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Mercredi 18 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

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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON GENERAL GOVERNMENT

COMITÉ PERMANENT DES AFFAIRES GOUVERNEMENTALES

Wednesday 18 January 2006

Mercredi 18 janvier 2006

The committee met at 0958 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 meet today for the purpose of clause-by-clause consideration of Bill 27, the Family Statute Law Amendment Act, 2006. We will now commence clause-by-clause consideration of the bill.

The first motion, Mr. Runciman.

Mr. Robert W. Runciman (Leeds–Grenville): Thanks, Madam Chair. I think everyone has copies of these, hopefully.

I move that clause (b) of the definition of "family arbitration" in section 1 of the Arbitration Act, 1991, as set out in subsection 1(1) of the bill, be struck out and the following substituted:

"(b) is conducted in accordance with the law of Ontario or of another Canadian jurisdiction and is compatible with the values entrenched in the Canadian Charter of Rights and Freedoms;"

The Chair: Any discussion or debate?

Mr. Runciman: Would you like me to speak to that briefly?

The Chair: Yes.

Mr. Runciman: Essentially, I think it addresses the concerns, the catalyst behind the government proposing these changes, but not as harshly, if you will, in terms of the language embodied in the bill before us. If you read this section of the bill, it uses much stronger language: "is conducted exclusively in accordance." I think "exclusively" is a word that caused some concern among a number of the people who appeared before the committee. I think this amendment could address that concern but still accomplish the objective the government wishes to achieve through Bill 27.

The Chair: Mr. Zimmer, do you want to comment?

Mr. David Zimmer (Willowdale): No comment.

The Chair: Mr. Kormos?

Mr. Peter Kormos (Niagara Centre): The New Democrats have been pretty clear about our position in this matter: We believe that family law has sufficient societal importance that it should be performed by public courts utilizing the public law. That of course does not prohibit anybody from using any other dispute resolution process that they choose and, in terms of the process, incorporating whatever standards they choose. But don't come to the public courts, then, for enforcement.

In many respects my comments on this amendment are moot, because at the end of the day we disagree with the government's direction. We don't think it addresses or solves an acknowledged problem that women and children have in some communities, including some faith communities, whereby their status is lesser, as we perceive it, than it would be in the norm in Ontario and in Canada.

But, having said that, obviously this flows from the participation of the Canadian Jewish Congress and indeed was one of their major recommendations. For those who support this legislation—and I presume the government continues to support the legislation—I put to you that it is a valuable consideration. I hope that Mr. Zimmer is going to comment on it. If he doesn't, his colleagues wouldn't know how to vote. I would hope that Mr. Zimmer is going to comment on it so that at the very least the Canadian Jewish Congress, who did a great deal of work in preparing their submission, understand why their proposal is not taken into consideration, is not being incorporated by the government.

There was a day and a half of incredibly valuable discussion in this room. I'm just so pleased I had a chance to be on this committee for this bill. From the beginning to the end, the quality of the debate, in my view, was stellar. It was a pleasure to participate in the committee, because that doesn't always happen, as you well know. Again, I have a lot of intellectual disagree-

ments with a lot of the contributions made. So be it. It was a valuable process.

I think the Canadian Jewish Congress's utilization of this phrase is valuable and I just don't understand why the government would insist on exclusivity when in fact, at the end of the day, Mr. Zimmer, that could well be problematic. You can well anticipate litigation—think about this, Mr. Runciman—should there be even the most obtuse and gratuitous comment by a judge that would permit somebody to argue that he or she, as an arbitrator, didn't exclusively use Ontario legislation. Furthermore, common sense dictates that A, B or C be the case. Well, I right off the bat can see lawyers arguing, "Whoops, there you go. This is not a valid arbitration award"—because this is what it's all about—"because the judge didn't exclusively utilize the law of Ontario or another Canadian jurisdiction." Think about it. Furthermore, common sense tells me that X, Y or Z should be the case. "Maybe the arbitrator adjudicating the matter is no longer relying exclusively on Ontario law. He" or she "is relying on common sense. Oh, my goodness, what a shocking proposition."

1010

I believe that the government has set a standard here with "exclusivity" that is going to cause grief down the road. I think that Mr. Runciman's motion attempts to address that. Whether it does it fully or not I'm not prepared to judge. I think it's a valuable amendment and I would ask the government to please, at the very least, consider it. Perhaps the government would defer the vote on this matter until they've had an opportunity to reflect on the significance of it and the impact of the language they have now.

It's a very, very high standard, "exclusive." I understand what the government is trying to do, but they've set a very high standard that could well cause grief down the road. Mr. Zimmer is a clever, capable lawyer, and 10, 15 years from now, when he resumes his practice of law after serving as Attorney General in perhaps the final year of this government, I can see Mr. Zimmer in Superior Court, arguing that the arbitrator didn't exclusively use Ontario law, and that is to say he didn't only use Ontario law with the exclusion of all other standards.

We know, Mr. Zimmer, that adjudicators in our criminal courts, in our civil courts, public adjudicators and judges apply the law, but they also apply a whole lot of other standards. How often do we hear a judge say, "And furthermore, society dictates; furthermore, it is a value in our society; furthermore, common sense dictates"? We hear that every day from judges doing good jobs, applying the law of the land and rendering judgments that are unassailable. Here you talk about "exclusive." I think that's a very interesting use of the word, and also a very dangerous course of action. You're going to invite litigation. Are you trying to make things easier for people in family disputes? Far from it, sir.

Thank you, Chair.

The Chair: You're welcome, Mr. Kormos.

Any further speakers to this amendment?

Seeing none, all those in favour of the amendment? All those opposed? That's lost.

Mr. Runciman.

Mr. Runciman: I move that subsection 2.2(1) of the Arbitration Act, 1991, as set out in subsection 1(2) of the bill, be struck out and the following substituted:

"(1) When a decision about a matter described in clause (a) of the definition of 'family arbitration' in section 1 is made by a third person in a process that is not conducted in accordance with the law of Ontario or of another Canadian jurisdiction or is not compatible with the values entrenched in the Canadian Charter or Rights and Freedoms,

"(a) the process is not a family arbitration; and

"(b) the decision is not a family arbitration award and has no legal effect."

