preferably by legislative fiat, be made subject to prior consultation. So the Lieutenant Governor in Council should not make regulations until it has consulted with stakeholders.

Secondly, the text of section 2.2 should be amended not to read that it's not enforceable unless it's "conducted exclusively in accordance with the law of Ontario," but rather that it's not enforceable unless it is compatible with the law of Ontario and with the values entrenched in the Canadian Charter of Rights and Freedoms. That gets you where you want to be. It tells you, "We're not going to enforce something that's unfair. We're not going to enforce something that's inconsistent with our values. We're not going to enforce something that is contrary to the Canadian Charter of Rights and Freedoms." That's fine.

I've listed on page 16 some unforeseeable consequences. Because I'd like to leave enough time for questions, I will leave you with the text of slide 16, about the unforeseeable, unintended and undesirable consequences. I remind you that this is going to have an effect not just on faith-based arbitration but on any arbitration. Anybody in a family law arbitration can come to court and say, "Don't enforce this. It has not been conducted exclusively in accordance with the law of Ontario." All that does is add uncertainty, cost, expense and time to the process, not what the people of Ontario are expecting. Thank you.

The Chair: You've left about a minute for each party to speak.

Ms. Matthews: I think you've made your argument very clear, and I appreciate your doing that for us. It obviously is the counter-argument to others we've heard. I appreciate your giving us that perspective.

The Chair: Thank you. Mr. Runciman.

Mr. Runciman: I don't have a lot of time here, but I'm interested in much of your submission. You make some comments which haven't been discussed at all here about the challenges to family law arbitrations, and you talk about court caseloads. As a former Deputy Attorney General, you could perhaps elaborate on that. That's a significant concern of anyone observing the system. We had a situation in Niagara Falls recently—I think it was Niagara Falls or Windsor—where it was an application to Family Court for a peace bond, which had something like an eight-month wait before an appearance, and there was a terrible murder. I just wonder if you could comment on what you see in terms of the problems that this is going to create with respect to Family Court.

Mr. Freiman: Let me take it from the other end. Arbitrations, mediations and alternative dispute resolution have been introduced into our system in order to try to relieve the backlog in the courts, alleviate high costs, simplify matters and allow people to have a say in what rules are going to be applied in resolving their disputes. I submit that even non-faith-based family arbitrations will have pressure put on them because of the uncertainty. If you make family law arbitrations questionable as to their enforceability for anyone, that means that cases that have been taken out of the system are going to be reintroduced into the system. Our system is overloaded as it is; waiting times have increased steadily over the past three years. Instead of being an assistance to take things out and to clear the way for things that only a judge can do, this will clutter our courtrooms, add costs and inevitably bring people back to you asking for more money for the court system.

The Chair: Mr. Kormos.

Mr. Kormos: I want to make sure I understand something you said in the latter part of your comments. You left the impression that should an arbitrator comply with whatever standards are set by the province, joining what-

ever group of arbitrators and being certified by whatever group, and should that arbitrator conduct an arbitration and purport to apply the law of Ontario, saying all the right things, but nonetheless attach to his or her interpretation of the law, and his or her exercise of discretion within the scope of the law, all of the inherent biases of his or her faith—and I say "biases" neutrally—that could well be a perfectly legitimate arbitration. In other words, somebody could import—let's be candid—sharia principles into an arbitration, however vague those are, as long as they say all the right things, cross their t's and dot their i's.

Mr. Freiman: Let me not be invidious about it. Let us say that Reverend X conducts a faith-based arbitration, and this reverend is from an unknown sect that believes that men should always get custody and women should never get custody. If Reverend X conducts the arbitration and says, "The law of the province of Ontario provides that I must look only to the best interests of the child. I've looked only to the best interests of the child, and I find that the father should get 100% access and the mother should not," that's not challengeable. It's been conducted exclusively in accordance with the law of Ontario and has not been conducted in accordance with any other law. If Reverend X were to say, "I have listened to everything, and my holy scripture says that only a father can have custody. Therefore, I interpret the words 'the best interests of the child' in light of my religious beliefs. I'm giving it to the father," that isn't enforceable. It's the same arbitration. It's a question of learning what the language is.

The Chair: Thank you very much for your delegation this morning. We appreciate your being here.

INTERNATIONAL CAMPAIGN AGAINST SHARIA COURT IN CANADA

The Chair: Our next delegation is the International Campaign Against Sharia Court in Canada. Good morning and welcome. After you've introduced yourself and the organization you speak for, you'll have 30 minutes. If you leave time at the end, we'll be able to ask you questions.

Ms. Homa Arjomand: Good morning. I want to thank you for giving me this opportunity to address this hearing on Bill 27. My name is Homa Arjomand. I am the coordinator of the International Campaign Against Sharia Court in Canada. I'm very pleased to appear at this hearing and to comment on some of the proposed amendments to the Arbitration Act, 1991, the Child and Family Services Act, the Family Law Act and the Children's Law Reform Act. During my speech, I will give you some background and information about myself, my work, why and how my fellow activists and I organized the opposition to faith-based arbitration in Ontario, and lastly, our views about some of the proposed amendments.

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My background: Prior to my arrival in Canada, I was a lecturer and human rights and women's rights activist in Iran. While living in Iran, I saw the rise of political Islam and with it the application of sharia law. The rise of political Islam pushed back the women's liberation movement in Iran and lowered the standard of that society by legalizing gender apartheid and enforcing religious family law that openly discriminated against women and children. As the power of political Islam grew in Iran, I witnessed the execution of all my fellow activists. Let me repeat: All my friends were executed for their belief and work in human and women's rights issues in Iran.

My husband and I, along with our two children—one was an infant—were forced to flee Iran on horseback to Turkey in the winter of 1989. There I worked for the United Nations and witnessed even more of what political Islam did to women's and human rights activists in the Middle East. Discrimination and gender-based persecution in the areas of marriage, divorce, child custody and so on are the reasons that many women flee societies which are ruled by political Islam and seek refuge in Canada and in the west. We too came to Canada in December 1990, believing we never again would lose the principles and laws that humankind has fought for over the past two centuries: namely, the principles of equality for all, women's rights, children's rights, freedom of speech and assembly, freedom of belief, as well as the right to citizenship in a secular society.

For the past 12 years, I have worked as a transitional counsellor for abused women in Canada. Many of my clients come from so-called Muslim communities. I help these women and children to escape abusive and often dangerous family situations and to start a new life in a safe and secure home. In my work, I often see the unfair treatment of women and children when they use faith-based arbitration. Most of these women receive very little in the way of financial support and often have no right to see their children. Sometimes, after a divorce, the father will send his children, particularly girls, back to his home country to be raised by a family member and then push them to marry at a very young age even though they are Canadian citizens.

A summary of my campaign: On October 23, 2003, Mr. Syed Mumtaz Ali, president of the Canadian Society of Muslims, announced the opening of the Islamic Institute of Civil Justice. In his announcement, Mr. Ali said that to be a good Muslim, you must use sharia law for family legal matters. This political statement was not only coercive but also a direct threat to devout Muslims who prefer to use Canadian laws. Mr. Ali's statement shocked me because his proposal has nothing to do with someone's personal beliefs. It was in fact very political. He claimed that his legal authority was based on Ontario law.

Through my work as a transitional counsellor, I was well aware that faith-based arbitration was occurring.

However, I had wrongly assumed that it was being practised illegally behind closed doors. At the time, I did not believe that Canada would permit arbitrations of family legal matters based on religious law. However, when I investigated further, I discovered that the Arbitration Act, 1991, section 32, "conflict of laws," did indeed permit family arbitration to be based on religious law. This discovery saddened and worried me and other activists.

To us as experienced defenders of women's and children's rights, the Arbitration Act, 1991, provided a green light for political Islam to widen its reach and tighten its grip on the lives of Muslims living in Canada. We thought it was our duty to inform the Canadian public of these threats to their freedom. All of us were motivated by a common concern that political Islam was trying to expand in Canada by promoting the use of family arbitration based on sharia law. We were sure that the rise of sharia court in Canada was not just a coincidence; it was a part of a global move of political Islam. We decided to take action, and our proposal was to ensure that there was one law for all and that that law should be the Family Law Act of Ontario.

Our international campaign started in Toronto on October 30, 2003, with a handful of supporters. Today it has grown to a coalition of 183 organizations from 14 countries, with over 1,000 activists who volunteer their time and skills. A similar movement to end the use of sharia law exists in other countries such as England, France, Sweden, Norway, the Netherlands and so on. The activists in these countries are watching closely—very closely, in fact—to see how Ontario decides on this issue.

Recently, some honourable members here have said that there was little or no public debate on the issue of faith-based arbitration. I find this claim surprising since our campaign was a very public effort and Mrs. Boyd's inquiry consulted a broad spectrum of the concerned public and faith communities. We all had a fair chance to make our views known to the government and to the press and public. Our campaign supporters wrote and called their members of Parliament, organized hundreds of public protests and meetings, handed out flyers, conducted polls, issued press releases and participated in debates across the country, including a few at the University of Toronto. Quite often, I debated with activists from the Muslim and Jewish communities who were in favour of faith-based arbitrations. These events were well attended by the public and were widely reported in the Canadian and international press. My colleagues and I, as well as our opponents, were interviewed by the press on a regular basis. On average, I personally responded to at least a dozen interviews each week from Canadian to international journalists. Some of the news agencies that interviewed me were the CBC, CTV, OMNI, TVO, the BBC, the Toronto Star, the Globe and Mail etc.

In May 2005, we conducted a poll in Ontario which found that 76% of both men and women agreed with the statement, "All Ontarians should be governed only by family laws and courts of Ontario." When it came to provincial voting intentions, NDP voters showed the most support for family law and the courts of Ontario, at 81%, followed closely by the Liberals at 76% and the Conservatives at 74%.

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This past August, we brought Dutch politician Ayaan Hirsi Ali to Canada to speak at the University of Toronto about political Islam and sharia law. We also showed her film submission, which is about the treatment of women in Islam. Over 400 people attended the Friday night event to hear her speech, to ask questions and see her film. Sixty-six news organizations attended our press conference that night. Today, over 28,000 people are on our e-mail list; 12,000 of them are from Canada, most of them are from Ontario, and 11,659 people signed our petition to end sharia law in Ontario. The petition, as well as many of the media interviews, can be seen on our website, nosharia.com.

Our view on some of the amendments: In general, my fellow activists and I are very pleased with the proposed amendments. I will comment on some of them now.

Subsection 2.1(1) of the Arbitration Act bill now clearly states, "Family arbitrations, family arbitration agreements and family arbitration awards are governed by this act and by the Family Law Act." We are very pleased with this amendment.

Section 32 of the Arbitration Act concerning conflict of law now clearly states, "In family arbitration, the arbitral tribunal shall apply the substantive law of Ontario...." This change corrects the heart of the matter and ends the use of religious law for family arbitration. We are most pleased with this amendment.

Section 45 of the Arbitration Act now provides an opportunity to appeal a family arbitration award to the Family Court or the Superior Court of Justice. The right of appeal was not available before. We are very pleased with this amendment.

Section 50.1 of the Arbitration Act bill clearly states, "Family arbitration awards are enforceable only under the Family Law Act." We are very, very pleased with this amendment.

The addition of section 58 to the Arbitration Act concerning regulation is welcomed. We look forward to reviewing the details of these regulations, which will be developed by the Lieutenant Governor in Council. We hope the new regulations will achieve the following results: establish training and professional standards for arbitrators; establish effective, accurate, full and prompt reporting methods; enable arbitrators to conduct family arbitrations in a timely manner; define the accountability of the arbitrators; provide an opportunity to review an arbitrator's performance on a regular basis and, if needed, withdraw an arbitrator's official approval.

Clause 72(5)(b) of the Child and Family Services Act concerning duty to report now includes mediators and arbitrators. We are very pleased with this amendment. This amendment is a very good start at protecting our most vulnerable citizens: our children.

Closing remarks: I will conclude my speech by saying that the politically diverse members of our campaign, all the people who came to Canada from so-called Islamic countries and all the people who struggle for a better life here in Canada need and expect you to pass Bill 27. We believe this bill will end the interference of religion in our justice system, empower battered immigrant women, giving security to our children, and protect equal rights for all, regardless of race, religion, gender or ethnic background.

The Chair: Thank you for your delegation. You have left about five minutes for each party, beginning with Mr. Kormos.

Mr. Kormos: Thank you kindly, ma'am. I appreciate the May 2005 poll: "All Ontarians should be governed only by the family laws and courts of Ontario." That's a position, of course, that the NDP has been adamant about.

There's something I want to make very clear with respect to Marion Boyd and her report. We in the NDP have the highest regard for Ms. Boyd. We appreciate the tremendous work that she put into her report. One of the comments made very early on in her report was that her review "did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues." As has been pointed out, of course there's no evidence because the arbitration, pursuant to any number of regimes or legal structures, is purely private. In terms of family law, that's one of our concerns in the NDP. Various observers and authors, whether it's Robert Nelson in the text on ADR that I referred to, acknowledge that there are certain areas of law that should not be submitted to arbitration because of the—Chief Justice Brian Dickson. Mr. Zimmer, I sent you a copy of that article by him in the law gazette; you read it, I'm sure. Chief Justice Dickson, once again, said that there are certain areas of law, including, he speculated, perhaps custody matters, that are so important that they shouldn't be conducted within the privacy of arbitration.

Again, I appreciate your participation here. I did want to point out that with respect to Marion Boyd, New Democrats have nothing but the highest regard for her and for the work she did. We don't agree with her, okay? It's as simple as that. We don't agree with her very-well-crafted conclusions, but we're not about to condemn those conclusions. It is but a point of view that has been part of the debate, and we respect that. We think it's important that she did what she did, because it is a position that has, in and of itself, validity. It's a way of approaching this. As I say, New Democrats don't agree with the conclusions reached by Ms. Boyd, but with the highest regard for her and the work she did.

The previous participation by Canadian Jewish Congress, Mr. Freiman, recommended—because section 2.2 says that an arbitration is not binding unless it's "conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction." The proposal was made that that be altered to read that it's not enforceable unless it is compatible with the law of Ontario and with the values entrenched in the Canadian Charter of Rights and Freedoms.

Again, that's another point of view that's been presented. Let's be careful in the course of this discussion not to be dismissive of alternative points of view. Is that in any way a way of addressing the concerns that people have, to conclude that the decision must be compatible with the law of Ontario and with the values entrenched in the Canadian Charter of Rights and Freedoms? Do you accept that or do you reject that?

Ms. Arjomand: I reject that. I just want exactly family law. If there's something wrong with family law, it's everybody's duty to work hard and make it right. To me, family law has not been reviewed for the past—how many years is it now? Of course, the review of family law is important, and very important for us. If there is any misleading or if there is anything we have to correct or put corrections on or add to it to make sure that it is defending women's rights and children's rights, of course we'll do it together. But right now I'm concerned, and I emphasize that it should be family law, and one law for all. That's it.

When you talk about compatible, I'm just thinking about whether it's going to be exactly the same or whether it's the assumption that it is going to be the same. Assumption—I would never go with it because I don't know what will happen to it. I don't know what the assumption is. Who is there to say it's exactly the same as family law?

The law of France—you just mentioned it—could be much better than family law here. It could be; I don't know. But I want only one law for all, and if our law is not as good as French law, then I want all of us to participate and make it right and make it better than French law.

Mr. Kormos: Thank you kindly.

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The Chair: I apologize, Mr. Runciman. You should have been the first speaker. You have five minutes.

Mr. Kormos: No, I apologize. I should immediately defer to him because he's older than I am.

Mr. Runciman: I'm not sure about that.

Thank you for being here today. We very much appreciate your submission.

I think you were here for the presentation by the Canadian Jewish Congress. I may have misunderstood Mr. Freiman, and I'll have to check Hansard, but at the end, he was talking about the example, which I think he used in response to a question from Mr. Kormos, of a reverend who could make a decision based on meeting the requirements of the law, and suggesting that the same sort of dangers may still be present. I think that's why they are suggesting the two amendments they have proposed. I gather you don't share that concern. Were you listening to that?

Ms. Arjomand: To be honest, we do believe that it would go behind closed doors as well. That's why we strongly believe that public education would help so much. None of the public is aware of what's happening

here in this room and what Bill 27 is. In closed communities where they're hardly integrated with the wider community, of course the imam, the sheik or any leaders of faith can direct the community in any way they want. By public education we're hoping that we can get rid of this. That's one thing. But also, in the back of my mind, I would say we would give it two or three years, going through public education.

I use "public education" not only as education at elementary, high school and university; I'm talking about the public in general. Hopefully, that would come out and people would know about their rights, especially women, and they'd know where to go in emergency cases, where to go to resolve their family disputes.

Mr. Runciman: There's another suggestion here with respect to a requirement for consultation on regulations. Do you have any view on that proposal?

Ms. Arjomand: Yes, actually, I did. I wanted to leave it to the lawyers, but then I realized that nobody mentioned anything. I prefer a BA and at least two or three years of paralegal training. I am hoping for at least a regulation that shows they know something about our law and regulations, and that should be at least two or three years' paralegal training regarding family law.

Mr. Runciman: So you're very supportive of some form of public consultation before the regulations become finalized. That's what you're saying, I guess.

Ms. Arjomand: Yes.

Mr. Runciman: I was just curious about the consultation. You did participate in the Boyd process? Did you get involved?

Ms. Arjomand: Yes, twice: once three hours by myself, and once three hours with 35 members of the campaign, each of them a chairperson or coordinator of another organization. We met with her for six hours on two different occasions. We discussed all these matters. I even talked about actual cases of women who came to us after going through faith-based arbitration. She did understand all these things, and I was very surprised when she came out with those recommendations.

Mr. Runciman: Were you consulted by anyone in the government with respect to the announcement that the Premier made related to Bill 27?

Ms. Arjomand: Did I consult with—

Mr. Runciman: That was a surprise to you as well as many others, I gather, on a Sunday afternoon?

Ms. Arjomand: Well, I was so happy. The day was perfect, and I didn't care if it was 5 o'clock in the morning. To me, it was a victory. Don't forget, this is a political attempt, and we've already pushed political Islam one step. I looked at it this way: Women's rights are not in danger anymore. I'm positively sure that with this bill, if passed, women's rights will be intact. I'm so happy. It doesn't matter what time of the year or what day of the year it comes.

Mr. Runciman: Or what really caused the conclusion to be arrived at. Thanks.

The Chair: Mr. Rinaldi?

Mr. Lou Rinaldi (Northumberland): Thank you very much, Ms. Arjomand, for your input and your passion. It's a commitment not just here in Ontario but abroad.

I don't really have any questions, because obviously your presentation somewhat mirrors our government's attempt to deal with the issue. I guess the statement I want to add is the fact of how we got here today. We, as a government, commissioned Ms. Boyd for a report. We listened, I think—well, I know we listened, because we didn't agree with her report because we also know there are a lot of good people out there like yourselves and other groups. It's the same as the Jewish folks who were here before. I think it took time. I guess I tend to agree with you. Regardless of who made the decision, at the end of the day, the majority of the stakeholders involved were happy with the result.

I just want to say thank you for your commitment and keep on doing the good work that you do.

Ms. Arjomand: Thank you. I appreciate that. I'm so happy that I'm here. We have members of government who actually listen to us.

The Chair: Thank you for your time. We appreciate your being here today.

MUSLIM CANADIAN CONGRESS

The Chair: Our next delegation is the Muslim Canadian Congress. Good morning and welcome. We're glad you're here. When you begin, could you say your names and the group you speak for. You'll have 30 minutes. Should you leave time at the end, there will be an opportunity for us to ask you questions.