Essentially, Madam Chair, this was an amendment to bring this section into compliance with subsection 1(1) of the bill related to the amendment I proposed earlier which has just been turned down by the government members of the committee.

The Chair: Any further comments or questions? Seeing none, all those in favour—

Mr. Kormos: Chair, please. Again, this is a proposition that's certainly worthy of some consideration. Here's Mr. Runciman incorporating into the bill the charter standard. What could be more Canadian than that? Think about it: Mr. Runciman wants the bill itself, the legislation, to indicate clearly that determinations, adjudications, shall be in compliance with the Charter of Rights and Freedoms. This is mom and apple pie.

I say, are there people in this room who don't believe in the Charter of Rights and Freedoms, such that they would oppose this amendment? Are there people in this room who would not want to see those fundamental rights and values contained in the Charter of Rights and Freedoms? Are there some in this room who would want to say that those fundamental values and rights contained and entrenched—our own Canadian Constitution; this really was a turning point in Canada's history. Are there people who would not want to see that articulated in a bill where we're talking about family dispute resolution and the rights of women and children?

I happen to be a fan of the charter. I happen to be somebody who believes strongly in its value. By the way, I also believe in maintaining or retaining the non obstante provisions. How else do we preserve public health care, for instance, in view of the recent judicial determinations around public versus private health care? I think it's shocking.

At first I was concerned about the non obstante clause, but I was much younger then; I really was. I thought the charter is the charter is the charter and rights are rights. But I think there's a significant difference between individual rights and societal collective rights. They're both rights, but in the case of public health care, for instance, it's a societal collective right to preserve that institution. I just wanted you to know that I believe that to abandon the non obstante clause is a very dangerous, reckless, un-

thinking, knee-jerk, irresponsible approach to our society and to our future. How could any rational person—

The Chair: Mr. Kormos, are you speaking to the amendment?

Mr. Kormos: Yes, ma'am.

The Chair: Okay.

Mr. Kormos: How could any rational person advocate the elimination of the non obstante clause, especially in view of the recent experience we had with the courts around private health care, other than a person whose motive, for instance, was to facilitate the growth and development of private health care to compete with public health care?

Again I urge—I exhort—the government members on this committee to at least give this amendment some consideration. Please, in the interests of those people who are going to have to rely upon this legislation, should the government ever proclaim it, give some consideration to this and perhaps defer the matter until you've had an opportunity, Mr. Zimmer, to consult with advisers and counsel at the Ministry of the Attorney General down the road on Bay Street. Please, perhaps just indicate with a nod, "I will agree to the vote on this matter being deferred," until you've had a chance to contemplate the amendment further. Thank you, Chair.

The Chair: Mr. Yakabuski.

Mr. John Yakabuski (Renfrew–Nipissing–Pembroke): I concur in many of the things Mr. Kormos has said. I might not put them in the same way; in fact, I would find it impossible.

Certainly, on the amendments Mr. Runciman has proposed here—the first one and this one—what I find troubling is that in no way do they weaken this bill. In fact, they make the bill far more workable, far more defendable and more realistic to implement and deal with the inevitable situations that will arise by replacing that exclusivity with the words "conducted in accordance with."

Right in this amendment is the Canadian Charter of Rights and Freedoms. I do find it troubling that the Liberal members on the other side did not support amendment number 1. Therefore I find it highly unlikely that they'll be supporting amendment number 2, which has right in its verbiage the protection entrenched in the Canadian Charter of Rights and Freedoms. I would ask them to reconsider their thought process on these amendments.

Thank you very much, Madam Chair.

The Chair: Mr. Runciman.

Mr. Runciman: I appreciate the contributions of the members as well. I just want to say, without getting into the merits of the charter and those kinds of arguments, that I think what was persuasive for me was essentially the presentation by the Canadian Jewish Congress, and the delegation we heard yesterday, which I think was a little less amenable to compromise, but coming from essentially the same direction. I thought the Canadian Jewish Congress, although very upset and deeply offended by the lack of consultation with respect to the decision the Premier made on a weekend and moved ahead with Bill 27 without talking to any of the stakeholders who had gone through the Boyd process, which they felt was a good-faith process—ultimately, I think quite properly, felt they were slapped in the face by the government of the day.

1020

Given the fact that rabbinical courts, from all reports, have worked quite well—no real concerns have been brought to our attention about the operation of rabbinical courts under the legislation, or even before the legislation for that matter, but certainly what's relevant here is under the current act—I felt they came here prepared to compromise. They didn't have a long list of demands. They didn't say, "Throw this legislation out." They certainly expressed their concerns about it, but they recognized the realities as well with respect to the government's position and came up with some realistic recommendations—only two—to this committee, which I felt were both realistic and a real move toward a compromise solution that they put forward.

One, of course, was the inclusion of the words I've proposed here through amendment today, and the other is coming forward later, dealing with a requirement for consultation. It's a very a reasonable approach, and it is truly regrettable that the government members are not seeing fit to support that reasonable approach.

The Chair: Ms. Matthews.

Ms. Deborah Matthews (London North Centre): I'm delighted to respond. The first point I really am surprised that I need to make but will make is that the Charter of Rights and Freedoms is in fact Canadian law. Our bill, by definition, includes the Charter of Rights and Freedoms. There is no need to add that amendment because the bill already includes the Charter of Rights and Freedoms and all other Ontario and Canadian law. As I said, I'm surprised that such well-informed people across—

Mr. Runciman: The former Attorney General proposed it.

Ms. Matthews: —really don't understand that it is Canadian law, the Charter of Rights and Freedoms.

The Chair: Less cross-chatter, please. Let the member talk.

Ms. Matthews: The second point I want to make is that we have actually given this some considerable thought. We examined the amendments overnight and did—

Mr. Yakabuski: Did you get any sleep, though?

Ms. Matthews: Not as much as I would have liked—and did in fact consult with some of the people who presented here specifically on this issue. I'm happy to read to you what we received from one group, and it reflects the opinion of other women's groups. This is from Pamela Cross, the legal director of METRAC: "We do not support the amendment proposed by the Conservatives to alter the definition of family arbitration. As we stated in our submission, we think the current bill provides the appropriate definition for this term and we do not want to see the requirement that arbitrations be

conducted exclusively in accordance with Ontario and Canadian law altered in any way." That is an opinion we concur in. Therefore we will not defer the vote on this. We're prepared to vote on this right now.

The Chair: Any further comments or questions?

All those in favour of the amendment? All those opposed? That's lost.

Mr. Runciman, you have the next amendment.

Mr. Runciman: I move that paragraph 2 of section 3 of the Arbitration Act, 1991, as set out in subsection 1(3) of the bill, be amended by adding "and" at the end of paragraph iii, by striking out "and" at the end of subparagraph—

The Chair: Mr. Runciman, just for accuracy, after the word "and" you just said "paragraph" instead of "subparagraph."

Mr. Runciman: Sorry—"and" at the end of subparagraph iii, by striking out "and" at the end of subparagraph iv and by striking out subparagraph v.

I didn't have an opportunity, because of time constraints, to have a chat with legislative counsel with respect to this amendment, but I believe it's achieving what we hope to recommend to the committee, as recommended by a number of presenters; that is, retaining the ability of parties who opt to enter into arbitration the ability to waive the right of appeal. I think there were some very solid arguments made with respect to this, in the sense that most of the contributors who have had extensive experience in dealing with arbitration felt this was an important element with respect to finality and recommended the strong consideration of retention of this right, requiring the agreement of both parties, of course. We support it, and hopefully the amendment I've just read addresses that.

Mr. Kormos: I want to speak to this as well. I hope people understand that some of the people who appeared before this committee: Mr. Bastedo, Mr. Wolfson, Ms. Fidler the psychologist, Barbara Landau—Landau and Wolfson are the authors of the major authoritative text on family mediation in Ontario and Canada. We were blessed with some of the best minds in the area of family dispute resolution over the course of Monday and Tuesday, here in this committee room—we really were—and I'm just so grateful that I had a chance to participate in this committee for that very reason.

But when Ms. Fidler, a psychologist—you'll remember she did the coordinating; she's a brilliant, brilliant person and a leader in these matters internationally—and Mr. Wolfson, again an internationally acknowledged leading expert in family dispute resolution, raise the concerns they did around the appeal issue, along with others—Ms. Tellier as well; you will recall she's a lawyer who is actively involved—I'm going to be quite candid in indicating that I had not considered that as problematic before their discussion, as I do now, especially as I came to understand more clearly that based on the definition—this is something, again, where these participants were very, very helpful—if an arbitration award under this legislation is not exclusively based on Ontario law, or the law of another Canadian jurisdiction, so say Ontario law, it is not an arbitration award. It's a nullity. It doesn't exist. It's zero. It can't even be appealed. The argument will be, should a party try to appeal an award that can be criticized or attacked for not being based exclusively on Ontario law, that an appeal court can't even hear the appeal because the law says you can only appeal a family arbitration award. This sounds bizarre, but I was pleased that this was acknowledged, and clearly acknowledged, by the experts as being the case.

So the right of appeal—whoa, wait a minute. What right of appeal? Because you attack an award that is not based exclusively—and this is where the word "exclusive" is going to cause grief, because unhappy litigants are going to be attacking award after award on the basis of its not being exclusive, by virtue of a single word being uttered by an adjudicator, by an arbitrator. So it's only bone fide judgments that are based exclusively on Ontario law that can be appealed. That's fair enough, in and of itself, except that this is what arbitration is all about. Arbitration is your getting to choose your adjudicator. People have any number of good or bad reasons for choosing adjudicators, but they choose adjudicators, they choose arbitrators based presumably on that arbitrator's familiarity with that area of law. Mr. Bastedo spoke to that, amongst other things.

1030

There are certain arbitrators who do some types of arbitrations. Again, in the construction industry, arbitration is very, very common and frequently used. There are some advocates of the profession who say that an arbitrator does not have to be familiar with the trade and that an arbitration is an exercise that's aloof from any knowledge. But by and large, it's acknowledged that one of the factors that people utilize in choosing an arbitrator is their expertise, their reputation for fairness, their reputation for even-handedness—all of these considerations.

What does that say, then, about appeal? I agree with the advocates of arbitration as an alternative to the public courts that, because of serious problems in our court system, a judge who primarily deals with criminal law can be thrust into a Family Court the next day. That was some legislation where we—Mr. Zimmer wasn't here yet; Mr. Runciman was here, though. Remember the debate, Mr. Runciman, about taking away the exclusive Family Court judges and their roles? We were concerned about the erosion of the special expertise that Family Court judges at the provincial level acquired. Upon reflection, I still think it was a wrong move, and it's been demonstrated to have been a wrong move.

So there is the luck of the draw around picking a judge. Look, judges don't have the luxury of time that an arbitrator has. An arbitrator has his or her billable hours. They have the luxury of their clients' pocketbook, I suppose.

I was interested in the phrase "litigation bullying." Again, you talk about trying to address power imbalance in family dispute resolution. Denying the opportunity for litigants in an arbitration setting, where you've always

said it's going to exclusively be Ontario law, which is a very high test, very readily attacked, very vulnerable, and litigants who get to choose their own arbitrator, to deny them—because you're presuming you've got ILA, independent legal advice. It's a strong focus, and nobody disputes the need for ILA, although I'm going to speak to that when we get to those sections, because the practicality of the real world is far different from the little intellectual exercise here in this room—far different.

But I'm impressed by the observation about litigation bullying. I understand—and I hope I'm correct. Again, as I've said so often, if I'm wrong, there are people here who will leap at the opportunity to say so. But I understand that it's usually the party with more power, financial resources, who has the capacity to engage in litigation bullying—you know, appeal it just to drag that so-and-so through another round of litigation. Understand that the appeal is to the Superior Court, those very courts that people are trying to avoid in the course of private arbitration because of their huge backlogs, because of the inability to choose your adjudicator. So a nasty litigant—and I don't have to tell you that in family matters things get nasty—can make the other party pay and pay and pay, and that's when you have injustices. Oh, I'm such a fan of Owen Fiss and his commentary on ADR. I sent a copy of the Yale Law Journal article to Mr. Zimmer because I knew he'd enjoy it. But that's exactly what Professor Fiss is talking about when he argues against settlement. It's at that appeal level—think about this, Mr. Runciman—that a powerful litigant can force settlement on the less powerful litigant, more likely than not the woman, because she can't afford to sustain the appeal. Do you understand?