Mr. Tarek Fatah: My name is Tarek Fatah. I'm communications director of the Muslim Canadian Congress. My colleague here is Hasam Mahmud, who is a scholar in sharia law and sits on our board as director of Islamic consultation. We will make a very short statement. We hope there will be more time for questions and answers, because this is a subject that is very close to our hearts.

Since the start of the discussion on the question of permitting religious law to be used in arbitration as a substitute for Ontario law, the Muslim Canadian Congress has maintained that there are two aspects to this debate: the legal question as to whether it is constitutional to allow private sector, for-profit practitioners acting as substitutes for Ontario family law court judges, and the political question of validating sharia law in Canada, thus enhancing the power of self-anointed religious clerics within the already marginalized Muslim community and its international implications.

We had proposed that no religious law be used in the Ontario judicial system and that disputes involving family law issues be removed from the Arbitration Act. However, our primary concern was that the proponents of introducing sharia law in Canada were part of a global movement that was inspired by Saudi Arabia and Iran and is trying to accord respectability and credibility to the power of clerics over the larger Muslim population. In

the Canadian context, it is like bringing the Maurice Duplessis era back to life, a time when the clergy in Quebec held sway over the lives of ordinary Québécois.

Even though we were hoping that Bill 27 would remove the application of the Arbitration Act in family law matters, we are pleased that, in the words of Premier McGuinty, "One law will apply to all Canadians." We are urging members of the opposition to rise above political considerations and ensure speedy passage through this committee. We appeal to you not because we feel that Bill 27 is perfect, but because one law for all Canadians is a principle that helps build a more integrated society. The other option of permitting religious laws to substitute for Ontario law would not only further balkanize our communities but would make it more difficult for a marginalized religious minority like Muslims to integrate and fully participate as equal citizens.

As recent Canadians, we follow the edicts of Islamic law in our personal lives. We believe there must be a complete separation between religion and state in all matters of public policy. We believe that refusal to give the stamp of approval and sanction to any religious law is a step in this direction.

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I would like to add that, strictly speaking from a Quranic perspective, mediation in a family situation is restricted to two people, one representing the woman and the other representing the man's family. So the proposals that were made were directly in contravention even if we had to apply Islamic law to a Muslim family.

We also believe that for the Muslim community, the application of religious law does not necessarily have to get the sanction of the state. The laws that have guided Muslims for the past 1,400 years have been applied and are working with Muslim families irrespective of whether or not they live in an Islamic state. These laws have been working prior to the creation of the modern nation-state and are above the laws that Parliaments discuss.

We also feel that the laws that guide us need to have the ability to be debated in Legislatures. Those that cannot be debated in Parliaments or Legislatures cannot be considered laws. Those who wish to make religious laws applicable in Ontario should first come up with the authorization that all the laws, whether they are from the New Testament or the Old Testament, whether it's the Gita or the Quran, should be debated in Parliaments without the notion or threat of castigating those who oppose secular law as apostates, which has been done in this case.

We, as practising Muslims, have taken great risks in coming out and opposing this. We have been threatened not only emotionally but physically as well on the streets of the city. We have been called apostates and traitors to our own community. We can tell you that we know the people who were pushing for this law, and family values and Islamic law were the last things on their minds. They were representing a global trend to reintroduce theocracy, and Canada was one place where they could sneak in. Thank God for people of sanity in this province: the current government, the New Democratic Party, which opposed it, and Mr. Tory, whom we also found very reasonable in listening to what we were saying, that there was consensus in Ontario that we cannot bring back medieval times, when laws that were considered to be divine and could not be debated in any Parliament were being introduced in this Legislature. Thank you very much.

The Chair: Thank you. You've left about eight minutes for each party. I'm going to give Mr. Runciman the floor first.

Mr. Runciman: I'll cede to Mr. Kormos. I'll go back to normal rotation. That's fine.

Mr. Kormos: Thank you kindly, Mr. Runciman. Thank you, both of you gentlemen. Mr. Fatah—Tarek, because we know each other—first, I think we should all acknowledge that you have been one of the major provocateurs around this issue. I say that in the best sense of the word. You, along with more than a few others, have been critical in bringing the debate to the surface.

However, what do you say to this observation, that we don't need an Arbitration Act for there to be arbitrations? Obviously, whether or not this bill passes—and I suspect it will; I have no reason to believe that it won't in terms of the Liberal control of the agenda. That's number one. Obviously, there being no need for an Arbitration Act and this bill not forbidding arbitrations—and I say small-"a" arbitrations, which are historic and long-standing—from being conducted, how, then, does one address the reality that there will be arbitrations conducted by any number of people in any number of communities with full voluntary participation by the litigants before that arbitration, with coerced participation of the litigants by virtue of power imbalance, by virtue of the traditions and customs and standards, and that the people will comply with those arbitrations because it is consistent with their faith beliefs, even though the conclusions reached may well be contrary to what the vast majority of us regard as fair? I think you know exactly what I speak of. How, then, do we respond to that reality, which will persist?

Mr. Fatah: I'll take "agent provocateur" as a compliment.

Mr. Kormos: As it was meant.

Mr. Fatah: We are cognizant of the fact that the fears you've raised are genuine, but we feel, one step at a time, that our community is already marginalized because of the obstacles it faces in integrating into this society. Historically, such marginalized communities have gone to their established institutions. In the absence of Muslim institutions that are secular, these groups of people, vulnerable people, have gravitated toward the clerics who would have received credibility, validation and authority over these communities.

The fears you've raised are genuine. Things will happen. We can't eliminate all wrong things in society simply by passing laws. There are laws against murder; murders happen. There are laws against theft; theft happens. We can't guarantee that as stakeholders. What we can do is that, by removing the validation that could

have come as a result of Marion Boyd's report, it's no longer there.

I can tell you that this debate did not take place in Ontario. It was on the front page of Pakistani newspapers when Marion Boyd's recommendation came out. I can tell you that a sister Legislative Assembly in the Republic of Dagestan used Marion Boyd's report to plead for polygamy over there. We know that in Lebanon these issues were raised, that in Egypt and in Saudi Arabia all Muslims who were fighting for equality, the ending of gender apartheid, were going to suffer a huge defeat across the Muslim world because these people were pointing out, "If it's good enough for a liberal, democratic parliamentary system in Canada, why is it not good enough for Iraq, where it is being introduced right now under the US administration?" Sharia has been introduced there.

Recognizing what you are saying, we as a small organization want to take baby steps. We've succeeded, and I hope that you co-operate and help to pass the law.

Mr. Kormos: Tarek, you're politically astute and skilled enough as a broadcaster. You know how to stay on message, and I understand that and I admire that. But, having said that, come on—you're a fundamental player in this debate—what do we do? What do all of us do to address the concern many of us might have about the fact that there are going to be arbitrations conducted and that people are going to be drawn into them for any number of good reasons? What are some of the real things we should be embracing to respond to that?

Mr. Fatah: The one thing that could happen in an ideal world would be to separate the Arbitration Act from the Family Law Act permanently. That would have been the ideal solution: that no family matters be directed toward arbitration. But, just like hospitals are being starved of cash and private clinics are being forced to open because hospitals are overloaded, we have now come to a situation where first we starve the judicial system of money and then we say, "Well, let's privatize the judicial system." So I can't, in my small organization, recommend what should be done.

In an ideal world, we would not be talking about tax cuts and we would be talking about funding the judiciary and hiring judges and crown prosecutors and creating more family law courts so there wouldn't be a backlog, so they wouldn't allow these stupid players who have no legal education, who have microphones in mosques and are telling people how to act, to suddenly become—they call themselves the court of judges, Darul Qada. It's a name they're taking on in Arabic that means "house of judges." They've even developed their own uniforms for when they come and preach.

If it were my government, I would have said, "Keep the Family Law Act and the Arbitration Act separate."

Mr. Kormos: Thank you, sir. Thank you, both of you gentlemen.

The Chair: The government side.

Ms. Matthews: Thank you very much. I appreciate the global perspective you bring to this debate. I also appreciate your leadership in bringing this issue to the awareness of the people of Ontario. This debate has been emotional but it has also been intellectual. We've heard, and will continue to hear, over the hearings from many different perspectives.

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It seems to me that a point of departure between both sides of this debate hinges on a finding in Marion Boyd's report, and I'll just read it. Her report noted that "the review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues."

I think that was an important statement to make, and I think that is where groups have agreed or disagreed with it. I wonder if you could comment, from your perspective, on that statement.

Mr. Fatah: Having worked with Marion Boyd, I find it difficult to put this, but let me be very kind and say that she was not truthful. There was enough evidence in front of her, by one organization after another: women crying in front of her, men whose daughters have been abused by this system across the world, people like me who have endured imprisonment in our countries under so-called sharia courts. We told Marion Boyd that the person behind this law introduced sharia law in Pakistan under General Zia ul-Haq. He was the minister of religious affairs. Today he's a citizen of Canada. He was running the show from Brampton, attacking Western and Canadian society as essentially evil. We told her, "That's his name; these are the writings." She refused. She came with a preconceived notion. She is a wonderful woman who believes, naively, that we should all live together and get together. She does not realize that in 52 countries, people like me are suffering and fighting. We are believing, practising Muslims. In this month of hajj, I can tell you that I've done my hajj twice, and I've been called an apostate by people who think that these folks are some court of latter-day Sandinistas bringing justice. No. And she won't listen to us. We begged her to find out.

I can tell you that one of the proponents of this legislation said something on the death of John Lennon. Let me quote exactly what his words were: "Lennon's life was also a reflection of the Western civilization. This civilization too will die at the hands of the evil it has let loose on God's earth."

On John Lennon: "If he created bent and twisted minds with such lines in his songs as 'happiness is a warm gun' and 'thank you girl', then it is right that he should be one of the victims of his own creation."

What more evidence do the people of Ontario need to tell you that this has nothing to do with family law? People have threatened your Liberal colleagues on TVO, saying, "We warn you that we will defeat you because you as a Muslim supported this law." How can this happen? This is not about law; this is about politics.

The Chair: Mr. Runciman.

Mr. Runciman: I just want to add my thanks for your contribution today. Sitting on the sidelines, you are playing a very active role, and I'm impressed by what you've said today. Obviously, you have a better sense of

this than any of us in this room would. How widespread do you think the sentiment you've expressed here today is shared amongst the Muslim community in Ontario?

Mr. Fatah: It is very widespread. But when your team is under scrutiny and is losing everywhere, you're associated with underemployment and poverty, three of your countries are under occupation, people are beaten who have come forward and said this is a problem for us—walk in my shoes when websites are accusing us of being gay and lesbian simply because we oppose this oppression. I've been beaten up on Yonge Street, and I can't go to the courts or the police because they will say I'm a publicity hunter. I get an average of 10 e-mails a day saying that I'm the kuffar or an agent of Zionism or some Christian evangelical or a communist—you name it. Those labels have been given to us. There are people who have put a lot at risk. There's no one from our community in Holland or the United States or Britain or the Scandinavian countries who has taken this risk. The Canadian Council of Muslim Women has done an incredible job with courage and bravery. I wish Muslim men had the same courage.

I'm not debating the law—how you treat it, how you folks get around—but Ontario has set an example. I've never voted Liberal, but I admire Mr. McGuinty for showing courage and that he didn't succumb to a lot of pressure that came on him.

I tell my Jewish and Christian friends who talk about values that values have been interpreted over the last 1,000 years to inflict terrible pain on ordinary people. It was only after the American and French revolutions that we came to the consideration that all of us are equal irrespective of race and religion. We cannot have citizenship based on inherited rights and inherited races. NDPers, Liberals or Conservatives in this province, with all their differences, have a commonality in civic society where you debate; you don't threaten each other's lives.

Just as an ordinary citizen, I'm pleading that there has to be consensus. We cannot have multiple levels of citizenship.

Mr. Runciman: I appreciate your contribution. Very quickly, you and your organization are supportive of the legislation as it's currently structured? We've had other submissions from individuals and groups that share your view, but they are proposing a number of suggestions and amendments. But basically your organization is supportive of the legislation as it's currently written?

Mr. Fatah: We are part of the broad coalition that has taken the issue from a legal perspective and we support it. We are not qualified, nor do we have the resources; we are a voluntary organization. We know Islamic law very well; we know democracy very well. How folks work out the best solution is up to you. I'm supportive of the women's groups that come up. They know first-hand. I can't second-guess what the women's groups in Ontario have suggested.

The Chair: Thank you, gentlemen, for being here today.

NO RELIGIOUS ARBITRATION COALITION

The Chair: Our last delegation before we break for lunch is the No Religious Arbitration Coalition. Thank you for being here today. Could you say your name and the organization you speak for? You'll have 30 minutes, and should you leave time, we'll be able to ask you questions.

Dr. Janet Ritch: Madam Chair, members of the committee and friends, it is my great privilege to address you today as the last speaker of the No Religious Arbitration Coalition.

My name is Janet Ritch. I teach undergraduates at York University and graduates in the Toronto School of Theology at the University of Toronto. I'm a practising Catholic by choice, and a woman, not so much by choice.

I will begin by stating my respect for both Premier Dalton McGuinty and Attorney General Michael Bryant and their staff for producing a complex piece of legislation which preserves the strengths of family law arbitration while restricting religious mediation to the realm of advice only. Those with faith in a just and merciful God are still free to bind themselves to whatever they believe is God's will. Hopefully, they are equally free not to be bound by what is not God's will. It is not a perfect world, nor is the judicial system perfect. But at least our Canadian laws respect the dignity and freedom of the individual conscience while trying to protect all citizens from each other, and even from themselves.

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Nevertheless, at the second reading of Bill 27, on November 23, which we all support as written, basically without change, the official opposition in the Ontario Legislature repeatedly complained that the Liberals arrived at their decision "without consultation," in a procedure which "shut out" or "rebuffed" certain groups, of which they mentioned only one organization, the Canadian Jewish Congress, who spoke earlier. Conversely, the same Conservative members of Parliament remarked that they had not heard a single complaint from the Christian community. They set that up in juxtaposition to the Muslim community, which was totally divided, and the Christian community was totally unanimous. That is what sparked my anger and to be here today, because that's unjust. The Christian community is no more united than the Muslim community. There are 28,000 denominations of Christians. Did you know that? It's incredible.

Since such remarks triggered these public hearings, I would like to address them. Homa Arjomand has already addressed the first issue of broad consultation, which gave rise to Bill 27. So I don't need to go through what everybody knows, that Marion Boyd was commissioned. She spent six months in consultations and she reported over a year ago in December. Section 4 of that report summarizes the consultations in 40 pages; that's the summary. Since her procedure was conscientious, consultative and transparent, it is difficult to imagine what could have been more democratic. Furthermore, her efforts have not been wasted, since the honest intention

behind her 46 recommendations is reflected in many provisions of Bill 27.

Her first recommendation, for example, that "arbitration continue to be an alternative dispute resolution option" for "family and inheritance law cases," has been accepted, among others. Furthermore, Boyd's firm belief in the importance of educating new immigrants to their rights under Canadian law will be put into practice. Personally, I think immigrant men should be educated as much as women.

Although a few justifiable checks have been made to balance Boyd's recommendations within Canadian law, her work has been largely respected. Consequently, the democratic process that produced Bill 27 can hardly be called into question, and these public hearings are redundant and unnecessary.

Since the Conservatives are anxious to hear Christian opinion, I will remind them of the statement released by the Catholic Archdiocese of Toronto soon after Premier Dalton McGuinty made his announcement on September 11 of this year. According to this statement, "Roman Catholic marriage tribunals apply canon law internally and do not engage in the civil determination of matters such as custody of children, support payments, division of property, descent and inheritance, or any other matter which would be covered under the Ontario Arbitration Act." Consequently, the Family Statute Law Amendment Act does not affect in any way the largest Christian denomination in Ontario, the Catholic church. Marion Boyd stated that very clearly in her report on page 39.

As a woman practising my faith within the Catholic church, I would also like to point out that when a female becomes disenchanted with the doctrine of the male hierarchy within this institution, she often feels that she has no recourse but to leave the church. Instead of expressing her dissatisfaction, she learns to suppress it or abandon her faith. Since these are rather negative options, they explain why few women within this tradition are organized enough and at liberty to express their discontent with the patriarchy in an official manner. Furthermore, I can see that my female Jewish friends are caught in the same negative trap in which their dissent is easily marginalized.

Our Muslim sisters are in some ways much more courageous. For this reason, I would like to take this opportunity to express my regret that they were ever subjected to such emotional turmoil here in Canada as that which occurred when the term "sharia" was introduced in this context. Perhaps the individual or institution which introduced the concept was hoping that we ignorant westerners would not notice the lack of equivalence between sharia and family law. The term's significance is too big to be reduced to the narrow field of family law arbitration.

One great benefit that has arisen from that debate, however, has been the rising Canadian awareness of the true meaning of "Islam," a word signifying "peace" in Arabic. It is all the more incumbent upon us in Canada to ensure that we are fully informed of the broad semantic range of the foreign-loan words which we adopt into English, especially when the language is as complex as Arabic. While "sharia" is often translated as "path to the water," another contentious word, "jihad," which as you all know is now translated as "holy war," could be translated by the Christian concept of "psychomachia," which is a Greek word, "psyche" meaning "soul" and "machia" meaning "battle." "Soul battle" is what "jihad" is in my interpretation. It's a battle that every Christian with a free conscience engages in.

The prevailing Christian attitude, in the case of all the immigrants we are welcoming to Canada, should be that which Jesus selected from the Torah: "And if a stranger sojourns with you in your land, you shall not vex him. But the stranger who dwells with you shall be unto you as one born among you, and you shall love him as yourself." I am aware that in the Jewish tradition the Torah is never read alone without commentary. It is quite obvious that this text too requires interpretation, since the stranger in it is clearly a man from a cultural context which did not allow the woman to exist independently. Yet some Christian fundamentalists read these words and other words in the Hebrew Bible literally—one reason we should not trust them to apply religious arbitration to family law.

Men have been the lawgivers, legislators and interpreters of the law since the Hammurabi code in Mesopotamia, in the 18th century before Jesus Christ ever lived. This code sanctified the most primitive law of all time, the law of retaliation—lex taliones—still all too operative today: "eye for eye and bone for bone," as it goes in the Mesopotamian code.

One commentator of the Talmud argues that the Jewish version was progressive for its time, because the Judaic form of retaliation in kind, measure for measure, consistently upholds one standard law for all, which is after all the main objective of Bill 27: one law for all Ontarians. Christians ideally place mercy and forgiveness over retaliation. This means that even a feminist revenge for male abuses is unacceptable. Nevertheless, we must admit that the male bias still exists in law and politics, not just religion. Four thousand years of written law against less than one hundred years of female participation represents no small power imbalance.

Bill 27 walks a fine balance between the cancellation of binding religious arbitration and the continuation of ADR and family law—a perilous path, but a risk which must be assumed responsibly. Since the Liberal government has already proven itself to be responsible, it can be reasonably trusted to iron out the details of the proposed regulations in consultation with legal professionals.

While we are urging the government to proceed with the third and final reading of Bill 27 as soon as possible, there are some outstanding concerns that I would like to reiterate. We are focused upon reducing the risk of self-appointed arbitrators outside the public court system. People who are more conversant with the legal details have already spoken. I just hope that the records which the accredited arbitrators are required to keep are detailed

enough for proper scrutiny. I did think of something creative yesterday: Why doesn't the government do surprise audits of the arbitrators like you do when you're interested in our income tax? Are families less important than income tax? I would say they're more important.

Speaking of taxes, there is absolutely no excuse for failing to provide adequate funding for legal aid here and across the country. Stephen Harper asserts that Canada enjoys a surplus. Whoever forms the new government on January 23 owes the Canadian people the social services that we expect in return for our taxes. Legal aid is one of these services. Premier McGuinty will just have to keep fighting for the transfer payments which we are owed. We could use that surplus to bring both the public courts and the arbitration system up to standard and to make the justice system accessible to all women and mothers on reduced incomes.