Appeals are very expensive, because now you're into the course of paying for transcripts and lengthy, lengthy, lengthy legal analysis on the part of lawyers, on the part of counsel as well as on the part of the court. It's at this appeal level that weaker litigants can be forced into unjust settlements, because they simply give up. I don't know about your constituency offices, but in my constituency office I get people in there on a weekly basis, every Friday that we've got appointments for me, showing me the legal bills around family litigation. To spend $50,000 or $60,000 per party on family litigation is not unusual at all, and it can quickly go up into the six digits. Quite frankly, arbitration doesn't necessarily—it certainly doesn't eliminate the legal bills, and if it does reduce them, in many cases it's only marginally.

I get constituents, and I trust you do too—if they don't talk to you, they're talking to your staff—who come in with legal accounts of $30,000 or $40,000. I don't begrudge the lawyers who maintain firms and staff and all the overhead and get paid for what they're doing, but they've run out of money. Do you know what happens in civil matters when the lawyer can no longer collect his or her fee? What's the motion they bring before the court: to be removed as council of record, Mr. Zimmer? Have I got that right? Mr. Zimmer is not even nodding. It's a motion. I believe a lawyer will bring a motion to the court to be removed as solicitor of record when his or her client has run out of money. That's what happens. It's over.

Again, I'm not saying to deny the right of appeal, but if the government is creating legislation that addresses power imbalance with independent legal advice, why not then give those same litigants—and if it creates that incredibly high standard—exclusively Ontario law? Why not at least give litigants the opportunity, with ILA, with independent legal advice, to say, "And furthermore, the resolution imposed on us by this arbitrator is going to be filed," so that that other party can't continue to drag this matter through the expensive, slow and incredibly painful—those folks who were here each could have spent a day with us, easily. You understand that this is not just about spouses; this is about children. The incredible impact that these tortured and agonizing processes have on kids is profound.

I became persuaded, very much so, by the experts who were here that giving litigants who have ILA, giving litigants who have representation, giving litigants who have the opportunity to choose their arbitrator the opportunity to similarly say that this will be final and binding—I think that's a good, important thing, and I say that the government is defeating its purpose. It says it's going to give people the opportunity to use these private courts; I'll have more to say about that later, because that's what they're creating. We're not talking about poor people here; we're talking about people with means. Poor people down where I come from are those poor women lined up in Family Court, unrepresented or using the duty counsel that happens to be available that day. This does nothing to alleviate the grief that those parties to family disputes suffer, nothing at all. Let's make that very clear. This is for people with means.

It also, quite frankly, is for people who have a sufficiently amiable relationship with their spouse/partner that they can agree to arbitration. The people in the really violent, unhealable and dangerous relationships are not going to sit down and agree to arbitration, by and large, unless they're motivated by factors like privacy: if they are celebrities who don't want their cocaine habits to become public knowledge, or their assets or mistresses or boyfriends or girlfriends and their assignations in cheap hotels down on the Lakeshore strip to become public knowledge. I suppose if they're rich, they're doing it at Sutton Place, not down on the Lakeshore. That would be the motivation of some parties.

The Chair: Can you bring it back to the motion, Mr. Kormos?

Mr. Kormos: Yes, ma'am. Well, no, very much so.

The Chair: I sense a little deviation here.

Mr. Kormos: What, the business about assignations? That's life, Chair. I'm sorry.

The Chair: It's a deviation.

Mr. Kormos: It's not deviant; it's perfectly human behaviour. It happens. Trust me.

But, look, the parties who can agree to arbitration have retained some level of relationship. We're not speaking

to the needs and interests—and again, I'll talk about women whose relationships are so dangerous and volatile that they can't sit down with their spouse and say, "Let's go to arbitration, honey." They've got to go to the Family Court and file the papers and wait and wait in those dank, mouldy hallways.

1040

I say that Mr. Runciman has made a very important contribution to this process. Far be it from me to suggest that it's the opposition's job to do the government's job, but from time to time, intellectual integrity compels us to perform that role. This amendment makes the bill better, friends. It's intellectually sound, it's policy-sound and it addresses some of the ill that you purport to be speaking to.

The Chair: Any further discussion on this motion?

Mr. Zimmer: Let me say this in response to the remarks from the members of both parties, in particular Mr. Kormos's party. One thing this bill really does, in keeping the appeal rights in place, is protect poor and vulnerable women at the arbitration stage of things. We are trying to make a level playing field at the arbitration stage. The fact of the matter is that appeals of arbitration awards are relatively rare and infrequent. Keeping this appeal provision strikes the proper balance by removing the threat to vulnerable women who can't afford or don't engage counsel at the arbitration process, to ensure that if something comes off the rails at the arbitration process, there is an appeal to a judge who will ensure that any decisions, anything that happened at the arbitration stage, were in fact made according to Canadian law and that all the other aspects of this bill are in place.

We've had extensive consultation with various women's groups as late as yesterday afternoon and over the evening. They see the appeal provision as key to levelling the playing field in the arbitration process. This will make the arbitration process more attractive to women. It will ensure that if things do come off the rails at the arbitration stage, there is another look at it by a judge.

Mr. Kormos: Again, arbitration is no more about poor litigants than the doctors up on Yorkville Avenue who do the liposuction for rich, fat people. Arbitration is about people who can afford to pay their own way; that's number one. Number two, and you said it again, the appeal process is important in case the arbitration goes off the rails and isn't conducted in accordance with Canadian law. That's the whole point. If it isn't conducted in accordance with Canadian law, you can't appeal it because it is not an award; it's merely null and void. If the argument is made that we're appealing this award because it's not in compliance with Canadian law, the appellate court will have to say, "I'm sorry, we can't hear the appeal because you can only appeal family arbitration awards, and it's only a family arbitration award if it's conducted in compliance with Canadian law."

Mr. Brad Duguid (Scarborough Centre): That's not true.

Mr. Kormos: What do you mean, it's not true? Of course it's true. Read the bill, Mr. Duguid, and listen to the experts. Listen to Mr. Bastedo, listen to Mr. Wolfson, who were here yesterday.

Mr. Duguid: I'm watching the experts shake their heads.

The Chair: Committee, I'm not going to allow debate back and forth. Mr. Kormos, you have the floor.

Mr. Kormos: Thank you kindly. Read the bill. It's only an award if it's made in compliance with Canadian law, and it can only be appealed if it's an award. Therefore, a decision that's not in compliance with Canadian law is not an award and cannot be appealed. It is a nullity. Am I saying that's a good thing about the legislation? No, but I neither drafted it—and I don't criticize the drafting people, because they follow orders.

I can hear the rolling of eyes when those—Mr. Runciman, think about this. You've been in the cabinet; you've had to work with these people. When those poor civil servants were given their marching orders after Mr. McGuinty, on that Sunday afternoon, blurted out his ill-thought-out response to the issue, civil servants who were compelled to draft this legislation—again, you can hear their eyes rolling.

I'm not saying that it's good legislation. Look, I've been pretty consistent in that regard in terms of being critical of it, but I've just been trying very hard to understand what kind of beast the government is giving birth to here. It is very problematic in this whole issue, because we're not talking about denying the right to appeal. We're talking about—this is what Mr. Runciman's amendment does—giving parties who are free agents—because that's the whole basic assumption: If they are free agents, it's not an arbitration. The premise of arbitration is that two people willingly and with some meaningful parity in terms of status and power engage in the process, because you can't compel somebody. As a matter of fact, what this bill—in some circumstances, like in contract situations, you can compel somebody to go into arbitration if, for instance, you decide in your agreement that that's how you're going to resolve disputes. I'm going to get to that when we reach the point where you talk about not being able to commit to arbitration agreements prior to the dispute arising, another very problematic part of the legislation.

So I hear you, Mr. Zimmer, but again I say to you that your analysis of the bill, if you say that the appeal is there to address awards that are not in compliance with Canadian law, is inaccurate. It's incorrect. I say that we're not talking about, nor does this amendment talk about, eliminating parties' right to maintain the right to appeal. We're talking about giving them the right—dare I say it? I'll use the government's language. It's about choices. How often have we heard that in the government's spin around so many issues? It's giving them the choice to say, "And furthermore, this is going to be the end of our dispute. We're going to walk away from this, and we can carry on with our lives."

That is so important, as I understand it from reading the literature in family litigation. It's important in other areas of litigation too, but it's so incredibly important, and not just for the spouses but for the kids. This takes such an incredible toll, family disputes and the litigation, on children. It's something that we, just because of the time constraints, weren't able to—it probably isn't germane. Some would say it's not relevant to the actual specifics of the bill.

So I disagree with Mr. Zimmer in that regard. I simply want to point that out. I'm not going to belabour the point.

The Chair: Thank you.

Ms. Matthews: I just wanted to address the issue of finality that was raised by some of the people we heard from in the hearings when they were arguing that we do allow parties to waive the right to appeal. I think it's important that we all understand that there's already a very narrow ability to appeal now. It's 30 days, and it's on a point of law. So in a process that has probably gone on for many, many months, adding a 30-day appeal period doesn't really, in any material way, affect that finality that people really do want to have when they're closing one chapter of their life and moving on to the next. So I am comfortable with not allowing the right to waive appeal because it's such a narrow window. It has to be within 30 days and it has to be on a point of law, so I'm comfortable with that.

I've also received a note from the experts here that I'm going to try to make sense of. Basically, I'm told by the experts—and I am ill-equipped to get into a legal argument with a lawyer—that the appeals will occur. Your argument, I'm told, is wrong. If they're not in compliance, they'll lose the appeal, but the appeal will still be heard. In order to find out whether or not an arbitration is in compliance, in accordance with Ontario and Canadian law, that appeal is actually a necessary step. So I'm comfortable—in fact, I think it's important that we retain that appeal period.

1050

Mr. Runciman: I guess your partisan experts are much more well informed than someone like Mr. Bastedo, who has been operating in this area for so many years.

I was taken by Mr. Zimmer's comments that, "Late into the night, we consulted with women's groups, and they assured us that this was the way to go." I think that speaks volumes about this government's response to this: It's all political. They're not looking, in my view, in terms of what's really going to make the arbitration system work for people in this province. This is a political exercise, which was exemplified, I think, by those comments and by the Premier's Sunday afternoon comments to a reporter and the failure to consult thereafter.

The Premier and his party talked about a democratic deficit prior to the election and since, and we've seen very little of an attempt to address it. What we've tried to do from the official opposition perspective here is put forward some amendments that will improve the legislation and make it more attractive for families and individuals in this province to access it. We've listened to the experts. We've taken the advice of experts, people who have no partisan axe to grind and are not here to support one party or another; they're here to put their experience on the record and offer the best possible advice to us as legislators to make those ultimate decisions. Of course, you've closed your ears and listened to a few special interests with respect to not only how the legislation was drafted but your failure to listen to the people who donated their time, if you will, to provide us with their best advice. That's truly unfortunate.

At the end of the day, we are probably going to support the legislation. We supported it on first and second readings. But I think the way you're going, the path you're taking here, is really going to make arbitration much less attractive, and it will be up to a future government to clean up this mess, apparently, because you certainly don't seem willing to address very valid and legitimate concerns.

Mr. Yakabuski: I'm not a lawyer either, and I don't have any legal experts passing me any notes either. But based on the testimony we heard over the last couple of days, and perhaps your legal experts could comment on that or give you a note that would help you out on that, my understanding, based on what they've said, is that even if these amendments were passed which gave the parties the option or the right to waive their right of appeal in arbitration awards, it in no way nullifies anyone's right to appeal under an error in law, in applying Canadian or Ontario law. It only gives them the right to waive the arbitration itself—you can't say, "I don't like the award; therefore, I'm appealing it." They still retain the right, even if these sections—and maybe Mr. Kormos would have a better understanding of that. Under all circumstances, including if the right to appeal was here, or the right to waive the right of appeal, they could still appeal under the Canadian law that the Ontario law was not applied or the Charter of Rights was not applied in arriving at that award—not the award itself, not the terms, but if they didn't do it with respect to the law. That's basically what you were talking about in your response.

The Chair: Mr. Kormos?

Mr. Kormos: I defer to Mr. Duguid.

Mr. Duguid: My understanding is that what we're talking about here would depend on what was agreed to in terms of what they're waiving, but if you waive your right to appeal, you waive your right to appeal, plain and simple, so you waive your right to appeal even on a legal basis. Now, you could write a waiving that would say, "With the exception of a legal basis," but that's not necessarily going to be the case.