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Secondly, our immigration laws continue to invite people from around the world who come here for refuge in hopes of a new and better life. Too often they are disappointed. If we are welcoming them here, we must provide them with the support services they require to make Canada their home, and we must be open to integrating them fully into the Canadian lifestyle.

I have just a few examples of what we could do better. First, we must ensure that qualified translators are competent to provide accurate translations in the public courts. A scandal in Peel region exposed by Casey Hill before Christmas, as reported by Christie Blatchford, suggests that this is not always the case.

Second, we need to sensitize lawyers and judges, not just arbitrators, to cultural practices which are imported from places like India, where the honour code still sometimes reduces a woman to the level of her husband's or her father's property. We've seen too many cases of men murdering even their own family members when that honour code has been abused, in their minds.

Third, an effort could be made to lessen the adversarial nature of the public courts and to shift the emphasis from being reactive to being more proactive in order to prevent disasters before they happen, like that of the child who was thrown on to Highway 401 in March of last year. The Family Court was responsible for that near tragedy, and I was expecting an inquiry.

I recognize that the legal community already has creative ways for dealing with ADR, including court-annexed ADR. I urge you to work co-operatively to reach a consensus between the legal community and all members of government as speedily as possible so that when the Legislature reopens, you can pass Bill 27 with as much enthusiasm as possible, and unanimously—Homa asked me to ask for that—and uphold Canadian laws, not just Canadian values, and then get on with the regulations.

I reiterate Alia Hogben's first recommendation in particular: It is vital to monitor and evaluate the implementation of the law. I will continue to monitor it from within the Christian community to be sure that you place the common good of all Canadian men and women of any racial background, religion or colour above the self-interest of the established elite.

There are many paths to the water. Surely the path is less significant than the water, the source of all our lives, from which we come and to which we all return, whether we like it or not. This is a relatively new country with relatively little historical baggage. We must forge a new path together, walking a fine balance forward into history.

The Chair: Thank you. You've left just under five minutes for each party, beginning with the government. Mr. Zimmer? No. Ms. Matthews? Anybody on the government side with any questions or comments?

Ms. Matthews: I just want to say thank you very much for your thoughtful presentation. It's very much appreciated. I have no further questions.

The Chair: Mr. Runciman?

Mr. Runciman: No, none here. Thank you very much for your presentation.

The Chair: Mr. Kormos?

Mr. Kormos: Thank you very much, Ms. Ritch. You expressed concern about lex talionis, yet there are many legal historians who regard the Leviticus, embraced by Jewish peoples of that era, of lex talionis as not only progressive but the foundation of our concept of proportionality; in other words, that the punishment should not be disproportionate to the crime, be it in criminal matters—which is very much a hallmark of, presumably, a civilized criminal justice system, that the punishment should not be disproportionate to the crime—or in civil matters, that the judgment should not be disproportionate to the claim. In other words, there shouldn't be unjust enrichment.

I hear you, and I have no doubt that there are many sources for your observation, lex talionis in its most literal sense. As I said, what's interesting—and again, this is why the commentary is valuable. I don't know whether Mr. Zimmer shares this view or not, whether he read the same stuff I did over the course of the years. I've always regarded, based on the legal historians that I've read, that it's the underpinning of our modern western liberal justice system. I find your references to those sorts of things an incredibly valuable part of your presentation, because you engage us in a way that others wouldn't with the omission of those sorts of references.

Thank you very much. I appreciate your contribution to the debate.

Dr. Ritch: When you said that that brought in one law for all, I was referring to the fact that in Mesopotamia at the time there was slavery, so that if a slave lost part of their body, the value of the slave would go down. So the retaliation for the property, the slave, being damaged was different than for an aristocrat within the society.

Mr. Kormos: Look what we do to victims of workplace injuries in this country.

Thank you very much.

The Chair: Thank you very much for your delegation.

Dr. Ritch: Could I just clarify one thing?

The Chair: Sure.

Dr. Ritch: I am the least of the members of the coalition here; even though I'm being billed as the No Religious Arbitration Coalition, I'm just the Christian side of it. So please accept everything that they've stated before me, which was all the presentations here today, as really standing for the No Religious Arbitration Coalition, and me as an add-on.

The Chair: We appreciate your being here today.

Committee, we're scheduled now for a break before we begin our afternoon hearings. We are a little over the time, so in order to give everybody an hour, we are probably going to have to start a little bit late.

Interjection.

The Chair: Oh, we're starting at 2 o'clock. We're early. Sorry, I got my time wrong. So we'll be starting again at 2 o'clock.

The committee recessed from 1239 to 1403.

ONTARIO ASSOCIATION OF INTERVAL AND TRANSITION HOUSES

The Chair: Good afternoon. The standing committee on general government is back from its recess, and we're here to continue public hearings on Bill 27, the Family Statute Law Amendment Act, 2006. Our first delegation this afternoon is the Ontario Association of Interval and Transition Houses. Could Eileen Morrow come forward.

Mr. Kormos: Chair, if I may, Philip Kaye, the legislative researcher, has drafted a couple of very good pieces of work for us, and I just wanted to thank him, on behalf of all the members of the committee, for his work in that regard and for getting it to us early. I appreciate that.

The Chair: And he showed initiative. He did it without being asked. Thank you very much. We appreciate that.

Could you say your name and the organization you speak for? You will have 30 minutes. I'll begin the time after you have introduced yourself. Should you leave time at the end, there will be an opportunity for us to ask questions.

Ms. Eileen Morrow: Thank you very much. My name is Eileen Morrow. I'm the coordinator of the Ontario Association of Interval and Transition Houses. My organization is a 75-member association of first-stage emergency shelters for abused women and their children across the province of Ontario. It's the largest women's shelter network in Canada. We were established in 1977, so we're coming up to our 30th anniversary, working on behalf of abused women and children who are exposed to woman abuse.

Today, I'll be speaking primarily to Arbitration Act changes and amendments, and the amendment to the Children's Law Reform Act. You have a copy of the brief we've provided to you. I'm not going to read it, obviously, but I'd like to just hit the high points, I hope.

I'd like to speak first of all about the Arbitration Act and how the amendments support women in abusive relationships, and to cite first of all that we are very pleased to be able to come here and support the intention of the changes to the Arbitration Act to restrict religious arbitrations to advice only. We're very pleased that the government has listened to women's concerns across the province, because we feel this provision is important to protect the safety, equality and legal rights of women. In particular, our concerns would be for abused women and their children. We believe that the current wording and provision within the Arbitration Act, as it's proposed, does not disallow seeking advice from faith leaders, while at the same time ensuring that there is one law for all Ontarians, including women in the province of Ontario.

We're also pleased that the bill ensures that parties to an agreement must receive independent legal advice before making an arbitration agreement. It is important for abused women and children that they receive information on their legal rights, as mediators of all kinds are focused on achieving agreement, not necessarily legal fairness. This has been a problem for abused women and their children in the past, and continues to be.

We also support the inclusion of a statement that a party's failure to object to any irregularity in the arbitration or mediation will not be considered a waiver of the right to object later. This is critical to abused women and their children, because often women who are in abusive situations feel pressured into mediation by everyone in the system, including systems like legal aid, and only later do they realize that the agreement they have made is actually not legally fair. Then they're in a situation where they are accused of signing something. You know: They've made the agreement and they have to stick by it, even if it's not safe or supportive to the well-being of their children, who are exposed to woman abuse.

We do, however, have some concerns about the amendments to the Arbitration Act and would like to speak a little bit about how the amendments make it harder for women in abusive situations. We're actually troubled that the government has taken the opportunity, when making amendments to restrict arbitration to Ontario law, to also decide to codify and enshrine mediation in the law of Ontario.

Advocates who work with women in violent relationships have opposed the growth of family mediation for a long time, because women are often not in equal bargaining positions with their partner and often feel pressured to enter mediation. They're often given inaccurate information to encourage them to participate; for example, that mediation is cheaper, that it's less adversarial, that it's better for their children. They may even believe that the mediator can change their abusive partner's behaviour. These myths are dangerous to women in abusive situations. We believe the enshrinement of family mediation in Ontario law will enhance the credibility and use of family mediation, and so we worry that it will also enhance the jeopardy of women in abusive situations as a result.

There are a number of factors that concern us about mediation. Mediation and arbitration require relatively equal bargaining power between parties, which the women whom we work with almost never have. The actual definition of an abusive relationship is a power

imbalance. So it's not just in the mediation or during the divorce; it's an encapsulation of the entire relationship in the past, present and future.

Many mediators are not educated about intersecting equality issues or the role of the family in perpetuating power imbalances between women and men and other power imbalances like racism, homophobia and discrimination against women with disabilities.

Mediators often do not and cannot identify tactics of intimidation or coercion. So they look to things like physical violence or outright insults, but they don't see the look on his face, the way he moves his head, the way he pushes his chair back. These things are signals to women in mediation.

In addition, mediators cannot make women safe by having in place safeguards like shuttle mediation or things like that, because the intimidation exists in the world, not just in that room or after they leave the room.

Mediation in family law promotes the creation of a private agreement rather than a public judgment based on legal fairness and rights. Women in abusive situations have seen far too much private justice, thank you very much. They don't need any more.

Mediators engage in negotiation, a concept that is alien to abusive, manipulative and controlling partners. Family mediators often promote shared parenting, an arrangement that has not been proven in the best interests of children and, in particular, is dangerous for children who have been exposed to violence against their mothers.

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Mediators often promote a focus on the future and discourage the parties from discussing the past. For women in abusive situations, this is clearly unfair, as the best predictor of future behaviour is past behaviour. Mediators focus on achieving agreement, as I said, not fairness or equality. Women in abusive situations often feel they need to trade off their equality and legal rights in order to be safe or to protect their children.

So if the government continues to follow the path of codifying the practice of family mediation under the Arbitration Act and the Family Law Act, the regulations and legislation should be strengthened and monitored to ensure that women in vulnerable situations do not lose their rights to safety, security and equality under the same Ontario and Canadian laws that the act seeks to uphold.

We therefore recommend that a clause be added to the legislation per se that requires anyone engaged in any form of family law mediation to immediately screen out and refer to independent legal counsel and women's community advocates any cases in which they identify abuse, violence or power imbalances based on any of the equality provisions under section 7, the right to life, liberty and personal security, and section 15, the equality clause of the Charter of Rights and Freedoms.

Mediators and arbitrators should be required to receive ongoing education on issues of equality based on sections 7 and 15 of the charter. Ongoing monitoring of arbitrations and mediations is needed, and comprehensive record-keeping, to ensure accountability to these rights.

There has been no consultation on the codifying of mediation in this bill, so I think we seriously need to monitor this for women who are vulnerable in all communities in Ontario. Legal aid funding must be increased to ensure that parties streamed into arbitration and mediation have the resources to seek independent legal advice comparable to parties within the family law system to support them through the mediation process. The act should specifically state that without proof of independent legal advice, an arbitrated agreement is of no effect.

Resources should be provided to ensure that all women and children have access to supports that would facilitate their equal access to justice in the family law system, including cultural and language interpretation, accommodation for parties with disabilities, and advocacy support from community-based services where that is applicable. The bill should be amended to include a clause requiring evaluation and review of the sections of the act applicable to family law matters in their entirety at least three years after the debate and the amendments are proclaimed, again, because there are some serious implications of the codification and the changes in this act.

I'd like to turn now to the Children's Law Reform Act and talk about that just briefly. How does the amendment support women in abusive situations and children who are exposed to violence against women? We believe that this is a very positive step forward and long overdue within family law, and we'd like to thank the Ministry of the Attorney General for taking this step to better protect women and children who experience the challenges of escaping an abusive situation. The failure of courts to consider abuse against not only children but their mothers has resulted in some Family Court custody and access decisions that have had tragic outcomes, including the deaths of children and their mothers. Courts have often made the misguided assumption that abuse and violence against women will stop when couples separate and that separation alone will protect children from exposure to abuse. This is absolutely untrue.

This amendment also honours at least one of the recommendations of two coroners' inquests into the murders of abused women in Ontario—the Arlene May inquest and the Gillian Hadley inquest—both of which recommended, among other things, the consideration of domestic violence in family law custody and access decisions.

The amendment to the Children's Law Reform Act proposed in Bill 27 will go a long way to ensuring that lawyers will be able to raise issues of abuse without fear that courts will dismiss them or see them as irrelevant to the well-being of children in custody and access decisions. We've heard this from lawyers who have tried to support abused women in Family Court.

We're particularly pleased that the amendment mentions both abuse and violence, as many courts assume that non-criminal acts of abuse are safer than those of

physical or criminal violence. They could not be more wrong in this. In both of the inquests into the deaths of Arlene May and Gillian Hadley there was very little physical violence, but a lot of criminal harassment and non-physical violence that led to these women's deaths and threats against their children.

Although there are additional amendments that could and should be included in the best-interests-of-the-child test, especially the history of primary caregiving of the child, for example, we are pleased to support this current amendment and urge the opposition parties to support the government to ensure its passage.

We also fully support the intention of the government to repeal old sections of the Children's Law Reform Act that were adopted but not proclaimed in 1989, and we also urge opposition parties to support these changes as recommended.

Finally, I would just like to say that while we recognize the problems of supporting processes and practices that do not conform to the Ontario law and we support the amendment to the Arbitration Act in that sense, we also recognize the shortcomings of that same family law that we support for women and children, and particularly for aboriginal women, racialized and immigrant women, women with disabilities and poor women in Ontario. We strongly urge the province to move as quickly as it has moved on this legislation to remedy all of the current imperfections in the formal family law system, including within legislation governing family law matters. In doing so, it will have the contribution, expertise and support of women's advocates and violence survivors for any progressive changes it proposes.

Thank you very much. I'm done.

The Chair: Thank you. You've got just a little over five minutes for each party, beginning with Mr. Runciman. Did you have a question?

Mr. Runciman: I don't have a lot of questions. You referenced the Children's Law Reform Act. This issue was raised earlier today, and the issue of gender neutrality. Do you share those concerns? I don't know if you were here for that earlier submission.

Ms. Morrow: I'm sorry?

Mr. Runciman: Gender neutrality: They're concerned that perhaps the legislation should be stronger with respect to that issue.

Ms. Morrow: Yes. I believe it should be stronger with respect to that issue. I believe that, by and large, what we're talking about here is women abuse, and we're also talking about a situation in the family in which women are still the primary caregivers of children. Even when courts order joint custody, for example, women end up being the custodial caregiver of the children. I believe that as long as that is happening, we need to recognize and support women who are attempting to carry on the care of these children and to protect them. Because it's not a gender-neutral condition in our communities, I think we really need to recognize the imbalance. We're not talking about same-same here. Even when we're talking about violence, we're not talking about the same situation.

I don't have time to go into the intricacies of it but I'd be happy to speak to you at another time about why it's just not the same, including the fact that after marriage dissolution women become poorer, they remain the caregivers of the children regardless of the court order and they remain in danger. You can't flip it. The power imbalance doesn't flip the other way.

Mr. Runciman: Are you familiar with the Quebec jurisdiction in this regard? I'm not, really. I raised it just out of a very cursory understanding, but apparently there is no provision for this kind of mediation in Quebec. Is that correct?

Ms. Morrow: I'm not a lawyer, and to be honest, if I start speaking about the legal processes in Quebec, I'm going to get into trouble.

Mr. Runciman: We tend to be supportive of the intent of the legislation. I guess my only concern is that while this seems to be and it could be simply, in response to you, a resource issue, when you start taking a look at the current backlogs in Family Courts, the opportunity for appeal, all of the complications that grow out of this, do you have any concerns?

Ms. Morrow: I guess the question back to you would be, has the government costed out providing independent legal counsel to everyone in mediation under this bill? Has it costed out monitoring the enshrinement of the codification of mediators? Has it costed out training the mediators on an ongoing basis? Has it costed out the administration of the record-keeping and reporting of mediators? If that's costed out, mediation, especially if it doesn't work, doesn't necessarily cost less.

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Mr. Runciman: They're great questions. We'll await the responses from the government.

Mr. Kormos: Thank you, Ms. Morrow. Those are important observations. You might be interested to know that the bill currently before the House amending the Child and Family Services Act actually institutionalizes mediation in child protection cases, which I find a pretty frightening proposition in view of the subject matter that's being dealt with.

Ms. Morrow: I have bigger concerns about the child welfare legislation.

Mr. Kormos: So here we are. To be fair to the government—and people will rush to correct me if I'm wrong—the bill only deals with mediators in passing in terms of the Child and Family Services Act. There's not a whole lot of regulation—there's no regulation. I'm going to be asking people from that community how they feel about being added to the list of mediators and arbitrators.

I know the kind of work that you, your member organizations, their staff and their volunteers do. I've been in those Family Courts, in the provincial court, family division—I don't know what you call it now—where people are lined up in hallways, where women who have been abused are sitting six feet away from their abusers. They're all scrunched together in the same

space. They sit and wait and wait. Family court judges have dockets three and four pages long. The staff have been there for eight, nine or 10 hours. People finally get into the courtroom, and the judge says, "Look, we've got to adjourn your case for three more weeks because we just can't deal with it today." That's incredibly dangerous, in my view, and frustrating, amongst other things. There's certainly no justice in it for the litigant, for the woman who's fighting custody issues and seeking some modest support etc.

How is arbitration going to help the bulk of those women? You talk about financing the independent legal advice. Let's face it: If people can afford $2,000 or $2,500 a day for a private arbitrator, if people can afford to rent the facilities, if people can afford the court reporter who might have to be hired to make a transcript in case they want to appeal it, they're not likely to be eligible for legal aid anyway. My concern is that this does nothing to address the real problem out there of Family Courts that simply don't have the capacity to deal with the backlog. What do you say to that? A whole lot of the folks we know in shelters do not have the resources to even entertain private arbitration. They've got to use the provincial court, family division.

Ms. Morrow: I don't think that the Arbitration Act or the enshrinement and codification of mediation or mediation as it stands right now—unregulated, unsupervised and freely reigning around the province—really does solve the problems of the family law issues. The family law issues are still there. They're still endangering women and they're tearing women apart. Abusive men are very familiar with the family law system, how to abuse it and how to abuse the legal aid system in order to maintain control of the women and children they have in their control when they're in the relationship. It's one of their primary systems for going after women after the relationship has ended and the couple has separated. They use custody and access—in particular, access—as their primary weapon.

That's a family law issue as well as an arbitration and mediation issue if the mediators and arbitrators are going to be making those kinds of agreements.

Mr. Kormos: I don't know if you share my understanding that even in arbitration, people retain counsel; people get lawyers to represent them in front of the arbitrator.

Ms. Morrow: Not necessarily. Anybody can hang out a sign that says, "I'm a mediator and I can balance the power and I can keep you safe."

Mr. Kormos: I'm talking about arbitrators.

Ms. Morrow: Arbitrators—oh, you mean like lawyers' mediation and that kind of thing.

Mr. Kormos: No. Arbitrators; the private judges.

Ms. Morrow: Like religious arbitrators?

Mr. Kormos: No. Private judges, like any of the dispute resolution services downtown here: a lot of retired, very capable, very competent people.

Ms. Morrow: Yes. Then they would have lawyers involved.

Mr. Kormos: With the same cost as in the public court system in terms of lawyers.

Ms. Morrow: If the public is paying for it, yes.

Mr. Kormos: In terms of legal aid, one of the things my office is being confronted with on a regular basis is that even if you get a certificate, you're hard pressed to find a lawyer. Most family lawyers won't take on a case because of the cap on the certificate. They simply can't do justice to that client.