Mr. Yakabuski: That's not our understanding.

Mr. Duguid: That would be ours.

The Chair: Can I just remind everybody that we are talking about the third motion. I want to make sure everybody is staying on task as to what's on the table.

Mr. Duguid, if you're done, Mr. Kormos?

Mr. Kormos: Note makers and memo writers and all inclined. This is what litigation is about. There are going to be disagreements; there are people who are going to say yes and there are people who are going to say no. However, it's about the enforceability. If an award is not made in compliance with Ontario law, then it's unenforceable. The issue is enforcement, and we are going to get into that when we come to the enforcement sections because there are amendments with respect to that as well. There was interest expressed in the enforcement mechanisms. The enforcement requires suing. You have to litigate on the award. That's one opportunity that people will have to contest the award as not being an award because it's not made exclusively in compliance with Ontario law. It's not enforceable.

There are appeals and then there are appeals. There is an appeal pursuant to the legislation, which requires that it be a valid family arbitration award before it can be appealed. There are, of course, going to be what some people will call appeals; to wit, motions to set aside an invalid order, a declaration. That will be seen by some as appealing the award, but in the instance where an award is not made in compliance with Ontario law exclusively, the real process, according to many, would be to move to set it aside if you wanted to act unilaterally or simply contest the enforceability of it. This is not a non-litigious process that you've created, Mr. Zimmer—far from it. The arbitration is just the beginning of a long, messy process on the whole basis of what the award entitles you to. All the award does is entitle you to sue the other party on the basis of the award. Courtrooms, once again, the palais de justice across Ontario, with their huge lineups and waiting lists and beleaguered staff—those poor OPSEU members who struggle with caseloads. Mr. Runciman, I'm sure, shares my concern for those poor OPSEU workers who struggle with those huge caseloads in those courts.

Trust me, if this bill passes, this will be litigated and there will be appeals upon appeals about the very nature of the words in this bill.

Mr. Zimmer: I've given to the clerk of the committee two letters; one from Pamela Cross, legal director of METRAC. Opposition members have copies of that letter now. I just want to point out that, with respect to the Pamela Cross letter—and I won't get into the letter, but just the first sentence. This was following the two days of hearings, and it points out that METRAC supports all of the government's proposed amendments. On the second letter, from Kelly Jordan from the Ontario Bar Association, it's important to note that she writes on behalf of three sections of the Ontario Bar Association: the family law section, the alternative dispute resolution section and the feminist legal analysis section. They are supportive of the government's amendments at this stage after the two days of hearings. I assume Mr. Bastedo is a member of the OBA also.

Mr. Kormos: There's no two ways about it, Mr. Zimmer: You have fans out there. There are people who admire your zeal in the performance of your duties. I happen to be one of them. I just find you an incredible performer in this role of parliamentary assistant, and I wish you well and look forward to seeing your career progress.

Mr. Runciman: It surprises no one that the OBA supports this, that lawyers are supportive of more opportunity for appeals.

The Chair: Any further discussion or comment? Seeing none, all those in favour of the motion?

Mr. Kormos: Recorded vote.

1100

Ayes

Kormos, Runciman, Yakabuski.

Nays

Dhillon, Duguid, Matthews, Rinaldi, Zimmer.

The Chair: That motion is lost.

Mr. Runciman.

Mr. Runciman: Okay. Hopefully I'm on the right one here, Madam Chair.

The Chair: Number 4.

Mr. Runciman: I move that paragraph 10 of subsection 46(1) of the Arbitration Act, 1991, as set out in subsection 1(7) of the bill, be struck out and the following substituted:

"10. The award is a family arbitration award that does not comply with section 59.6 of the Family Law Act."

Madam Chair, I believe this amendment and the following amendment both deal with the enforceability provisions. I believe there may be a government motion addressing this as well. I'm not sure, but I'll leave that to Mr. Zimmer to outline, if indeed that's the case.

It's a response to the concerns expressed by a number of witnesses related to enforceability, that there should continue to be the right to apply, under section 50 of the Arbitration Act, for the enforcement of an award. We think that makes eminent good sense, and we're supporting it through this amendment.

The Chair: Comments or questions?

Seeing none, all those in favour of the motion? All those opposed? That's lost.

Mr. Runciman, you have the next motion.

Mr. Runciman: I'll read it into the record, but essentially, I think it deals with the same issue.

Subsections 1(8), (9) and (10) of bill (sections 50 and 50.1 of Arbitration Act, 1991)—I shouldn't be reading that, I guess.

I move that section 1 of the bill be amended by striking out subsections (8), (9) and (10).

The Chair: Comments or questions? Mr. Runciman, did you want to speak to that?

Mr. Runciman: I believe again this deals with section 50 and the ability to ensure enforceability of an arbitration award.

The Chair: Any comments or questions?

Mr. Runciman: Just to read something from Mr. Bastedo that I have here in front of me, currently an arbitrator has "the power to order the production of documents in the course of a hearing," and if the order isn't followed, it can be turned very easily into a court order by section 50 of the Arbitration Act. The order is then enforceable through the contempt provisions of the rules of civil procedure.

Under the bill as it's currently worded, and as pointed out very eloquently by Mr. Bastedo, it will now be impossible to seek this sort of order. The interlocutory or interim awards which are continuously made through an arbitration process wouldn't have an effect. But he certainly addresses this as a very significant concern of his, and I think the government members should take this opportunity to appreciate that concern and address it through the amendment.

The Chair: Mr. Kormos.

Mr. Kormos: I'm concerned about the concern raised about the bill being silent as to interlocutory or interim orders. I think everybody understands how important they are in any litigation process, but especially in family, when you're talking about preserving property, right? You don't want one of the parties selling off all sorts of assets. That's one of the areas where, as I understand it, interim orders are made, ordering a party not to sell the motor home, not to sell the Rolls-Royce, the Mercedes-Benz, what have you; the protection of children; the exclusive possession or interim exclusive possession of a matrimonial home.