Ms. Morrow: That's an issue for family law as well. It's an issue in court as well.

Mr. Kormos: Yes. Quite right.

Ms. Morrow: Many, many more people are representing themselves.

Mr. Kormos: Shouldn't we really be discussing some of those things?

Ms. Morrow: I think we should be discussing some of those things. I think there are a whole lot of things we should be discussing around family law and the legal aid system. I hope the province of Ontario moves on to discussing all the things that—

Mr. Kormos: Mr. Zimmer is the parliamentary assistant to the Attorney General. He has the ear of the government. He's the person to tell that to.

Thank you, ma'am.

Ms. Morrow: You're welcome.

The Chair: From the government, Ms. Matthews.

Ms. Matthews: Thank you very much for coming today. I really appreciate your perspective. I know your organization, and I know you do excellent work with women and children who are at the most difficult moment of their lives. I really appreciate the work you do and the fact that you took time away from that to come and comment on this legislation.

I know the discussion has gone beyond this legislation. We've talked about other challenges that we face, but to refocus on your presentation, I want to thank you for bringing up the amendment to the Children's Law Reform Act, because we haven't heard a lot about that. I just wonder if you have anything you want to add about why this change will strengthen the arsenal against domestic violence in Ontario.

Ms. Morrow: I think it's really critical. If I were to choose one amendment—I wouldn't choose one amendment, by the way, but if I were going to have to choose one, this would be the one, because abusive partners use custody and access to maintain control and power over their partners, and it's often tragic for women and children. We've seen that in the past. Children have died in these situations on access visits. In fact, Helen Keric and all four of her children were murdered on an access visit some years ago.

This is not a fantasy; it's a nightmare for women, so it's very important that judges be required to consider it. To be honest, there are not a lot of people who truly understand how dangerous this can be for children. They believe, when they're making a decision in the best interests of children, that it really doesn't matter what the relationship is like between the parents of the child. They

have, I think, kind of wishful thinking. They believe that if the parties just separate, there will be no more violence. I know they believe this, because they think that both parties are involved in this violence, that it's some kind of argument gone out of control, that these people just don't get along, and if you separate them, everything will be fine and the kids will be fine. That's actually not what's going on in an abusive relationship.

Abusers often in fact intensify the violence after the woman leaves, because control is gone. It's when women either decide to leave or have left that you see murder happen and the killing of whole families. To allow that kind of destructive belief system to go on in the Family Court and be freely used by abusers—freely using our public system to continue that kind of behaviour—is scandalous. We've been working on these issues for 30 years, and we're still having judges refuse to take this into consideration, even though we have Dr. So-and-so and Dr. So-and-so and Dr. So-and-so testifying. There's research; there are all kinds of proof.

We need a direction. We need to give direction here. We need to take leadership and give the courts direction that they must consider this in the best interests of the child. If they're to do that, the two most important things in the best interests of the child are the level of poverty the child experiences and the well-being of the primary caregiver, who is almost always the mother regardless of the court order. Shared parenting notwithstanding, it's the mother who ends up taking care of the kids.

If those two things affect the children and the well-being of the children the most, why aren't we considering those things in the best interests test? I would say it's critical to protecting children and, in particular, it's critical for protecting them from exposure to violence against their mothers. I think it's illogical to assume that they will never be exposed to any abuse against their mothers if fathers are given access or, for that matter, custody—so for sure, joint custody.

The Chair: Thank you for your delegation today. We appreciate your being here.

Ms. Morrow: Thank you very much for the opportunity.

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ONTARIO BAR ASSOCIATION

The Chair: Our next delegation is the Ontario Bar Association. Good afternoon and welcome. Will you all be speaking this afternoon? As you begin, could you introduce yourselves and the group you're speaking for? Once you've introduced yourselves, you can begin. You have 30 minutes. Should you leave time at the end, there will be an opportunity for us to comment or ask questions about your delegation.

Ms. Kelly Jordan: I'm Kelly Jordan, chair of the family law executive of the Ontario Bar Association. I'm here with two of my colleagues: Hilary Linton, vice-chair of the alternative dispute resolution section of the bar association, and Maryellen Symons, a member of the executive of the feminist legal analysis section of the bar association.

Together, we're here to present the position of the bar association, which is a branch of the Canadian Bar Association. The Ontario Bar Association, or OBA, is the largest voluntary legal association in Ontario, representing 16,000 members, including lawyers, judges, law professors and law students. It was founded in 1907.

The OBA supports the policy considerations that underlie Bill 27; namely, the protection of vulnerable parties in family law arbitrations, who are primarily women. We support the principle that family law arbitration should be conducted in accordance with Ontario/Canadian law. Arbitrations in family law are an important choice available to separating couples to resolve their disputes. Family arbitration is voluntarily chosen by many people who are unable to resolve their own conflicts. It is affordable, accessible, confidential and generally less adversarial than the court system. It can offer vulnerable women and men a sane way to end a very serious conflict, which ultimately benefits children who need the conflict between their parents to end.

The choice of arbitration has been recognized as an important one by family law judges. In a recent Ontario case, the presiding judge was asked to enforce a private arbitration award, and he stated, "In recent years, alternative dispute resolution has become an important part of the system of family law in Ontario. The courts are overburdened and when parties attempt to resolve their issues privately some of this burden is relieved."

The importance of ADR has also been recognized by scholars who work in the area. Robert Nelson, the author of Nelson on ADR, published by Carswell, has stated, "I strongly support the use of mediation or arbitration in family law matters. I can see a great benefit to using a confidential process to resolve some of the thorny issues facing a family in crisis—such as maintenance, division of property, etc."

Bill 27 offers important safeguards to vulnerable parties who choose this method of conflict resolution. We support those provisions, including the requirement that parties who choose arbitration do so after obtaining independent legal advice. We also support the amendments contained in the bill with respect to the Children's Law Reform Act, including the direction that courts consider domestic violence in assessing one's capacity to parent.

The OBA, however, does have some serious concerns with four main aspects of the bill that are more process in nature. I'm going to address the first of these issues and then ask my colleagues to address the remainder.

The issue I'm addressing is what we view as most critical, and that concerns the absence of a quick enforcement mechanism for arbitration awards in the bill. This issue is going to be canvassed at some length by Mr. Thomas Bastedo, a senior family practitioner, later this afternoon, and so if we can't get to all of your questions on this issue, I think you'll have an opportunity to speak to him about it in more detail.

Under the Arbitration Act currently, arbitration awards can be enforced by the parties under section 50, which requires a court to "give judgment" enforcing an award with very few exceptions. To give you a specific example, if you went to arbitration and obtained an award for the payment of money—for example, for the payment of $100,000 to settle your property dispute—and your spouse refused to pay you that money, you could go to court under section 50 and have the court make an order on the same terms as the arbitrator did in his or her award. In our example, that would mean you could go to court and quite quickly garnish your spouse's wages or force the sale of his or her property in order to secure your award.

Bill 27 exempts section 50 of the Arbitration Act from family arbitrations, and instead says that arbitration awards should be enforced not by court order but as domestic contracts under the Family Law Act. This is particularly problematic. Domestic contracts, like separation agreements, aren't automatically enforceable. They are contracts between two parties, and when one party contravenes a provision of a separation agreement, the remedy is for the other party to sue on the basis that the contract has been breached. In the example I was using where your spouse owes you $100,000, you would have to sue in the courts, on the basis that your spouse contravened the domestic contract, for the payment of the $100,000. This would entail starting a court action and essentially re-litigating the issues that were the same subject of the arbitration that led to the award.

This, in our view, is contrary to the goals of finality and cost-efficiency that are central to family law arbitrations in Ontario presently. Enforcement is critical, particularly to the more vulnerable party, who generally has less resources to pursue enforcement. The OBA therefore recommends that the bill be amended to allow family arbitration awards to be enforced under section 50 of the act.

I'll now ask Hilary Linton to address part 2.

Ms. Hilary Linton: I'm going to talk about a couple of other sections of the bill that are causing us a lot of concern. Before I do that, though, I just want to clarify the profound difference between mediation and arbitration. I was listening to some discussion previously about mediation. This bill, of course, is not about mediation. Mediation is an entirely different process. We are dealing here with a process involving the decision-making capabilities of an arbitrator, not the facilitation role of a mediator. I won't say anything more about that, but I just thought it was important to emphasize that the distinction is real.

I'm going to ask you to take a look at clause 1(11)(c) of Bill 27, which stipulates the ability of the Lieutenant Governor in Council to make regulations. In particular, I'm addressing proposed clause 58(e). This regulation would require arbitrators to meet with parties separately as part of the arbitration process. This process is known as screening in family mediation—screening for power imbalances, violence and abuse. In mediation practice, of course, such screening is essential to ensure a fair, balanced and safe mediation process.

However, it is very inappropriate to require arbitrators to conduct this kind of screening. The goal behind this regulation is laudable. It's very important that arbitration be voluntary and very important that the process of arbitration be safe for parties, and we support these goals. I want to emphasize that we also support the requirement that arbitrators receive training in the dynamics of violence and power and abuse, because that's important information for arbitrators to understand in order to manage the arbitration properly and to apply the law properly. However, it is not appropriate to ask an arbitrator, who is a neutral, impartial decision-maker, to meet privately with a party and, in essence, take evidence from that person on matters that may be relevant to the issues in dispute in the arbitration. That's what you do in a screening process: You meet with parties privately and ask them a lot of questions about the dynamics of their relationship, about violence, about abuse, about facts that may well be evidence. To ask an arbitrator to do this is to put an arbitrator in an untenable position as a professional arbitrator. It violates the requirements of due process, fairness and procedural justice that are the hallmarks of the Arbitration Act.

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Therefore, the OBA is recommending that the legislation be amended to require that not the arbitrator but the lawyer who is providing the independent legal advice have the responsibility for this important function. It is the responsibility of the lawyer who is advising the parties prior to arbitration to ensure that the parties are attending arbitration voluntarily, to ensure they understand the implications of this agreement and to negotiate a fair and safe arbitration process if the screening indicates that there are any safety concerns. In our experience, it is entirely possible that victims of violence will want to proceed with an ADR process such as arbitration, and it will be the responsibility of the arbitrator then to put into place the kinds of safety plans a mediator would put in place when the screening indicates evidence of violence in the relationship.

The role of the lawyer providing independent legal advice would be to assist in structuring an arbitration process that's safe; or alternatively, if the screening indicates that the person's participation in arbitration is not voluntary, then the gatekeeper will be the lawyer providing independent legal advice, and this person then will advise the party to not participate in arbitration if it's not a voluntary choice.

Second, I'd like to talk about one of the proposed amendments to the Family Law Act which is set out in subsection 5(6) of Bill 27. This subsection turns the agreement the parties enter into at the outset of the process, the agreement to arbitrate, into a domestic contract. This, in turn, gives the parties a new remedy for setting aside that agreement if it doesn't comply with the requirements of section 56 of the Family Law Act. It also provides the parties with a new means of setting aside an

award at the end of the arbitration process if they can show that the agreement to arbitrate at the beginning of the process did not comply with the requirements of section 56. Fundamentally we support this, particularly the provisions in clauses 56(4)(b) and (c), which set out that the agreement to arbitrate can be set aside, for instance, "if a party did not understand the nature or consequences" of the arbitration agreement or "otherwise in accordance with the law of contract," and that's all good. It's the first part that we're concerned about: 56(4)(a). This section would require parties to exchange financial disclosure, which is in practice exhaustive financial disclosure just to enter the arbitration process, even if the issues that are being arbitrated are not financial issues and are not issues on which you would normally exchange that kind of financial disclosure. So it's an added burden, an unnecessary cost to the parties, to require them to undergo that procedural step when they're entering into an arbitration process.

Our recommendation is that family arbitration agreements be considered to be domestic contracts but that they be exempted from the requirement of clause 56(4)(a) of the Family Law Act that deals with the exchange of financial disclosure or that allows a party to set aside a domestic contract for inadequate financial disclosure or for failure to disclose substantial assets and liabilities. That should not apply to family arbitration agreements. Second, we support the notion, though, that family arbitration awards should be capable of being set aside if that kind of financial disclosure was not made in the arbitration process. Those are the two recommendations that we're making with respect to subsection 5(6), amending the Family Law Act.

The final point I want to touch on is subsection 5(10) of Bill 27. This is the section that adds the new definition of "secondary arbitration." This is a real concern for us. We feel that there may be potentially a very serious problem with the draft legislation in the definition of "secondary arbitration." Secondary arbitration, and I'm thinking particularly of mediation-arbitration, what's known as med-arb, is a very common process for parties to incorporate into their separation agreements as a means of resolving future disputes arising out of the separation agreement. It's a widespread practice, and for good reason. Parties who go through the purpose of negotiating a separation agreement get full, independent legal advice, then want a manageable and affordable mechanism for resolving future disputes—not just managing the ongoing administrative aspects of the agreement but actually determining future disputes that may arise between the parties. I believe that speakers following us will be touching on this important issue as well.

Because it's so cost-effective for parties to agree to this process in their separation agreements, our concern is putting additional obstacles in the place of parties who want an effective way of resolving future disputes. Our concern is that the current wording is too narrow. First of all, it could lead to a lot of litigation, but second, it could put parties in the position where they have to go and get further ILA on the agreement to arbitrate the secondary dispute. In many cases, they may arbitrate several times secondary disputes after their separation agreement has been executed. In each case, are they going to be required to obtain independent legal advice just to enter that arbitration process, when they've already done it in the context of negotiating their separation agreement? So, although we understand the objective behind this provision of the legislation, and we do support the notion that parties not be bound by arbitration clauses in marriage contracts, we query whether the standard should be different when you're talking about arbitration clauses in separation agreements.

Thank you. Those are my comments.

Ms. Maryellen Symons: I'm Ms. Maryellen Symons. I'm going to take up the last issue in the concerns we would like to raise with you.

After a great deal of careful consideration and discussion, the three sections of the Ontario Bar Association that are most concerned with the effects and implications of Bill 27 are largely in consensus. But there are some concerns on which we were not able to reach consensus, and they relate to whether parties to family arbitration should be able to contract out of the limited right of appeal. Section 45 of the Arbitration Act provides a right of appeal on a question of law alone, with leave of the court, which is quite restrictive, and the grounds for getting leave are quite restrictive. We still are not in full agreement. We still have some concerns about whether parties should be able to opt out of that limited right of appeal and we'd like to present those concerns for your consideration.

The family law and alternative dispute resolution sections believe that prohibiting parties from contracting out of the right of appeal would take away a significant benefit of family arbitration. This benefit is finality, which in their view is often more valuable to the more vulnerable party. Their concern is that an abusive or overbearing spouse could prolong the dispute through further negotiation and litigation if the right of appeal is maintained for all arbitrating parties. Final and binding arbitration may be the only way to end the dispute and terminate a disadvantageous or dysfunctional relationship. Moreover, the costs of arbitration could increase if transcripts are required for possible future appeals.

Family and ADR would recommend that the right to appeal remain a negotiable item in family arbitration agreements.

The feminist legal analysis section believes that family law involves public policy aspects which make it desirable for family arbitration awards to be subject to scrutiny. They point out that section 46 of the Arbitration Act, which provides for setting aside an arbitration award under, again, very limited specified conditions, does not provide a remedy for an award that wrongly applies the law. If the arbitrator messes up on the law, section 46 does not provide a remedy for that.

They also think that the finality of an unappealable award can be as valuable to a domineering and abusive

spouse as to a vulnerable spouse. Bill 27 adds significant protections for vulnerable spouses, which should lessen the concern about continued abuse through litigation.

Therefore, the feminist legal analysis section would recommend that the right of appeal be preserved in family arbitrations.

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All three concerned sections of the bar association support Barbara Landau's recommendation, which you will hear about later, that lawyers who provide independent legal advice to parties contemplating family arbitration should be required to certify that they have explained the appeal rights and the consequences of waiving them. We concur in urging you to give careful attention to her submission that parties should be able to waive appeal rights when the arbitrator is a Canadian lawyer or retired Canadian judge, but not otherwise.

We also recommend that the full range of appeal options should be set out in standard family arbitration agreements. At present, many standard agreements to arbitrate family disputes simply have a clause contracting out of appeal rights—that's the standard default clause in the agreement—and this makes contracting out the default position and militates against a freely negotiated choice. We think that whatever the Legislature decides to do about appeal rights, the full range of choices—limited appeal, full appeal, no appeal or whatever—should be there in the standard agreement for the parties to choose from.

Thank you. Those are our submissions.

The Chair: You've left about three minutes for every party to ask you questions, beginning with Mr. Kormos.

Mr. Kormos: Thank you kindly. Where are the defenders of arbitration?

Interjection.

Mr. Kormos: Bless you.

Look, you're right: Arbitration is cheaper because the parties can design their own process. They can make an abbreviated process. They can dispense with evidentiary rules that are cumbersome. They can design it to meet their particular needs. It's private, which means no state intervention either; no state scrutiny.

I just gave Mr. Zimmer the Hansard from back in 1991, when Howard Hampton introduced the Arbitration Act for first reading, the Uniform Arbitration Act, which was lauded by everybody and subsequently by judges. The Liberals were gushing with praise after first reading of the bill. Greg Sorbara, the Liberal responding to Howard Hampton, said, "Thank goodness you've introduced this, Mr. Hampton. It's the work that Ian Scott, the Attorney General, had been doing for some good chunk of time now."

My view is that the government has created something that's neither fish nor fowl. They say it's arbitration, but it lacks some of the fundamental qualities of arbitration. It seems to me, and I may be alone on this, that they're creating a private, government-regulated court system for family law. Is it still arbitration when the government regulates arbitrators, when the government tells you what law to utilize, when the government tells you what procedural course to take? Is it still arbitration?

Ms. Jordan: We've given it careful consideration because it does change the conduct of family law arbitrations fairly significantly and it will change our practice on a day-to-day basis as family lawyers. But we think that the underlying policy consideration of the bill in protecting vulnerable parties is an important one, and that the bill, for the most part, subject to those four main areas we brought up, achieves the correct balance between protecting vulnerable parties in family arbitration, which is different from other civil arbitration, and also giving parties the choice for arbitration.

I think you brought up Quebec, or I can't remember if Mr. Runciman did. My understanding is that Quebec didn't have a history of arbitration prior to these issues coming to the fore but they have now passed legislation that would say that there can be no family arbitration.

Mr. Kormos: The Quebec civil code clearly states that family matters and probate matters are exempt from arbitration.

Ms. Jordan: Right. There weren't significant arbitrations prior to that, so it really only codified the existence, but we wouldn't want to see that in Ontario. We think arbitrations are a very valuable choice for family law.

Mr. Kormos: What if commercial arbitration is next on the government's hit list?

Ms. Symons: I don't think that's a realistic fear because, looking at society, there still are systemic power imbalances between women and men. Women have made a great deal of progress but there still are systemic power imbalances, and those systemic power imbalances do frequently become very live in matrimonial relationships. Although I agree with my colleagues about the value of arbitration, otherwise I would not be here, I think the reason for the government's initiative to provide some protections for parties in family arbitrations is that here you have a situation where historic, pervasive, systemic inequalities and power imbalances still are in play. They present a situation where you're going to have more of a risk of a vulnerable party being harmed in a process. That happens in court processes too, but we have more of a danger of a vulnerable party being harmed in a process if the process is not adjusted to face those realities.

The Chair: Thank you. Mr. Zimmer.

Mr. Zimmer: A question on this issue where the arbitrator screens for the power imbalances: In your model or your amendment, you'd like to see that rest with the lawyer representing the party. My question is, if that were the case—it resting with the lawyer, not the arbitrator—what are the protections for the woman in this case to protect against incompetence of the lawyer, a conflict of interest that the lawyer may have? Perhaps the lawyer that she has engaged was referred to her by the other party to the arbitration—the husband, if you will—or is just a lawyer who doesn't practise a lot in that area and, while not incompetent, is just not up to snuff on the issue. How would you protect there?

Ms. Linton: It's a good question, which we have thought about. The whole field of independent legal advice is a rather well-developed one in family law. The proposal—I believe Barb Landau will be speaking to this to some degree—includes a fair amount of training for family lawyers who are providing this independent legal advice in the dynamics of violence and abuse. The same kind of training that we as mediators take, we are recommending that the family lawyers also be required to take, and that they certify that on the certificate.

Beyond that, it's the same protection that anybody has who goes to counsel for independent legal advice and receives incompetent ILA. There are remedies for that in law.

Mr. Zimmer: Just a follow-up on that: Do you not think that a party to an arbitration—a woman, in this case—might feel a little more confident or be open in her complaints or her story being able to speak privately to the arbitrator on this issue, rather than going through the lawyer, who will try and capture her concerns and then articulate them in a more public forum at the arbitration board?

Ms. Linton: There are two pieces to this. One is, what are the criteria for entering arbitration? The next one is, what is the arbitration process going to look like? When you go to a lawyer for independent legal advice and the lawyer screens, that's a very exhaustive process. That's the place where a woman will be comfortable, in my view and experience, disclosing the extent of abuse or violence, discussing it and providing the information.

The arbitrator is a decision-maker. It's no different from a judge. This is why we're saying it's very inappropriate to put the arbitrator in the position of receiving that information privately, in particular. If that is relevant evidence, it will get put before the arbitral tribunal in the proper forum. But we're not talking about evidence; this is process screening. It's something that should take place before, just from a proper process point of view, but as well just to preserve the integrity of the arbitration process. No arbitrator would do that. No arbitrator could do that.

The other risk we foresee, of course, is that if you put an arbitrator in that position and the arbitrator meets privately with a party, takes evidence, in essence, privately and doesn't share it with the opposing side, it then becomes a ground for setting the arbitration award aside. Worse, it exposes the woman who gave the information to the arbitrator to a risk of harm because ultimately, on a judicial review, the information she provided the arbitrator would have to be disclosed in the judicial review process. It's critically important that information provided during this kind of screening process never be disclosed to the abuser. We see also a risk of harm to vulnerable women by having them disclose this kind of information to the arbitrator in a private forum. If it's relevant—

Mr. Zimmer: But if—

The Chair: Mr. Zimmer, I'm sorry. Your three minutes are way over. We're going to go on to the opposition.

Mr. Zimmer: Sorry. It was just getting interesting.

The Chair: Mr. Runciman.

Mr. Kormos: I'd like you to have one more question.

The Chair: Mr. Runciman, you have the floor. No? Okay, Mr. Yakabuski.

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Mr. John Yakabuski (Renfrew–Nipissing–Pembroke): Thank you for your submission. I'm not a lawyer, to begin with, so I—

Interjection.

Mr. Yakabuski: Yes. Thank you very much, Mr. Kormos. I'm proud of it, too.

I'm looking at this whole discussion and this whole process. We're talking about arbitration; we're talking about independent legal advice; we're melding lawyers and arbitrators. At this point, I'm looking at this, for example, and the clause that Mr. Zimmer is talking about, which I believe is 58(e). You're saying that the government is saying, "You should be meeting with an arbitrator to discuss whether there is a power imbalance," and you're saying, "No, you've got to meet with a lawyer first to determine if there's a power imbalance."

When you start to look at the complications of all of this, why would people bother with it? It looks like they're going to end up in court anyway, because we've got lawyers and arbitrators involved. You have to ask yourself, I suppose, where the parties are in this dispute resolution situation. I guess my question would be, at this point, if you're getting legal advice and arbitrators involved it would seem to me that the situation is probably already headed for the courts.

Ms. Jordon: Arbitration is not mediation. From the limited time I've spent here today, I think there seems to be some confusion about mediation and arbitration. Arbitration is similar to courts in that you are empowering an individual—someone you choose—to make decisions between you and your spouse that will resolve the dispute between you. It's no different than a judge except that you choose who that decision-maker is, you choose the process of how that decision will be made, what evidence, for example, the decision-maker will hear. But it is an adversarial process and parties should have independent legal advice before they enter it. We support that in the bill. But it's not akin to mediation. So it's an alternative to the courts, it's an alternative to heading to the courts, but it is when two parties are unable to resolve, by agreement, a decision and they need someone else to make that decision for them.

Mr. Yakabuski: But it would appear that the government is setting, through regulation yet to be seen, all of the terms of reference with regard to the arbitration, not the two parties.

Ms. Jordan: It's true that this bill does impose different considerations on family law clients who are going through arbitration than civil or commercial litigation. There are different safeguards here, but we think that those safeguards are important.

Mr. Runciman: This is from the Canadian Jewish Congress submission—I don't know if you heard them or

not: "If section 2.2(1) is to be retained, its wording should be amended to read that a family law arbitration is not enforceable unless it is 'compatible with the law of Ontario and with the values entrenched in the Canadian Charter of Rights and Freedoms.'" Do you have any reaction to that suggestion?

Ms. Linton: I can respond to that. We didn't hear the submission, but we were briefed on it briefly. I think our sense is that if there is a way of preserving the ability of parties to arbitrate their dispute in accordance with the law of another jurisdiction that is compatible with our law, we would support that. On the other hand, we didn't see this as a significant enough issue to raise a concern within our submissions.

The Chair: Thank you very much for your presentation today. We appreciate your being here.

NICOLE TELLIER

The Chair: Our next delegation is Nicole Tellier. Welcome. Before you begin, if you could say your name for Hansard. When you begin, you'll have 30 minutes. Should you leave time, afterwards we'll be able to ask questions or comment on your delegation.

Ms. Nicole Tellier: Thank you. My name is Nicole Tellier. Good afternoon, Madam Chair and honourable members. I'm grateful for this opportunity to speak. By way of personal introduction, I'm a family law lawyer who's been practising in the city of Toronto for 18 years. A significant component of my practice has been the representation of victims of violence, both in the family law process and also in civil lawsuits and administrative proceedings aimed at compensating victims of violence or disciplining their perpetrators. I'm an active member of the OBA and the Advocates' Society and their law reform initiatives, I'm a regular consumer of mediation-arbitration services, and I am also to a lesser degree a provider of mediation and arbitration services. So that is the experiential foundation of my submissions today.

I'd like to situate my submissions in a larger political and legal framework before addressing them specifically. I'm mindful of the work and efforts by various interest groups that led to this legislative initiative, and I understand the importance of this reform. I think we also need to be very mindful of some other context, and that is that in the last decade, we have seen an astronomical increase in the use of private dispute resolution, and it continues to increase. People opt for the arbitration process because it's accessible, because it ensures confidentiality, because it offers control over the adjudicative process and because it's more cost-effective. While the increase in its use may regrettably be symptomatic of some of the foibles of our justice system, including systemic delays and the like, we need to bear these features of the arbitration in mind when doing the clause-by-clause and ensure that they are maintained. I think that can be done without altering or diminishing the integrity of the bill and the policy rationale that informs it.

Briefly, while I have an audience of politicians, I would like to make an important plug. We as family law practitioners have been asking for pension reform for decades. This is an important reform, but we hope that this is the beginning of other family law reforms to come.

Lastly, before I direct my submissions to the more, for lack of a better word, critical comments or concerns I have with respect to the bill, I would like to applaud the amendments to the Children's Law Reform Act in relation to expanding the test for best interests of the child. I sat in a room similar to this probably 10 or 15 years ago as a representative of the National Association of Women and the Law and urged the Legislature then to amend the CLRA to acknowledge that spousal abuse or violence speaks directly to a capacity to parent. This is a long-overdue amendment, and while it ought to be common sense and while there is an abundance of social science literature that points to the serious damage that this can have on families, judges today still do not consider it to be a factor. Regrettably, we must use the mandatory language proposed in this bill to direct them to do so. I'm grateful for that amendment.

The five areas that I wish to address are set out on page 1 of the submission, which I hope has now been circulated before you. This is not an exhaustive list, but these are the ones that I have chosen to deal with in my limited time today: the absence of a meaningful enforcement mechanism; the proposed screening process by arbitrators; the appeal provisions; possible regulations for record-keeping; and the requirement for full financial disclosure when the arbitration agreement is entered into. They're listed somewhat in order of priority.

Let me say at the outset that the absence of a quick enforcement mechanism, in my mind, is the most troubling aspect of this bill. Under the existing Arbitration Act, parties to private arbitration have a quick and easy remedy: Essentially, their award is taken to the court and transferred into an order. Judges routinely, on motion, convert awards into orders. Often, these motions are on short notice or even without notice. Clients who opt for this process are advised in advance that this is a remedy. It's critical to them to know that at the end of the day, they really do have a remedy and that the award can be translated into an enforceable document without unnecessary delay or expense.

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As currently drafted, Bill 27 amends part IV of the Family Law Act and says they are enforceable in the same way that a domestic contract is, which would require the filing of the domestic contract in the case of support.

It leaves two big holes in enforcement. The first relates to property awards. Since there is clearly a concern for protecting the vulnerable, I would like to give the example of exclusive possession of the matrimonial home. This is an award that might be made either to protect a spouse who is a victim of violence or to ensure that the children's best interests are met. Under the present bill, there would not be a satisfactory, readily

available award to enforce that kind of property remedy. Moreover, there is an increase, in my view, in the number of cases, including high-conflict cases, that find their way to the arbitration process. So it's important that parenting issues also have an easy enforcement mechanism, and the simplest way to achieve that is to mirror the provisions in the existing Arbitration Act.

Lastly, I wish to point out that many arbitrations are done under the rubric of the Divorce Act. While obviously the province has no jurisdiction to legislate in that area, the Divorce Act provides for spousal support, child support and custody, as do the FLA and the CLRA. Those parties would have the enforcement mechanism available to them under the Arbitration Act, and spouses within the meaning of the FLA would have a completely different regime. I submit to you that, where possible, all members of the public and litigants, whether they be married or unmarried, should have the same remedies. So there is another reason to fix this section.

The recommendation on this is found at pages 3 and 4. I'll leave it to you to read it. I specify the sections in the FLA and the CLRA that would need to be amended in order to achieve the recommendation of an improved enforcement mechanism.

Next, I wish to briefly address the pre-screening by the arbitrator. I think this has already been eloquently stated by my colleagues earlier. Arbitrators are neutral adjudicators. It's completely inappropriate to involve them in a pre-screening process in which they have to assess issues about which they are going to hear evidence, and possibly very controversial evidence. It would not just taint but undermine the entire integrity of the process. I believe it was Mr. Zimmer who was concerned about this issue earlier. I think that the mischief that can be caused if this screening is allowed is much more dangerous than what safeguards are in place in other parts of the bill.

The bill requires independent legal advice before signing on to an arbitration agreement and selecting this process. It's important to remember that separation agreements do not require ILA. People waive ILA when they enter into their separation agreements all the time, nor is a waiver of ILA determinative of having it set aside at a later date. So we are holding parties and their counsel to a much higher standard when entering into this agreement, because they must have ILA. That ILA, hopefully, will help screen the appropriateness of the process for the individual case, and also, there are other safeguards in relation to setting aside an award or judicially reviewing it. I think that, on balance, it is far more important to maintain the overall integrity of the arbitration process with the assurance that ILA should address that issue. The certificate of ILA, for example, if you wish to be practical, could require the lawyer to say that they have screened. It could be part of a standard ILA certificate, and that could be dealt with in the regulations. If nothing else, I would like to think that lawyers read what they sign. They would read that and be mindful of that. I think that's the solution to that conundrum presented by the bill.

I do wish to leave time for questions, so I'll address briefly the appeal provisions. This is another area about which I feel quite passionately, although my colleagues may feel less passionately. This bill is a significant departure from the current Arbitration Act, which permits parties to waive their right of appeal and vest the arbitrator with final binding authority. I think the ability to secure finality through this right of waiver is a key feature of arbitration. I can say from my own experience over many years that most parties elect to waive their right of appeal. If one of the primary purposes of this legislation is to protect the vulnerable, then this inability to waive the right of appeal is actually contrary to that purpose. Victims of violence are among those who wish to have a final award, and if there is an option to have the right of appeal, we should not be paternalistic. We should grant them the agency to choose that right and to allow them the ability to have an award that truly is final.

We also have the built-in default position under the current provisions, which I am suggesting are the ones that be adopted. In this scheme, obviously both parties must consent to the waiver so that if one doesn't, the right of appeal will be maintained. On that basis, I am suggesting that section 3.2.v be deleted and a new section be added, stipulating that parties to an arbitration agreement may elect to waive their right of appeal and that such waiver is only operable if both parties consent to it.

I'd like to address next the regulations for record-keeping. I have to say, I'm not entirely certain what the rationale of these regulations is. Obviously, the underlying rationale should dictate the nature of the regulations themselves. The concern is twofold: One is the maintenance of confidentiality, which is the key reason why many people invoke this procedure; and the second is not to create too onerous a responsibility on the arbitrator, which in turn will result in added costs to the litigant.

If the purpose of these regs is to keep rudimentary data so you know how many cases are being arbitrated and their outcomes, I suspect it will not be problematic. Judges frequently use initials when they're dealing with infant plaintiffs and some regulation can be passed that would ensure confidentiality is maintained. I am certain that arbitrators, who are usually very senior members of the family law bar, can do a précis of their award.

But if the intention is to have a larger body of jurisprudence, then we have different considerations because it would require the deletion of identifying information throughout the award. So I think it's very important that this committee be clear about what the rationale is. I can say from my own perspective that, although I am a consumer and provider of these services, it is not without some regret that the public system is not being accessed more frequently and that we are indeed privatizing family law, something feminists fought strongly to avoid, and we are losing a public record of what goes on in family law disputes. So if the intention is to maintain a body of jurisprudence, then we need to be careful that it can be done in a way that does not impose a burden on the arbitrator or costs on the participants.

The last area where I suggest a recommendation relates to the requirement of full financial disclosure at the time of entering into the arbitration agreement. As I stated earlier, many parties opt for the arbitration process to resolve their parenting issues, and it's completely irrelevant, so it shouldn't be in there. Moreover, the financial disclosure can be either a complex aspect to the case or it can be one in which the parties wish to agree to streamline. It's premature to ask for it at this stage and it would delay both the entering into of the agreement as well as the scheduling of the arbitration. That is access to justice denied. We have appropriate remedies, including motions for third-party production if there are disclosure issues. Therefore, I'm recommending that 56(4) of the Family Law Act be amended to exempt arbitration agreements from the operation of 56(4)(a). My recommendations on this, which appear on page 8, give you draft language in that regard that's very easy. You can achieve this result by adding four words when you do your clause-by-clause later this week.

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Lastly, I've suggested that there be a review. I don't know that any persons who made submissions have made this suggestion, but it is a common and, to me, very useful suggestion when a major law reform initiative such as this is being contemplated. A case in point, of course, is the child support guidelines. Frequently, the new law will require a mandatory review of that law as a way to assess its successes and its shortcomings and to determine whether further amendment or fine-tuning or regulations are required. Since this is going to fundamentally alter the way in which arbitrations are conducted, with a whole scheme of regulations aimed at training and regulation of service providers, I think that it would be remiss if the legislation did not provide a mandatory review process to see if what you're hoping to achieve here is indeed being achieved.

On that note, I think I've left about 10 minutes for questions, and I hope that you have some.

The Chair: Actually, you left more than that; you left about four minutes for each party, beginning with the government.

Mr. Zimmer: Just on this right to appeal, two questions. In your experience as a family law lawyer, what motivates parties to waive their appeal now?

Ms. Tellier: Finality. They want the dispute over. One of the beauties of arbitration is that you select your adjudicator. I have to admit that sometimes we get judges who know less than others, and they are more likely to be subject to appeal or we may be more disgruntled about their result. But for the most part, parties to arbitration are choosing someone that they know has the requisite expertise, and they want it over.

Mr. Zimmer: That leads me to my second question, then. If the right of appeal is waivable, then by definition it becomes something you can negotiate whether to waive or not to waive. If it can't be waived and it's always there—it can't be negotiated away—is that not an added protection for the parties to the arbitration?

Ms. Tellier: No, it's a disincentive to participate in arbitration. For those who want the right of appeal, they simply don't sign on because that's the default position. One of the things that is evident in high-conflict cases and cases of domestic violence is that you often have what has recently been coined in a case that was just released: litigation bullying. If the arbitrator is vested with the power to make a final award, we can deal with that issue. If you're dealing with a competent adjudicator, then the chances of an error in law are slim. It doesn't mean that there aren't times when there shouldn't be judicial review or that an award ought not to be set aside, and those protections are there. So it's a balancing.

Mr. Zimmer: It seems that if I was in a high-risk arbitration, a high-risk case, and I did not have a right to appeal—I'm speaking personally—I might not go into the arbitration because I just want to have that extra step that I can take it to, whereas if I do have the right to appeal the arbitration, I'll at least go through that exercise first.

Ms. Tellier: I put the decision-making process to you this way: In considering whether to arbitrate or go to court, one of the considerations is your right of appeal. With the protection of ILA that's been introduced into this legislation, presumably potential litigants will be advised of the difference between the automatic right of appeal under the FLA and the provisions that exist under the current Arbitration Act, which is the model I'm proposing.

The more vulnerable person is the more likely to wish finality and the more likely to have fewer resources to either defend or advance an appeal. So with the greatest of respect, I think this provision is actually completely contrary to the interest group it purports to serve.

Mr. Yakabuski: Thank you very much for your thoughtful submission. I just want to clarify the discussion between you and Mr. Zimmer. I think you mentioned when you introduced yourself that you've been doing this kind of work for something like 18 years. You're saying that the most vulnerable of the two people in a relationship before an arbitrator would like to know, going in, that when they are settling this—today, tomorrow, whenever it's settled—that is the final settlement, so to speak, because their concern, if I'm reading you correctly, is that if there are rights of appeal, they, being the vulnerable party, can get worn down, out-financed or—

Ms. Tellier: Re-victimized.

Mr. Yakabuski: That's another way of putting it. It goes on and on and, at the end of the day, they simply end up being the losers in it. Is that how I'm reading you?

Ms. Tellier: That is my experience. As I also said at the outset, my family law practice has always had a significant component of it in which I deal with these kinds of cases and high-conflict cases. That is certainly my experience with those clients.

Mr. Runciman: The OBA suggested that parties should be able to waive appeal rights when the arbitrator's a lawyer or a retired Canadian judge, but not

otherwise. It seems a little bit elitist perhaps, but I wonder how you feel about that.

Ms. Tellier: That's an acceptable alternative. I support that.

Mr. Runciman: How many—

Ms. Tellier: I suspect that most—actually, I won't suspect anything. I don't know how many of those who are providing these services fall into that category, and others are lawyers, clerics or others.

Mr. Runciman: So someone without the LL.B. behind their name would not be competent enough to make those kinds of decisions?

Ms. Tellier: Well, the whole point of this legislation is to require them to make the decisions in accordance with the law of Ontario and not out of their principles. So I thought that just a general ability to waive the right of appeal would be sufficient.

Mr. Runciman: I tend to agree with your position on this, but just for whatever reasons, it bothered me.

It seems to me—and I think Mr. Kormos suggested this. As we listen to this, why do people go into arbitration? It strikes me that they don't want the delays, the complexity of getting into the Family Court system and the cost of it as well, and a whole range of reasons. This seems to be, I think, as he suggested, becoming something of a mini-court system. What we're talking about here is the development of a very complex process as well. I'd just like to hear from someone who's experienced in this field. What's your view of what the reaction of people is going to be to what is being proposed here, in terms of this bureaucracy, if you will, the processes that we're contemplating the establishment of?