I would hope Mr. Zimmer would help us in this regard, because this is exactly what Mr. Runciman spoke to in terms of Mr. Bastedo speaking to the handcuffing of an arbitrator in terms of interim interlocutory awards. Or perhaps ministry staff, and there are a couple of them here, could assist us. Where does the authority for an arbitrator to make an enforceable interim interlocutory award come from? Is it by virtue of the present Arbitration Act? Are Mr. Bastedo's concerns grounded? I don't know the answer to that, and I dearly want to. Can anybody help?

The Chair: Mr. Zimmer, did you want to respond?

Mr. Zimmer: We're mindful of the lawyers' concerns and we have an amendment that will address this.

The Chair: Mr. Kormos.

Mr. Kormos: What can I say?

The Chair: "Trust us"?

Mr. Kormos: Yes. Oh, great: "Hi. I'm from the government and I'm here to help you"—the world's third-greatest lie.

The Chair: Any further comments or questions on this motion?

All those in favour? All those opposed? That's lost.

Mr. Runciman, you have a motion.

Mr. Runciman: This is number 6?

The Chair: Yes.

Mr. Runciman: I move that section 58 of the Arbitration Act, 1991, as set out in subsection 1(11) of the bill, be amended by adding the following subsection:

"Consultation

"(2) Before a regulation is made under this section, the Attorney General shall engage in a public consultation about the content of the proposed regulation."

Again, this was suggested by a number of the presenters, I think primarily by those who were offended by the fact that the Premier made a weekend announcement. This followed eight months of consultation by Marion Boyd before she made her recommendations, which they had participated in in good faith. In their view, her recommendations were rejected by the Premier in a very cursory way because of political heat, and then a failure to consult prior to the tabling of Bill 27 in the Legislature. I think they've made a very reasonable request. Because the regulations could have enormous impact on how arbitration functions in the province in the future—setting aside faith-based arbitration; we're talking about arbitration of all these kinds of family law matters—I think it's important that the government accept this recommendation.

This is not precedent-setting. A research officer, assisted by one of his colleagues, has provided us with an extensive list of examples of acts that have required consultation with the public before regulations are made under the legislation. I'll just put a few of them on the record: the Commitment to the Future of Medicare Act, 2004; the Environmental Bill of Rights, 1993; the Fiscal Transparency and Accountability Act, 2004; the Greenbelt Act, 2005; the Ontarians with Disabilities Act and the Quality of Care Information Protection Act. Those are examples of where the current government has incorporated a requirement for consultation before regulations become finalized.

I think this is a very appropriate request and amendment, and hopefully the government members will be receptive to at least one of the friendly amendments that the opposition has made here this morning.

The Chair: Ms. Matthews.

Ms. Matthews: I'd like to comment on Mr. Runciman's comment that this bill was introduced without consultation. I think we've heard that too many times for me to sit and listen to it one more time without commenting. I don't know about you, but I got more calls on this issue in my constituency office than I have on any other issue. There was broad consultation. There was more public debate on this issue than on any other legislation I can recall in the two years since I was elected. There was enormous public debate. I don't know if you have problems that the Premier happens to work on Sundays, but the accusation that there was not a broad public debate on this is simply unfounded.

As for this motion that you've put before us, I can assure you that consultation on regulations is done routinely. It is something we are absolutely committed to doing. We do not need to put it in the statute. There is no reason to do that. It is something we will do.

I think the record of your government, when you were in office, of not even sending legislation to committees puts you on a very weak foundation to criticize this

government for not consulting. We have sent more legislation to committee in the last two years than you did probably in the entire time you were in government.

1110

The Chair: Mr. Kormos.

Mr. Kormos: Please, Ms. Matthews, don't be so negative and so hostile.

The Chair: Are we speaking to the motion?

Mr. Kormos: The ads aren't working out there in the public, and that sort of negative attack is being deemed by Canadians to be totally inappropriate in this political context. Let's restore some civility to this committee.

I support the amendment, and I commend Mr. Runciman. But quite frankly, Mr. Runciman, you've got to have been hanging around the Brockville grow op to actually think the government is going to pass this; of course they're not.

But I've got to tell you, you had practitioners here on Monday and Tuesday—these are the people who are doing this work—and the government would be well advised to talk to those practitioners in terms of what works and what doesn't work and what addresses the concerns. My fear is that the regulation-writing process is going to be as unpleasant as it is in most other cases. Quite frankly, consultation to ask questions is one thing, but heeding the advice is another. I'm not disputing—

Interjection.

Mr. Kormos: I have no doubt that the government consulted, but did they heed the advice?

As to the volume of phone calls, if you, like the New Democrats, had come out earlier on with a clear and unequivocal position, people would have known where you stood and your staff would have been able to deal with other matters. But that's just free advice, worth exactly what you're paying for it.

The Chair: Further comments or questions?

Mr. Runciman: Just a quick one responding to Ms. Matthews, which perhaps will encourage her to respond back—I hope not; I don't want to delay the proceedings any longer.

In terms of consultation, in which she referenced phone calls, certainly my constituency office was called on a regular basis prior to the Premier's making his announcement. I think it was essentially concerns that had been allowed to fester across the province because of the failure of the government to respond in any definitive way with respect to Ms. Boyd's recommendations. As I mentioned earlier, I think the people who participated in the Boyd process did so in good faith. They felt they were being listened to. Whether they agreed or disagreed with the recommendations she made at the end of the day, they felt they had had the opportunity to have input.

From what we've heard here today, and we've certainly heard it before as well, they felt betrayed by the fact that the Premier made a decision not to accept Ms. Boyd's recommendations and to move ahead with legislation that would clarify the situation. They felt they should have been brought into the loop during that period of time and should have been asked for their views. Whether or not they agreed with where the government was going, they should have been asked: "We don't want to talk about the decision. This is where we're going. What do you suggest in terms of arriving at that goal?" That's where they felt betrayed, hurt and offended, and I'm saying that can now be addressed through a consultation effort prior to the finalization of regulations. I think that's fair and would be very much appreciated by the people who, up to this point, feel deeply hurt.

The Chair: Any further comments or questions? Seeing none—

Mr. Kormos: A recorded vote, please.

Ayes

Kormos, Runciman, Yakabuski.

Nays

Dhillon, Duguid, Matthews, Rinaldi, Zimmer.

The Chair: That's lost.

A government motion: Mr. Zimmer.