Ms. Tellier: To a large degree, they already exist. As I said at the outset, the use of arbitration as a mechanism for resolving family law disputes is well entrenched in our legal and social culture. I think that the efforts aimed at training and raising the bar of those who are providing services will be welcomed. They don't need to be overly bureaucratic. There are many who believe that we should have mandatory legal education for all lawyers, not just those providing these services. So I think that in large part what we're doing is revisiting something that already exists and making sure that it's meeting the needs of the vulnerable, which has been recognized as a problem.

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Mr. Kormos: Thank you, Ms. Tellier. This is very important and I appreciate your comments. On page 3, you made reference to arbitrations under the Divorce Act. What you're telling us is that if Bill 27 becomes law, arbitrations pursuant to the Family Law Act etc. will be dealt with by Bill 27 and those amendments, but an arbitration under the Divorce Act will be based purely on the Arbitration Act, 1991, which means that the arbitrator can utilize faith-based standards, any law that the parties agree to. Is that what you're telling us? That's number one.

Number two, the arbitrator's award has the status of a domestic contract in terms of enforceability. To be enforced, the arbitrator's award, according to the legislation, would have to be based exclusively on Ontario law or law of another Canadian jurisdiction, but a separation agreement—am I right?—is a domestic contract, too, and enforceability of a separation agreement doesn't depend on it being exclusively Ontario law. Does that then create the reality of faith-based arbitrators telling people, "This is the arbitration decision and you will incorporate it into a separation agreement," hence domestic contract, but since this is not an arbitration under the Arbitration Act, it's merely advisory, Mr. Zimmer. Do you understand, Mr. Runciman? There's a domestic agreement, which is not based exclusively on Ontario law, which then becomes enforceable.

Ms. Tellier: There were a lot of comments and questions there. I'll try to unpack them. My main point was to point out the remedial differences between marrieds and unmarrieds under the current scheme, and suggest that all Ontario residents who are going through this difficult time, whether they be married or unmarried, should have the same access to remedies, including the enforcement of an arbitral award. The degree to which an arbitrator will make decisions in the shadow of the Divorce Act, which provides different statutory considerations both in respect of child support and spousal support, albeit very similar ones, and what that means for faith-based, to be frank, is not something that I considered before coming here today.

Mr. Kormos: Let's face it. Let's cut to the chase here. This is all about the concerns around so-called sharia law. That's what gave rise to this whole consideration, and bona fide concerns. One of my concerns, going back to the domestic contract, is that if people can enter into a separation agreement, whether it's with or without counsel—not lawyers, but the rabbi, the imam, the priest, the clergyperson—are you telling us that it's enforceable, notwithstanding that it may not be based exclusively on Ontario law?

Ms. Tellier: There may well be a separation agreement in which there are no property issues as between the parties that has been crafted in accordance with the Divorce Act and has no family law features in it whatsoever. There could be a propertyless couple or there could be a childless couple who are divorcing for whom there are spousal support issues, and they would deal with those issues.

Mr. Kormos: They could agree to it whichever they want, if it's a separation agreement.

Ms. Tellier: Yes, they can.

Mr. Kormos: And the fact that they agree to it in a manner that isn't necessarily exclusively in compliance with Ontario law does not make the agreement unenforceable?

Ms. Tellier: No, that's for federal jurisdiction.

Mr. Kormos: Okay.

The Chair: Thank you very much. We appreciate you being here today.

TORKIN MANES COHEN ARBUS LLP

The Chair: Our next delegation is Torkin Manes, barristers and solicitors. Welcome.

Mr. Lorne Wolfson: Good afternoon.

The Chair: I have three delegations listed.

Mr. Wolfson: Actually, it will be two.

The Chair: If you could identify yourselves, if you're both going to be speaking, and the group that you speak for, and when you begin, you'll have 30 minutes.

Mr. Wolfson: My name's Lorne Wolfson, and I will be speaking on the issue of the use and advisability of arbitration in family law procedures. Dr. Barbara Fidler is seated on my right and will be speaking to the importance and issues of parenting coordination. I've provided you with a paper that lays out some of my concerns. In the brief time I have, I'll try to highlight a number of those concerns.

I've practised family law in Toronto for approximately 29 years. I'm a certified specialist and I'm a dispute resolution officer certified by the Superior Court of Ontario. I support the joint recommendations from the ADR and family law sections of the Ontario Bar Association, the submission of Mr. Bastedo regarding enforceability of arbitral awards, the submission of Dr. Landau regarding training of arbitrators, as well as the submission of Dr. Fidler that you'll hear regarding the role of parenting coordinators.

My comments relate to the importance of preserving and facilitating the use of arbitrations in family law proceedings. Over the past 10 years, I've reached the point where I refer over 90% of my family law cases that cannot be resolved by way of negotiation to arbitration. The reason why I do that and why so many other senior family lawyers are doing the same is important for you to understand. I've tried to lay out briefly in my paper a number of those reasons.

First of all, arbitration is faster and more convenient than proceeding in the court system. Simply obtaining an initial application date in the court system can easily take six to eight weeks. You can be in front of an arbitrator in a matter of two to three weeks, and sometimes earlier if necessary. To get a date for a motion in the court system can often take two to three weeks. You can be in front of an arbitrator on an urgent motion within a matter of days.

The arbitration system allows parties to choose their decision-maker. In the court system, you get the judge who is sitting the day you bring your motion or show up for your trial. Many judges are very experienced and dispense excellent justice; many judges have absolutely no family law experience and the quality of their decision-making is quite uneven. In arbitration, the parties have the right to choose their decision-maker, and typically their decision-maker is someone who is qualified both in family law and in the arbitration process. If not, they wouldn't be choosing them in the first place.

In a typical court case, you arrive in front of a judge on a motion, and that judge could have 12 or 15 other cases on his or her list that day, which means that if you're lucky, you get 45 minutes of that judge's time. He may or may not have had an opportunity to review your materials. In arbitration, you are typically the only case in front of your arbitrator. The arbitrator will have read your materials and will have as much time to devote to your matter as the case requires.

In my experience, arbitration is much more cost-efficient. Courts are procedurally slower. The arbitrator can develop whatever procedures, formal or informal, he or she wishes and the parties wish to move the matter along.

Confidentiality is important for many parties. In the court system, unless the judge seals the file, which is a rare event, the proceedings are public. Anybody can sit in, and they can be reported in the public press. Typically, arbitrations are private and are not available to members of the public.

Finality is a major reason for parties choosing arbitration over the court system. Proceedings in the Family Court typically can take six to 18 months, and it's not unusual to see cases that drag on two to three years. In my experience, arbitrations rarely last more than six to nine months, and interlocutory proceedings, motions and procedural matters are done much more quickly.

Effectiveness of mediation-arbitration: In the hands of a skilled arbitrator, most cases are resolved very quickly. Many family law parties opt for a process called mediation-arbitration, where they contract to resolve the case before an arbitrator, but the arbitrator has a mandate to try to resolve the case through mediation first. It's very effective where you have a skilled mediator-arbitrator. In my experience, I've probably done 100 cases of mediation-arbitration in front of many senior family arbitrators in the Toronto area. I would say that over 90% of those cases resolve in the mediation phase, never get to the arbitration phase, but it's the stick of the arbitration that allows the mediator-arbitrator to assist the parties in resolving it themselves.

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Many of the submissions you have heard suggest that arbitration will not protect vulnerable parties, and it's been suggested that the court is a much better protector of their rights. In my view, it's exactly the opposite that is the case. The court system is a very poor place to go if you're a vulnerable person. If you do not have a deep pocket, if you're a woman who perhaps is intimidated by your spouse, if you are not someone who is able to play the aggressive litigation game, then court is a very unfriendly place for you. That is why, frankly, in my experience over the last 10 to 15 years, arbitration has become such a popular alternative, particularly with parties who are more vulnerable.

The choice, in many cases, isn't arbitration versus the court system, because very few cases get to trial. The choice is between arbitration and people walking away from the court system saying, "I give up," and in most of those cases agreeing to their spouse's terms and agreeing to settlements that very often do not reflect principles that we agree are reasonable and that are very often very bad

deals. In my experience, arbitration is an effective tool to level the playing field and let vulnerable parties participate on the same level as parties who have greater power.

Many of the changes in the proposed legislation are good. The proposal to give power to the parties and responsibility to the lawyers giving ILA when the arbitration agreement is first signed is a positive step. Arbitrators should be trained to ensure that they have standard qualifications in terms of knowledge of family law and Canadian arbitration procedures. However, the changes in the legislation such as weakening finality and taking away the decision-making regarding appeal rights will weaken arbitration and in my view make it a less desirable alternative for those who are looking for that alternative.

Those are my submissions. I'd be happy to answer any questions that you have.

The Chair: Maybe you both would want to speak, and then we'll see how much time is left over for both.

Dr. Barbara Fidler: The following is a summary of my submission. You have the longer version in writing before you, along with my CV.

There is a need to speak on behalf of separating and divorcing parents who need and consent to arbitration, mediation-arbitration and, in particular, parenting coordination, the latter a more recent dispute resolution alternative also governed by the Arbitration Act. There is also a need to speak on behalf of both the legal community and mental health professionals, who are committed to helping high-conflict families.

I am an experienced psychologist and have been working with separated and divorcing families and, in particular, high-conflict families for more than 23 years. I am also a member of the Association of Family and Conciliation Courts' multidisciplinary task force, which developed guidelines for the practice of parenting coordination approved by the board in May 2005. I support the joint recommendations of the ADR and family law sections of the Ontario Bar Association, as well as the submissions of Thomas Bastedo, Dr. Barbara Landau, Lorne Wolfson and Ms. Tellier.

After defining parenting coordination, I will address concerns about the proposed amendments in terms of regulation, unenforceability, section 59.4 and subsection 59.7(2). Parenting coordination is an alternative dispute resolution process reserved for a minority of families who remain entrenched in chronic conflict years after the separation and divorce and for whom adequate assistance has not been provided by our overburdened courts. Typically, a single family has already relied upon numerous professionals, including several lawyers, therapists, community and child welfare agencies, mediators, assessors and, in some cases, more than one assessor.

These families have high re-litigation rates, much of the time over small issues that do not fall under the auspices of legal custody, be it sole or joint. They struggle with implementing their parenting plan and argue incessantly about day-to-day matters such as choosing holiday dates, making temporary changes for special events, parent-teacher meetings, school field trips, extracurricular activities, the movement of hockey equipment, parent-child telephone contact and even haircuts. They sweat the small stuff, and this in turn creates havoc and significantly compromises their children's adjustment. It is a waste of resources, ineffective and counterproductive to attempt to have these types of disputes resolved by the courts or through interminable negotiations between lawyers.

Pursuant to the AFCC guidelines, parenting coordination is a post-parenting-plan service chosen on consent by the parties with independent legal advice at the time their parenting plan is being finalized. The ultimate goal of parenting coordination is to protect and sustain safe, healthy and meaningful parent-child relationships. More specifically, parenting coordination involves minimizing parental conflict, and thus risk to children, by disengaging the parents and by resolving ongoing implementation problems in a non-adversarial forum. The parenting coordinator provides education, intervention, coaching and facilitation, all with a view to eradicating ambiguities and loopholes in their parenting plan, which only breed more conflict. In addition, the parenting coordinator assists the parents to reach a mutually acceptable resolution.

If an agreement cannot be attained, the parenting coordinator has the authority under the Arbitration Act to modify the parenting plan and make binding decisions; however, only within a certain limited scope. Pursuant to the guidelines, the parenting coordinator does not have the authority to make decisions with respect to legal custody, the permanent residential schedule or relocation to another jurisdiction. Neither is the parenting coordinator determining matters related to property, support or finances. In mediation-arbitration, the scope of authority may include all matters of custody and access. In my written submission, you'll find more about the historical background of parenting coordination and how it is practised in other jurisdictions.

Minimum requirements for qualifications and training are imperative, and these, along with regulation standards, currently exist. Each of these is elaborated further in my written submission. They exist in the AFCC guidelines for parenting coordination, in the Ontario Association for Family Mediation standards for accredited mediators and their policy on abuse, and at the licensing colleges for social workers, psychologists and psychiatrists. This is a requirement that people who do parenting coordination are both accredited mediators and have licences to practise. They also exist in the Regulated Health Professions Act and the associated legislation that governs psychologists and psychiatrists and, finally, in the Ontario Psychological Association guidelines for child-custody-related work that includes mediation and arbitration. They are updating their guidelines to also include mediation-arbitration and parenting coordination.

Moving now to enforceability, the proposed amendment to remove the binding nature of decisions and, in effect, prevent enforceability is counterproductive and

defeats the primary objective of minimizing risk to children by minimizing parental conflict. This proposed amendment inadvertently places the more vulnerable parent at risk, because now the more powerful of the two can keep the issue alive by appealing decisions just because such appeals are permitted and easily exercised. Vexatious and frivolous complaints are not uncommon in this minority of chronically conflicted parents. Or the parent who supports the decision may have to sue to enforce the decision, again keeping the conflict and litigation alive. Finality—that is, the resolution of conflict—is imperative for these families, and in particular the children. That is why the parents consented to the process in the first place. Relevant here is that the issues before the parenting coordinator are minor in nature, although still causing significant conflict and potential damage to children.

It is important to note that the judicial review of a decision made by a parenting coordinator or mediator-arbitrator that has involved an unfair or unjust process remains possible under section 46 of the Arbitration Act, with its nine separate grounds for appeal. This is sufficient to protect the consumer, as evidenced by cases in the past. See, for example, Hercus and Duguay, where decisions were set aside because the process was not proper.

Section 59.4 does not protect children from parental conflict and, instead, is likely to inadvertently increase risk to them. The proposed amendments indicate that parents would have to wait until after a dispute emerges before agreeing to their dispute resolution mechanism. Again, this defeats the very purpose and benefits of these alternatives for child-focused, speedy and relatively cost-efficient resolutions.

The need to resolve the problem quickly and cost-efficiently cannot be overstated, as this will in turn protect the children from conflict and minimize risk to them.

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Without exception, parents must obtain independent legal advice and be fully informed about whatever dispute resolution process they choose. Unnecessary delays, coupled with the escalation of detrimental parental conflict over what are often time-sensitive and relatively minor issues, are inevitable if the process and the acting professional are not named when the parenting plan is finalized, which necessarily is in advance of future disputes. Agreement in advance of a dispute is a much-needed preventive measure for protecting children from parental conflict.

Finally, the proposed definition of "secondary arbitration" and the inclusion specifically of "possible future disputes relating to the ongoing management or implementation of the agreement, order or award" appear to indicate that parenting coordination would be an instance of secondary arbitration and therefore permitted. Accordingly, and to avoid any confusion in the escalation of parental conflict, I propose that parenting coordination be specifically named as an instance of secondary arbitration. Thank you.

The Chair: You've given about four and a half minutes for each party to ask questions.

Mr. Yakabuski: Thank you very much for your submissions. I'd like to ask Mr. Wolfson a couple of questions. Well, they apply to both of you because you covered similar topics on a couple of things.

It seems, as we're hearing the submissions today, that there's not much of a problem out there with arbitration; there was a problem with faith-based arbitration. That seems to be the common thread.

Another common thread is this right to appeal that we're hearing from a lot of different people, and the fact that the proposed legislation—I think it is 58 something or other—takes away the option of people waiving their right to appeal, however you want to term that legally. It seems to me that there is a lot of concern with regard to that specific section, or amendment to the act, if you want to call it that, first of all because of the concerns that the more powerful of the two will prolong this thing to the extent that the weakest eventually submits, and that in the end is certainly to their detriment. I think we can all see the likelihood of that happening; it's certainly at least a possibility.

On the arbitration side of it, the Canadian Jewish Congress proposed a couple of amendments this morning. One of them was that the arbitration is not enforceable unless it is compatible with the law of Ontario and the values entrenched in the Canadian Charter of Rights and Freedoms. Could you support that amendment? As well, if you want to respond to the other two questions.

Mr. Wolfson: I personally have no objection to those changes. I think that's very similar to the part of the legislation that suggests that decisions are only enforceable if they're consistent with Canadian law. I have no problem with that.

In regard to your previous comments, arbitration, in my view, has been working very well. I think the parts of this legislation that would standardize qualifications, that would standardize the ILA given to individuals going into arbitration agreements, are all for the good. I echo Ms. Tellier's comment that by limiting the right to opt out of appeal rights, you in fact are taking away the power from the most vulnerable, which is probably the opposite of what was intended. But I agree 100% with her analysis.

The Chair: You have a minute and a half if you still want to ask a question.

Mr. Yakabuski: No. Thank you very much.

Mr. Kormos: Thank you, both of you. I'm becoming increasingly interested in this issue of appeal and I hope the government is too. I'm looking forward to what Mr. Bastedo might have to say about it. One of the hallmarks of arbitration, of course, is the ability of the parties to design or tailor-make, if you will, a process. That's where the efficiencies come in; is that fair?

Mr. Wolfson: Yes. I believe that's fair.

Mr. Kormos: But the appeal from the arbitrator's award, whether the appeal is valid or not, is to the very Superior Court that you, Mr. Wolfson, talked about as

having the huge backlogs and the inherent delays and the luck of the draw when it comes to picking a judge.

Mr. Wolfson: Yes, I agree with that. To add to that, there already is the protection in the Arbitration Act, which Dr. Fidler mentioned, that if there has been any type of procedural unfairness it can be overturned by judicial review. Whether the appeal rights are there or not there, those rights for judicial review remain.

So all we're saying is that for the really bad cases where something went off the rails and the arbitrator ignored due process, for example, judicial review will be there. But for someone who just doesn't like the result and wants to continue this and has the deeper pocket or wishes to be abusive, that's where appeal rights will give him or her the opportunity to keep the fight going. In my view, it's not necessary and the parties should be given the opportunity to waive it. If they choose not to, that's their decision as well.

Mr. Kormos: In a faith community, where women may not be held in the same regard as one would wish they were and a woman, therefore, is co-opted if not outright coerced into participating in that faith-based arbitration, even a small-a arbitration—you see, my concern is, how do we still protect that woman, because if she can be coerced into participating in that small-a arbitration, she can be similarly coerced into complying with the award. She's not likely to go and appeal it.

Mr. Wolfson: I think the solution to that is not expanding appeal rights at the end of the process. I think the solution is ensuring that when the parties sign that arbitration agreement at the beginning of the process—that's the thing that commits them to arbitration in the first place—the lawyer whom each party has to meet with, who gives them the independent legal advice, has done his or her job. That includes satisfying themselves that that person is entering into this arrangement, number one, with knowledge, understanding the implications of it, and, number two, voluntarily, and that there is no undue influence or duress or any other circumstances lurking in the background which would vitiate their consent. That's the protection. It's at that stage, not at the other end.

Mr. Kormos: I appreciate that family mediation is a very special part of the mediation family, if you will, that different skills are required of family mediators than other mediators. But understand, I come from down in Niagara, where steel plants and paper mills have shut down, and those job losses of course have an immediate impact on family breakdowns. Where people don't have very big incomes, they end up in Family Courts and, with all due respect, they can't afford your services or your services. They can't afford to retain private arbitrators. They can't afford to pay for that process. They're stuck in a Family Court system that's underfunded; it's a sausage factory. The staff aren't well served, the judges aren't well served, the litigants aren't well served. I can't see anything here that does anything for those folks I represent, with all due respect to the—

Mr. Wolfson: I don't think anything here does anything for those folks, because those folks only have one choice. But we are talking about the people who, for whatever reason, do have an option and choose to go into the arbitration process. I think the whole discussion today is what, if any, limits should be put on that process for the people who choose to go down that road.

Mr. Kormos: Thank you. I wish my constituents were wealthy enough to use arbitration.

The Chair: Mr. Zimmer.

Mr. Zimmer: I understand why mediation is obviously user friendly to the parties, because they want to talk back and forth and resolve their disputes. But arbitration is much closer to the litigation model in the sense that the people have not been able to mediate their disputes, so they're saying to a third party, "We can't decide. You impose a decision. You give us your decision."

What is the protection, then, if, in the arbitration process, people going into it obviously can't settle their differences and they're saying, "Impose a decision on us," if there's no right to appeal and that arbitration gets nasty and ugly and moves closer to a trial model? Is it not wise in those circumstances to preserve an automatic right of appeal?

Mr. Wolfson: I think you should assume that if a case goes to arbitration, it's ugly. The easy ones get settled long before that stage. So the ones that go to arbitration are the difficult ones; they're contentious. The reason they are there is because they need someone to make a decision. It's not mediation; it's arbitration.

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The protections are that people have chosen the arbitrator because of his or her reputation, qualifications, and the people want to be there. Once they're there, they want that person to make a decision; they enter the process. Again, assuming the lawyer has done his or her job in the ILA associated with the arbitration contract, and understanding all of the ups and downs, they've decided to leave the court system.

The appeal rights do not improve the chances of better justice. The chances of better justice are with knowledgeable people entering into the process and choosing the right arbitrator for him or her. If we're worried about the arbitrator, as I said before, who goes off the rails, who doesn't follow procedural fairness, who is biased, who does not listen to both sides and who has made his mind up in advance, the protection for that is in judicial review. Judicial review is the remedy for all of that. You don't need an appeal for that. An appeal is basically saying, "I can't point to anything that was done wrong procedurally, I just don't like the result. I want another person to look at the reasons and overturn it because I'm not happy with the result." I say that's inconsistent with the finality that most litigants want.

Mr. Zimmer: As a lawyer, going through the judicial review exercise, the grounds are more expansive; you can always find something to do a JR on. The appeal mechanism isn't traditionally the right of appeal; it's a much narrower basis on which you can appeal. So that being

the case, wouldn't it be cheaper to go through an appeal mechanism rather than through a judicial review mechanism?

Mr. Wolfson: In my experience, appeals involve much more cost, much more delay, and whether the appeal is successful or not, the other party is dragged along. That's why I say that it's unnecessary if the parties choose they don't want an appeal right. For the bad cases that do go off the rails, where protection is necessary and nobody foresaw that the arbitrator would make his mind up before he or she heard the evidence, then judicial review is there. In my experience, it's a much more efficient remedy for the cases that need it.

Mr. Zimmer: Isn't an appeal mechanism a simpler mechanism than a judicial review?

Mr. Wolfson: Not really, because you need to get transcripts, number one, and the cost of the transcripts of the hearing can be very expensive; there's significant delay, depending on what body you're going to; you can have appeals of interlocutory proceedings, which means you never actually get to the hearing. In my experience, appeals can add significantly to cost and delay. Again, I'm not suggesting that they should be banned. All we're saying is to let people make their choice. Don't take away the right of decision-making.

The Chair: Thank you very much for your delegation today. We appreciate your being here.

THOMAS BASTEDO

The Chair: Our next delegation is Thomas G. Bastedo. Welcome.

Mr. Thomas Bastedo: Thank you, Madam Chair and members of the committee. I have distributed two documents. One of them is a paper which I delivered about three years ago to a meeting of the International Bar Association in South Africa. This paper rose out of the 1991 Arbitration Act in Ontario. Believe it or not, there has been a lot of discussion amongst those who do arbitrations, especially in family law, with respect to this act in comparison to many other jurisdictions, some of which, as has been pointed out, do not permit any arbitrations and some of which permit various types of arbitrations.

I gave you this paper because it sets out in fairly succinct form, I think, for a general audience, the differences between mediation, mediation-arbitration, and arbitration; it deals with the interrelationship between the Divorce Act, the Family Law Act and the Children's Law Reform Act in this province; it talks about the process of conducting an arbitration or a mediation-arbitration; it contains in its appendices various types of agreements which are commonly signed in this province—mediation agreements, mediation-arbitration agreements, arbitration agreements; and it sets out various matters of interest to the public and to lawyers who are advising clients on when to do one sort of process as opposed to another, and various checklists. I don't intend to refer to this paper today, but I leave it with you and I hope it will be of some value.

I'm here today for two reasons, and these reasons are connected with the two aspects of the proposed bill which, in my respectful submission, if accepted, will vitiate the current practice of arbitration and mediation in this province.

There has been a good deal of discussion about other matters arising out of the bill which I've heard today. One of them most recently discussed was the matter of the right of appeal. While these issues are of interest and people have validly held views on either side, quite frankly, if the bill allows appeals or doesn't allow appeals is not going to destroy the process in this province. I personally stand on the side of Ms. Tellier and Mr. Wolfson, but I can live with the fact that there may or may not be appeals of various types. It will not really affect my practice. Most of my cases deal with people who do not want appeals, but if they do want appeals, that's fine. I don't know how many arbitrations I've conducted, but it's certainly more than several hundred, and I've never been appealed once. I've been judicially reviewed two or three times but never appealed. People put in the right of appeal because it gives them a subjective protection, or they believe it does, and I have nothing, really, against that.

My curriculum vitae is set out in tab A to my submission. I have been doing arbitrations and mediations since the year after I was called to the bar in 1971. I did my first arbitration in 1972 and I've been doing them ever since. I've done arbitrations in labour work, commercial work, family law and, most latterly, the last 10 or 15 years, in family law.

There are two fundamental problems with this bill, and I emphasize that if these problems are not resolved, the process will not be effective in Ontario and people will not go into the process. Whether that's good or bad is not my prerogative to say, but I do take the government at its best position that it wants to significantly improve the arbitral process in the province, and I'm here simply to make some suggestions as to how that better can be done. I have deliberately not dealt with many of the policy initiatives because, again, I'm here as a technical person, as an arbitrator, and I leave the policy provisions to other persons. But I've tried to put my recommendations in a format which will not in any way destroy or alter the policy objectives of the legislation as I see it.

Various persons have discussed before you the enforcement provisions, and I wish to emphasize them in some more detail. The enforcement provisions of the legislation, if not changed or corrected, will make arbitrations in the province non-effective and as if they did not exist.

The second area that I wish to discuss is the prohibition on entering into arbitration agreements today which will affect disputes in the future. As you are all aware, the section in the legislation prohibits this from happening. It is my urging that this provision of the

legislation be changed, for reasons which I shall discuss. If the sense of the committee and the government is that it not be changed, then I have several alternatives to offer to you, which will at least be half a loaf, as it says.

If the arbitration process is removed as an access provision to the people of Ontario, then it will remove something which is currently cost-effective. It is substantially more cost-effective than the alternatives available. I agree with those persons who have said that it is effective mostly to those who are most disadvantaged in this process, the process of domestic dispute resolution; that is, women and children.

I have nothing further to add other than to support the, I thought, very powerful comments Mr. Wolfson made.

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I'd like to tell you a little bit about the sort of arbitrations I do, because they're directly relevant to the first point I'm going to deal with, and this is the enforcement. I do arbitrations that can be formal, like a trial. I have done arbitrations that have lasted as long as three weeks. I do arbitrations that are informal and could last as little as 15 or 20 minutes. I've done arbitrations over the telephone.

To give you an example of the latter, there might be a question that people want decided in a contract—a separation agreement—and they want to know which of two possible interpretations should be put forward. They would, for example, send me some written submissions and they would have 10 minutes to argue on the telephone, and I will decide. They will accept that, or else they wouldn't have hired me in the first place.

On other occasions, on formal arbitrations, the process will take into account expert witnesses, full production of documents and all the witnesses that one would expect in an ordinary trial.

One of the advantages of an arbitration is that the parties, through a pre-arbitration process, will decide the process by which the dispute is to be resolved. Let me give you a simple example. Supposing one of the issues is the valuation of a car dealership. In the ordinary course of a trial, the expert who gives the valuation of the car dealership will come to court, give his or her evidence on that dealership, and then they will be cross-examined. In an arbitration process we can agree that the expert can write a report, file the report and then the opposing person's expert or lawyer can simply cross-examine that expert. We can agree as well that the two parties will hire one expert and the expert will file the report on the valuation of the car dealership and then each party could cross-examine that particular expert.

Either one of these methods is going to save two or three days of court time. There are other ways that I won't take the time of the committee to describe, but suffice it to say that the comments Mr. Kormos made earlier today when I was here with respect to the antiquity—he didn't use that word; this is my word—of the evidentiary rules that bind our court system and that elongate civil trials and are under attack in many jurisdictions of the world are now discarded on a regular basis through the arbitration process.

In an arbitration, experts like Dr. Fidler, who is one of our finest psychologists dealing with this matter, can decide these things without the paraphernalia of a court system. What she didn't say and what is important to understand is that if two parents are fighting about, in her example, the times when the children should play hockey or not—and it's a very important issue in this country as to whether or not a child attends hockey practice four nights a week or whether for one of those four nights the child will be with the non-resident parent. It's a very difficult problem to deal with. If there's not someone like Barbara Fidler to deal with something like this, then the court has to deal with it. Most of the time, that involves the courts that Mr. Kormos is talking about.

Do you realize that in Brantford, Ontario, the Superior Court sits once a week? There's one judge, and that judge deals with all sorts of problems in Brantford: mechanics' liens, construction problems and problems dealing with whether John Smith can play hockey on Tuesday night with the Brantford hockey team in his league or whether he should spend that three hours with his mother or father, as the case may be. If you take away from someone like Dr. Fidler the ability to deal with this, you are left with that process.

In any event, that is an overview of the arbitration process.

During this process, all sorts of decisions have to be made. Let's go back to my example of the car dealership. Suppose the valuator asks the owner of the car dealership to give him or her the papers upon which he will base his decision as to the value of the car dealership, and the owner says no. That is a very early stage, and the arbitration process has what we call an interlocutory structure so that I can make a decision. Now, I make the decision that Mr. Smith must produce the financial statements of his car dealership for the last five years to the valuator; that is obligatory, and he doesn't do it. Now what happens? If there is no enforcement provision, that then goes into the court system, and the only way to get those papers is for an action to be instituted, a statement of claim. The claim, through the court system, will ask that the papers be produced.

That is what your bill is doing at the present time. If you take away the enforcement provision under section 50 of the Arbitration Act, you take away my ability simply to file the document in the court, and, as Ms. Tellier said, in one hour the judge will say, "This is the order," and that can then be enforced like a regular court judgment, through contempt, imprisonment or whatever. So that's an example of an interlocutory process, which is essential to the running of any dispute mechanism.

A similar sort of position was with respect to the declaration of possession of a house. What happens if there's violence in the house during an arbitration? Right now, I as the arbitrator have the ability to exclude one of the spouses so as to allow the other spouse to remain in the house with or without the children. But if I don't have

the power to have that enforced, then there is no way that anybody's going to come to Tom Bastedo or avail themselves of this process to say, "Mr. Bastedo, my wife has a big problem. She's an alcoholic, a drug addict. It's not good for the children. I want her out of there." So there's a hearing and it's decided. I say that with respect to the interlocutory process, it's essential to have the enforceability.

The second part of this relates to the ultimate enforceability of the award. Right now, your bill says that the award is to be enforced like a domestic contract. This means that if the domestic contract is to be enforced, you have to bring an action, you have to bring a claim, you have to bring an application in the court system to enforce it. So let's go back to our car dealership. Suppose I find that the car dealership is worth X dollars and the non-asset-owning spouse gets X minus $5. Let's say we have $95 left. That is the amount owed by the car dealer to his wife in terms of the resolution of the monetary issues, so I order $95. What happens now? That goes to the court under section 50 of the Arbitration Act, a judgment is given for $95, and it's enforced like any other judgment creditor. What happens with the bill? That $95 is there, so the person who now owns the judgment, as it were, has to bring an application in the court system and enforce it like a contract debt. That then is subject to all the defence mechanisms put forward in the defence of any other type of action. It means the case is going to be tried twice. I say to you, on number one, that unless there is the enforceability put back into the system, it won't work.

What's the second problem? The second problem is in paragraph 14 and following in my submission, relating to the arbitration of ongoing disputes or disputes which may arise in the future. I have put in three types of examples that bring the problem to the fore.

The first type is the one that Dr. Fidler brought forward, and that is the parenting coordinator. There is an industry in Canada now, and certainly in Ontario, whereby many people like Dr. Fidler—although not all of them have her qualifications—assist dysfunctional families in the management of their children. The concern here is that the legislation as currently drafted does not permit one to enter into an agreement which will provide for the resolutions in the future. I suggest that most of us would agree that that has to be resolved.

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Let me give you another example. In this country, as you know, the obligation to pay child support is a function of income. Lots of people's incomes vary. Suppose Mr. A has an income of $65,000 this year, and next year his income is $78,000. Someone says, "No, it's not $78,000. It should be $84,000, because he falsely or incorrectly deducted an expense for a new car. He didn't need a new car, so that $6,000 should be added back, and that is the income upon which child support functions."

I am named, as are many other people, as a permanent arbitrator of this sort of dispute. People enter into agreements. They say, "We have to have the income for child support done every year. Let's pick Tom Bastedo or Philip Epstein or Lorne Wolfson or Nicole Tellier or somebody like that to decide each year what the income is and then what child support flows from that." This is usually a straightforward, simple and effective process that decides the income. What is the alternative? The alternative is to bring an application in the court, where you have to go through two or three pre-trial or settlement conferences. Eventually, if you can't solve it, how do you solve it? You have a trial. So there are many types of agreements that have permanent arbitrators set out in clauses that decide all sorts of things.

There has been some concern about marriage contracts. As you know, there are four types of agreements set out in the Family Law Act in your definition of a family arbitration in this statute, and marriage contracts are one of them. Today, there are all kinds of marriage contracts. I suppose this is where we get into the problem of, are we trying to fix arbitration or are we trying to fix faith-based issues?

Certainly, if we stick to the former as opposed to the latter, there are many marriage contracts today between persons who are, say, over 40, who have some assets, many of whom have been married before. What they do ordinarily is keep the assets they have, because most times their children wish them not to divide their assets with their new spouse. Then there may be a dispute about their income. Suppose one of them earns $100,000 a year and the other one earns $20,000 a year. The dispute, if there is a separation, is who is going to pay somebody support, if there is indeed going to be support.

So what do they do? They put in an arbitration clause. They say, "Tom Bastedo or someone like him will decide, if we separate, how much money we're going to have to pay for support. If there's a dispute about the sale of the house"—and there always is: sometimes people don't agree on the price; they don't want to take a vendor-takeback mortgage; they want a different kind of financing—"if there's some sort of disagreement, let him decide that as well. And if we can't decide who's going to own the new television we bought last year and whether the television set is going to be traded for the stereo, let Tom Bastedo decide that as well." So you have a whole bunch of these things in here, and you get people like me written in the marriage contract as deciders. Half the time, the fact that I am in there as a decider means there's nothing left to decide.

I'm saying to you, what are the solutions to this? The first solution and the best solution, I submit, is simply to eliminate—let me get it right for the record—section 59.4. That section says, "A family arbitration agreement and an award made under it are unenforceable unless the family arbitration agreement is entered into after the dispute to be arbitrated has arisen." I say take it out. Why do I say that, aside from the practical reasons I've given? Because you have put into the statute safeguards now that I do not have any problems with; despite some of the quibbles, I see no real problems. You've put in safeguards and you can assure yourself that the arbitration

agreement is going to be well-negotiated, well put in. If something is going to last for a long time, there is nothing magical about having it last just because it's going to be resolved in the future. Every day, we enter into contracts that last for years. So what's the matter with entering into one like this?

This would completely solve the problem of your definition of "secondary arbitration." If you're not willing to do that, and I understand why you might not be, then secondly, we have to deal with the definition of secondary arbitration. I know you're going to do this on a clause-by-clause basis, and I bring to your attention my definition in section 19 of my submission—and this is different from the bill's definition—which says: "'Secondary arbitration' means a family arbitration that is conducted as a result of a family arbitration agreement"—and that is defined in the statute—"and which provides for the arbitration of possible future disputes which are clearly described and set out in the family arbitration agreement."

What's the matter with that? Let's go back to the marriage contract. We just say at the beginning that if there is a dispute over who is to pay support to whom at some time in the future, that's going to be set out in the marriage contract, and that, therefore, is a secondary arbitration and can be dealt with.

The last solution I have—obviously, these are in decreasing order of preference—is the solution that was adumbrated by Marion Boyd in her report, in paragraphs 5 and 6, where she distinguished between cohabitation agreements and marriage contracts and separation agreements. If you are unwilling to accept my solution with respect to the family arbitration agreement, which under your definition includes all different kinds of domestic contracts, then you can bring it back to the separation agreement and say that we can put in a separation agreement alone the right to arbitrate things that arise in the future. Going back to Dr. Fidler's example, a parenting coordinating agreement can be called a separation agreement, because the language in section 56 of the Family Law Act permits us to do so, and therefore the parenting coordinating agreement becomes a separation agreement and the issues are solved.

I'm sorry I've taken up so much time. I hurried a bit, and I've got a few minutes left. Those are my points.

The Chair: A very thoughtful presentation. You've given two minutes for each party to ask you questions, beginning with Mr. Kormos.

Mr. Kormos: Thank you very much, Mr. Bastedo. Quite frankly, on the subcommittee, we were excited when we saw your name on the list. We're pleased that you came and participated in this.

Mr. Bastedo: Thank you. I'm honoured to be here.

Mr. Kormos: Look, even if this bill passes, people are still going to come to you and sit down with you and design an arbitral process that's custom-made for their dispute, whether it complies with the new Arbitration Act as amended or not. They will lose the enforceability element of it. What do you think is the most operative reason that people come to you? Is it your reputation, your skills? Is it because of enforceability? I appreciate it's both, but what has priority: enforceability, or the fact that you are adjudicating, the fact that you are determinative of issues that help them resolve a dispute? Quite frankly, they could simply then put your determination into a separation agreement.

Mr. Bastedo: Mr. Kormos, I'm flattered by what you say, but really, when you make a decision, usually someone's not that happy, because when they come to you, both parties perhaps believe they have right on their side. So I believe you have to have the enforceability. I really believe that strongly. There is no one who does what I do, or any of the lawyers who appeared here before—they will all agree with that one point.

Mr. Kormos: Okay, sir. Thank you kindly. This is going to change the face of family arbitration, and significantly.

Mr. Bastedo: If it's not amended, I believe that it will destroy it and cease to make it efficacious. I really believe that.

Mr. Zimmer: Thank you. Welcome. I can tell you that anything I know about family law and arbitration is largely the result of reading your stuff over the years.

Mr. Bastedo: Thank you, Mr. Zimmer.

Mr. Zimmer: Just a question on your proposed definition of secondary arbitration. "'Secondary arbitration' means a family arbitration is conducted as a result of"—and so forth and so on—"of possible future disputes which are clearly described and set out in the family arbitration agreement." That definition is the one you're proposing. Why would you even bother to put in the phrase, "which are clearly described"? I would think that's a pretty hard thing to predict over the life of an arbitration agreement: all the possible disputes that might arise. Wouldn't it be even more efficacious just to say, "of possible future disputes," period?

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Mr. Bastedo: But if you're going to do it that way, then just take out 59.4. Just take it right out. I'm not a legislative draftsperson. You're absolutely correct: On the subject matter of "which are clearly described" or something like that, I was told that if there was any merit in these submissions, it would go to somebody who is a draftsperson, and that's not me. But certainly it's the subject matter which is of concern to me.

Mr. Zimmer: All right. Thank you.

Mr. Yakabuski: Thank you for your submission. You're not working together with Ms. Tellier and Dr. Fidler on a joint submission here. You seem to be citing their work on a couple of occasions in your presentation. But that's good, because it brings me to my question on this enforceability. Ms. Tellier is the first one, I think, who raised it. It would seem to me that what you're saying, and correct me if I'm wrong, is that if these arbitrations are not enforceable, they simply become null and void and they're nothing but a stepping stone to the court system for people. When they enter into an agreement to arbitrate, if it's not enforceable, it simply is

really meaningless because it's almost an assurance that it will go to the next level.

Mr. Bastedo: No, I disagree with that, sir. There's a fundamental misunderstanding here which a couple of people have put forward between the process of mediation and arbitration. We were at a mediation the other day. It was a very complicated mediation, and the mediator did not have arbitral powers. The problem was resolved. This happens every single day in the labour world and in all sorts of other worlds, and it doesn't mean that there will be no agreement and the case will not be over.

However, if people go to an arbitration, that means there is a contest, an adverse situation, which has to be resolved. Most arbitrations, as Mr. Wolfson pointed out, have a contest where one person loses. There has to be a method of enforcing them.

Mr. Yakabuski: I never mentioned the word "mediation"; I'm talking about arbitration. So if the arbitrations are not enforced, then they're not important because if they're not enforceable, it's almost an assurance that the parties will move on to another level.

Mr. Bastedo: Well, they'll go to court.

Mr. Yakabuski: That's what I'm saying.

Mr. Bastedo: There's no point in having an arbitration. There's no point in spending your money twice.

Mr. Yakabuski: That's right. That's precisely what I was asking. So if we don't have enforcement of this arbitration, then it becomes worthless.

Mr. Bastedo: That's right. I agree.

The Chair: Thank you very much.

ADR INSTITUTE OF ONTARIO

ONTARIO ASSOCIATION FOR FAMILY MEDIATION

The Chair: Our last delegation today is the ADR Institute of Ontario and the Ontario Association for Family Mediation. Welcome. You're last but not least. I only have one name listed here. If you're both going to speak, if you could identify yourselves for Hansard and the organization you speak for. After you've introduced yourselves, you'll have 30 minutes. If you leave time, we'll have an opportunity to ask you about your delegation.

Dr. Barbara Landau: I think I'm going to be the primary speaker, but I welcome my friend. I'll introduce her in one second. I'm Dr. Barbara Landau and I'm a psychologist and a lawyer, and I spend most of my life mediating all sorts of different disputes. I'm here on behalf of the ADR Institute. I'm a past vice-president and I'm a past president of the Ontario Association for Family Mediation.

My friend is Tami Moscoe. Tami, why don't you say a little bit about who you are.

Ms. Tami Moscoe: I'm a lawyer at Torkin Manes Cohen Arbus. I'm also on the board of directors for the Ontario Association for Family Mediation. I'm here to support Dr. Landau in her submission and to be available mostly for questions.

Dr. Landau: I'd like to make my submission, then. I'd like to start by focusing on what the concern is with this legislation, what it is that this legislative amendment is designed to address. What I want to do is separate that out from the practice of arbitration that has been going on quite successfully for a number of years.

For a number of years, clients who are divorcing have voluntarily sought the assistance of competent arbitrators to achieve an efficient and effective resolution to their marital disputes. They selected arbitrators who were acknowledged experts in Canadian law and sought finality in a less formal, more timely and hopefully less adversarial process than the courts. The need for Bill 27 arose because groups wished to apply a diversity of religious laws to family disputes based on different rules, different values and different cultural norms from our Canadian context. The concern was that the values of gender equality and the best interests of children that are protected in Canadian and Ontario family law might not be protected in private arbitrations that are governed by other standards.

Family arbitrators in the past have largely been trained under the Canadian legal system, most clients have been represented by counsel at these arbitrations, and arbitrations are most often a voluntary choice by the parties. In the religious tribunals, it is expected that most family arbitrators will not be Canadian lawyers, most clients will not be familiar with their rights and obligations under Canadian law, most will not have counsel present, and there may be cultural or community pressure to use this process. In cases of domestic violence or power imbalances, women and children in particular may be at risk if arbitrators do not understand or appreciate these issues or the impact of fear and intimidation on participants.

In a desire to preserve the gains made in family law in Canada over the past 30 or more years, and to extend these gains to all cultural groups, we support the following policies—and when I mention a number of these things, there's going to be a great deal of agreement between me and the Ontario Bar Association, the ADR section of the bar and the speakers you've heard from, because we've all been in communication and sharing a lot of good conversations about these issues:

(1) Application of Canadian or Ontario law: We support the policy that those who select family arbitration do so voluntarily on the basis of informed consent and that they be governed by Ontario and Canadian law. Again, that's addressing the concern as to whether or not people are actually going to be selecting this process voluntarily and whether the arbitrators who will be acting have a knowledge of Canadian law. So this will be the protection.

(2) Contracting out of the right of appeal: This issue has generated considerable discussion, including among members of this committee. On the one hand, there is the need to protect vulnerable people—that is, those in abusive relationships or those who are not well informed about Canadian rights and protections—from awards that

do not reflect Canadian law or values. On the other hand, there is a need to allow informed individuals the right to achieve finality in their arrangements after separation.

To balance the concerns noted above, we recommend that where the arbitrator is either a member of the bar of any province of Canada or a retired judge from any court in Canada, the parties have the right to contract out of the section 45 appeal rights, but where the arbitrator is neither a Canadian lawyer nor a retired judge, they may not be permitted to contract out of section 45 appeals. This minimizes the chances of an arbitration award falling outside of Ontario or Canadian law.

Also, in my experience, many couples select arbitration or parenting coordination as a dispute resolution mechanism for a very narrow set of circumstances, or as a method of dispute resolution following a separation agreement or a court order. These arbitrations or parenting coordination present fewer concerns with respect to finality. Many of these participants have had ILA, are making an informed choice and would benefit from finality, as you've heard from a number of the previous speakers: Tom Bastedo, Lorne Wolfson and Nicole Tellier. Therefore, parties should be able to contract out of appeals in these cases.

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I want to just stop there for a minute. I think it's very important to think about the differences between arbitrations that are going to deal with all of the important issues, all of the substantive issues—financial, custody and access, property division—versus those that are a dispute resolution mechanism when people have already negotiated or mediated a separation agreement and have consciously chosen, following independent legal advice, to use arbitration as a narrow dispute resolution mechanism. In the case of parent coordination, the ultimate issues are not addressed. They are addressing the kinds of things that you heard about, and I've had all of those. I've had not only the dispute about who takes the kids to hockey but every manner of minor dispute that you can possibly imagine. I had one case that actually ended up going to court where the issue was three quarters of an hour a week with a grandparent covering while the parent returned from work. The father didn't like the mother's parents and so he decided that—I wasn't acting as a parent coordinator; I was acting as a mediator, who does not make decisions. Had I been acting as a parent coordinator, I would have had no difficulty resolving that dispute and I would have hoped it would have been a final resolution, rather than those people then going to court to deal with the issue of, really, "My mother-in-law didn't like me."

Independent legal advice: We believe that the key mechanism for ensuring voluntariness and informed choice as to process options and appeal rights, and an assessment of the capacity to make decisions without duress, rests in an enhanced ILA role. We recommend special training requirements for those offering ILA in these cases.

We propose that the lawyer giving ILA certify that:

He or she has explained the various process options and the client is choosing arbitration voluntarily. I think that's a very important point, particularly if we're talking about things that can have finality. People should be choosing the process voluntarily.

I also want to make the comment that I've heard a number of people use "mediation" and "arbitration" interchangeably. They are not interchangeable. In mediation, the professional helps people have a good conversation and the parties themselves reach a resolution. In arbitration, it's rent-a-judge; it's hire a person to make a binding decision. I think parties need to know the differences when they're making their choices.

We're recommending that he or she has screened for domestic violence and significant power imbalances. Such screening is to ensure that both parties are informed as to their process options and have the capacity to participate safely, voluntarily and without duress.

I'll make a comment here that I do not think it's appropriate for the arbitrator to be doing the screening. I'll be commenting on that again, but the arbitrator has to play a neutral role, has to play an impartial role and it would be inappropriate for the arbitrator to be the one screening in advance. I think that's best done at the point of ILA.

The third subpoint around the ILA is that he or she has to have explained to both parties the various appeal rights in the Arbitration Act and the consequences—this is really important—of waiving those rights. This important issue must be fully discussed with each party before entering into the arbitration agreement. I think it should be part of the agreement to arbitrate that people sign off that they understand the consequence of waiving any appeal rights.

My fourth point deals with screening for domestic violence and power imbalances. I've already recommended that the person offering ILA should be responsible for screening for abuse and power imbalances. I've said already that it's not appropriate for that to be done by the arbitrator, but we are recommending that the arbitrator should also attend training in domestic violence and power imbalances so that he or she is aware of the problem and can appreciate its effects on the parties and children. This knowledge is very important when arbitrators are making awards about parenting issues and financial matters. In cases of abuse, control and significant power imbalances, arbitral awards need to reflect an appreciation of safety considerations and an understanding that vulnerable individuals may give up legitimate and necessary financial rights in return for being permitted to leave an abusive relationship.

I really want to underline this point. I repeatedly see judges making orders around parenting issues where they haven't taken into account the fact that there is abuse. One case I'm thinking of right now is where the judge ordered that the wife go to the husband's home to pick the children up. She had already been abused, she'd already had a complaint around his abusive behaviour, and now she was asked to pick the children up at his

house. Of course, he abused her again, and the children were witnesses to this abuse.

In the case of an arbitrator who would be familiar with these types of concerns, hopefully they would take this type of information into account when they were planning the transfer of children. Also, they might be concerned about whether people were actually giving up their rights in return for freedom. I just think that kind of awareness is very important.

For screening for domestic violence, we're recommending that the parties have ILA before making the choice of a med-arb process. There should be a written agreement that clarifies under what conditions the process will become arbitration and what appeal rights are available. It's becoming more popular for people to choose to start mediating if they run into an impasse than to turn the process into arbitration. I'm concerned that at that point, we need the same safeguards.

We make specific training recommendations in our brief, which are more appropriately discussed as part of the regulations. I'd be willing to answer any questions about the training and responsibilities of the lawyers offering ILA or the arbitrator.

In addition, we're suggesting that clients selecting arbitration should be required to attend a family information session, such as the mandatory program offered in Toronto, prior to committing to the arbitration. We're not suggesting that that would be needed for secondary arbitrations or for a parenting coordination role as a dispute resolution mechanism set out in a separation agreement, court order or family arbitration award. Those people would not be required to attend a family information session. Those sessions are really helpful to people. It's just that at the current time, they are offered far too late in the process. Most people have already spent a year litigating before they get to the family information sessions, so they should be moved up, and particularly if people are selecting arbitration, they should go before they go to arbitration.

My fifth point is enforcement of family arbitration awards. You've heard a lot about this and I'm not going to spend any particular time on it. I generally support Tom Bastedo, Lorne Wolfson and Nicole Tellier saying that the enforcement provisions of section 50 are the simplest and most straightforward mechanism for enforcing awards.

My sixth point is the amendment to the Children's Law Reform Act. We support the recommendation by the feminist legal analysis committee—and I notice that Nicole has also proposed this—that the Children's Law Reform Act be amended to require that domestic violence and witnessing violence be considered factors in determining a person's ability to parent a child in custody and access disputes. I don't know why that has never been promulgated. It should have been. It's been on the books for years.

I want to thank you for your attention and I'd be pleased to answer—Tami, did you want to comment?

Ms. Moscoe: I just want to underscore two points. I've been listening for the last hour and a half or two, so I'm not going to repeat things that a number of my colleagues have said.

The first thing I want to do is just dispel a notion that arbitration is only there for the wealthy. I am a more junior member of the bar than a number of the lawyers who have already spoken, and I have to say from my experience that arbitration is often a much faster, much quicker and therefore much cheaper process.

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I don't know how many of you have been in a Family Court recently, but it can take up to two months, maybe three, to get your first attendance. You can go and sit in a court for eight hours waiting for a judge who doesn't have a chance to get to you, and have to come back four or five weeks later—and the clients, at least in our case, pay for that service. It can be a very slow and painful process.

I know my colleagues in Barrie are very actively opting out of the court process because of the difficulty getting family law dates, and I know that their mediation and arbitration services are quite busy throughout the different socio-economic levels, because the courts just aren't necessarily available.

The only other thing I want to underscore is that we don't think it is the intention of the committee to limit the ability and effectiveness of parenting coordination, but that's obviously a concern for the members of my organization, who are social workers, psychologists and lawyers but who do provide a very valuable service for people who have children and don't ever want to see each other again but who have to get through all the issues you've heard about over and over again.

Thank you.

The Chair: You've left about three and a half minutes for each party to ask you questions, beginning with the government side. Mr. Zimmer.

Mr. Zimmer: I'm fine, thank you.

The Chair: No questions? Okay. Mr. Runciman.

Mr. Runciman: I don't have a lot of questions either, because you were reinforcing many of the messages we've heard earlier today. We do appreciate your submission, though.

I'm just curious about one comment. I raised it earlier, and you have supported the previous recommendation, I think by the OBA, with respect to the discussion surrounding waiving the right of appeal. If I heard you correctly, you were supportive, with some qualifications with respect to a lawyer or a judge being the arbitrator. I am curious about that.

The previous witness, Mr. Bastedo, didn't reference that, and I didn't have an opportunity to ask him about it. I'm just wondering, because of the other protections that are being proposed by the legislation in terms of independent legal advice, why you feel that is such a necessary precaution. I did ask somewhat earlier about the numbers with respect to arbitrators who don't have those kinds of qualifications. I'm just curious about

whether you could expand on your concerns with respect to that particular recommendation.

Dr. Landau: I think this is the most difficult issue. I appreciate your struggling with it, because I think we've all struggled with it. The reason I've made the suggestion that I have—and I didn't do it lightly—was because I'm particularly focused on the issue of the population that is likely to be using religious tribunals and the likelihood that the people who would be acting as arbitrators in those cases may not be familiar with Canadian law.

I think most of the people you've heard from have been focused on traditional family law clients, and there has not really been a problem that the Arbitration Act needs to be fixed; I think it has been working really well. But I would tell you that, apart from parenting co-ordination, the majority of arbitrators are Canadian-trained lawyers.

Mr. Runciman: I understand where you're coming from. I guess the point that I think Mr. Wolfson made earlier with respect to a decision of an arbitrator that isn't in compliance with Canadian law is that there is still the right of a judicial review. Am I wrong on that? If that avenue is still available—I guess I'm a little reluctant to say you can only do it if you have a certain group of people who are looking at it.

Dr. Landau: First of all, I understand your concern. I think that the majority of religious arbitrations that are going to take place are not going to take place in a formal context. I think it's going to be an informal process. I don't think they're going to have formal agreements to arbitrate. I don't think they're going to know the difference. If this group didn't know the difference between arbitration and mediation, then they're not going to know the difference. I don't think they are going to—

Mr. Runciman: That was a bit of a backhanded slap, wasn't it?

Dr. Landau: No. I thought it was a compliment. I thought that if this illustrious group does not know the difference—

Mr. Yakabuski: We've figured it out, though.

Dr. Landau: Okay.

I have held a number of discussions with different religious communities. I actually brought people together from across the entire spectrum—from the Jewish community and from the Muslim community—and we have really had good discussions from all perspectives within those communities. They did not know the difference. They were interested to hear the difference. My feeling is that it's going to be done informally and people will not be aware of their appeal rights. Probably it's only going to be some time after a decision is rendered, when people who perhaps have not been in the country very long start to learn about their rights, that they may then need to look back on decisions that were made for them and want the right of appeal. My feeling was that this was offering an extra layer of protection for that population.

I really made this recommendation after thinking it through, because it's very hard to say there should be two classes of arbitrators. Even though I have both sets of qualifications, I hate to say that psychologists can do this, but there's a limitation, and lawyers can do the other. But I really thought that would better protect those people who are not as well informed.

The Chair: Mr. Kormos.

Mr. Kormos: Thank you, both of you. I'm so grateful to you, along with everyone else who has appeared here today. I agree with you, because it seems to me that the same coercive factors—cultural, power imbalances, etc—that draw a party into a religious-based, faith-based arbitration are similarly going to be the factors that make that person comply with the award, even though the award isn't enforceable at law, which is why I'm concerned about this legislation, in that it doesn't address the fundamental issue of the prospect of injustice in faith-based arbitration.

But please, you've got to help me—I don't have a lot of time, and I'm from Welland; that's small-town Ontario.

Dr. Landau: But you are well known. You've put Welland on the map.

Mr. Kormos: But, Ms. Landau, I'm taking a look at this legislation. If an award is not based on Ontario law, to put it simplistically, then it's not an award. It's neither appealable nor enforceable, because your statute says that only a family arbitration award can be appealed. The law similarly says that it's not a family arbitration award if it wasn't arrived at by the law of Ontario or the law of another Canadian jurisdiction. It seems to me that that is not a concern. We don't have to preserve the right of people to appeal an award that isn't an award at law, because it's not enforceable; it's a nullity.

That then takes me to, if that protection is inherent in what is or is not a family arbitration award, then why wouldn't we reserve the right to educated—and I say that in the broadest sense—parties waiving the right of appeal, because they're only waiving the right of appeal of an award that is based de facto on Ontario law or the law of another Canadian jurisdiction?

I'm grateful to all of you because you brought me to that. Am I out of line in saying that? Am I way off base? I don't mind being on the left wing, but am I out in left field?

Dr. Landau: Well, we would hope so. I think that if there is not a valid award made, then there's no impediment to people going to court.

Ms. Moscoe: In fact, they can go to court and argue that very issue, right?

Dr. Landau: Yes. Let me just say that one of the things I really wanted to emphasize was the idea of this family information session. I think what's really needed is information for the community before they make decisions about process. Those family information sessions are really valuable and we have really underused them. I think what we're looking at is a process of educating the population so that they can then make better choices, informed choices.

I don't know whether I'm answering your question, but I wanted to say that I think that's where it starts. I

think people need to be more aware of the process choices. There can be an opportunity to find out about their rights under Canadian law, and then they're going to be better educated, plus the enhanced ILA will be a good thing. But I think that if right now we had the right of appeal that could be waived only if the arbitrator was trained in Canadian law, we would be offering an additional layer of protection.

Mr. Kormos: Thank you.

The Chair: We have time left, if you still have questions, Mr. Kormos. Otherwise, Mr. Zimmer has a question.

Mr. Kormos: Okay, if Mr. Zimmer wants to use it. Do you have a question?

Mr. Zimmer: My question was answered in the course of the comments on your question.

Mr. Kormos: I still hope, Mr. Zimmer, that we reflect a little bit more on why we would insist on a mandatory, unwaivable right of appeal when we don't have to concern ourselves with non-Ontario awards because they're nullities. They're not even appealable, because it says that a family arbitration award is the only thing that can be appealed. Your amendments also say that if it's not done in compliance with Ontario law or other laws of Canada, then it's not a family arbitration award.

Dr. Landau: What we're talking about is a relatively new situation where we have an increased use of religious tribunals in our country, and we haven't had a lot of experience with it. I think that rather than risk having the right of appeal waived, we could have this extra hedge in order to provide protection for Canadian law.

Mr. Kormos: I hear you very, very clearly. Thank you.

The Chair: Thank you very much for being here today. We appreciate your delegation and your candid comments.

I'd like to tell everybody that this is the close of our hearings for today. I'd like to thank all our witnesses, all the members of committee and the staff for their participation in the hearings. This committee stands adjourned until 10 a.m. on Tuesday, January 17.

The committee adjourned at 1703.

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