Mr. Zimmer: I move that section 58 of the Arbitration Act, 1991, as set out in subsection 1(11) of the bill, be struck out and the following substituted:

"Regulations

"58. The Lieutenant Governor in Council may make regulations,

"(a) requiring that every family arbitration agreement contain specified standard provisions;

"(b) requiring that every arbitrator who conducts a family arbitration be a member of a specified dispute resolution organization or of a specified class of members of the organization;

"(c) requiring every arbitrator who conducts a family arbitration to provide specified information about the award, not including the names of the parties or any other identifying information, to a specified person;

"(d) requiring any arbitrator who conducts a family arbitration to have received training, approved by the Attorney General, that includes training in screening parties for power imbalances and domestic violence;

"(e) requiring that every arbitrator who conducts a family arbitration shall,

"(i) ensure that parties are separately screened for power imbalances and domestic violence, by someone other than the arbitrator, and

"(ii) review and consider the results of the screening before and during the family arbitration;

"(f) requiring every arbitrator who conducts a family arbitration to create a record of the arbitration containing the specified matters, to keep the record for a specified period and to protect the confidentiality of the record;

"(g) specifying standard provisions for the purpose of clause (a), dispute resolution organizations and classes for the purpose of clause (b), information for the purpose of clause (c), persons for the purpose of clause (c),

matters for the purpose of clause (f) and a period for the purpose of clause (f)."

The Chair: Comments or discussion?

Mr. Zimmer: Yes, if I may just speak to this. This motion replaces the proposed regulation-making power of the Arbitration Act, 1991, found in section 58. The changes respond to the submissions made to the committee.

Clause (b) is made more specific to permit regulations which say only certain classes of members of dispute resolution organizations who meet training requirements could conduct family arbitrations. Some organizations have different classes of membership and different subgroups.

Clauses (c), (d) and (e) are made more general to permit flexibility in developing regulations in consultation with affected groups. We want to make sure that the authority in these sections is broad enough to accommodate the needs of several perspectives.

One change to clause (e) meets the concern that arbitrators in their judicial function should not meet separately with parties ahead of time. Regulations could now ensure that such screening is done, but not by the arbitrator. The arbitrator would consider the results of the screening before starting the arbitration. The results of the screening could also be considered during the arbitration.

Finally, clause (g) is changed so that the authority to prescribe specific components of the regulations is gathered in one comprehensive section.

Mr. Kormos: This amendment parallels the existing section 58 for all intents and purposes. Why you've made people rewrite those various paragraphs when in effect most of them say the same thing beats me, but you did. I'm with you, Mr. Zimmer, up to and until—

Interjection.

Mr. Kormos: Because clause (e) addresses the concern that an arbitrator, an adjudicator shouldn't be meeting privately with parties, nor should he or she be getting information from those parties that isn't tendered in the courtroom in the presence of the other party.

So I'm with you until you get to subparagraph (ii). Think about it, friends. You're saying, "You presenters who were right: The arbitrator can't get involved in private meetings and in getting information that is not to be disclosed to the other parties." Remember, we talked about the danger of that information being disclosed; for instance, a party who is a victim. But then, the arbitrator shall "review and consider the results of the screening before and during the family arbitration."

This is of concern. Is the purpose of the screening simply to identify—I'll use the classic language—the power imbalance, or is it to provide redress for the person who lacks parity? Do you do that by equipping that person with legal representation, resources and protection, or do you somehow have the arbitrator review and consider the results of the screening before and during the family arbitration?

If the results of the screening are merely to say that party A is homicidal and you should have a police officer or a security person present in the hearing room, even that causes me some concern. Don't forget, you've included a provision, not inappropriately, where an arbitrator, an adjudicator, can consider incidents of violence, but that narration, the evidence about that violence, has to be tendered in open court, if you will. The evidence isn't to be tendered by one party alone in the absence of the other such that it is unchecked.

1120

Mr. Zimmer, look what you've done. You've solved a problem and then you've created another one. You're giving the arbitrator information that was obtained from one party in the absence of the other party. You're not only giving him or her that information, but then you're telling him or her to use it, not just at the beginning where conceivably you could say the purpose is to ensure that this person has legal representation or that he or she has a lawyer of their own choosing, not one that their partner picked for them in a ruse to victimize them. But to consider it during the family arbitration? Unh-huh.

You were doing so good. You were just coming along fine. You were at a remarkable pace, your breathing was even, your heartbeat was under control, but all of a sudden you've got this embolism erupting in the veinal system of this legislation. Why, Mr. Zimmer, why? You were doing so well, and then you trip and fall. You were this close to the gold, and then you stumble and fall. Gosh.

Mr. Yakabuski: I agree with Mr. Kormos's concern on that. What we were trying to establish and what we were talking about in the hearings was that originally they were proposing that the arbitrator would be meeting with the parties prior to the arbitration, and they ensured that there would be independent legal advice for these parties so that they would go into this process in a more protected and secure fashion. Now we're basically going backwards and saying, "But now the arbitrator has to take another look at this." I guess the government is questioning as to whether or not people can actually get independent legal advice. Do they not trust the lawyers of the province to give independent legal advice? I don't know, I'm not a lawyer, so I have no record of you not trusting me on anything. I share Mr. Kormos's concern on that, and I'm just wondering whether that subsection was required at all.

The Chair: Who are you directing your question to? Are you directing it to Mr. Zimmer or is it a rhetorical—

Mr. Yakabuski: It was more of a statement, but yes, perhaps they can give us some response that would comfort us in this regard. In the written word and in his original submission of the amendment, I find no comfort.

The Chair: Mr. Zimmer, do you want to respond?

Mr. Zimmer: In responding particularly to Mr. Kormos's embolism that he was almost having over this issue, let me say that the cure for your concerns, of course, is that these issues and these questions will get sorted out in the regulations. As you know, when we're

working through the regulations, there's an opportunity for all interested parties and stakeholders to offer us the benefit of their advice, as I'm sure you will, when we work through the regulations, which are the final fine-tuning to the piece.

Mr. Kormos: You've added a fourth to the world's three greats. You know the first three: "The cheque is in the mail; your money cheerfully refunded; hi, I'm from the government and I'm here to help you." "Don't worry, we'll fix it in regulations"; how many times have I heard that?

Mr. Zimmer, I've been here long enough that when I started here I was skinny and had colour in my hair. I've heard that line so many times over the course of so many years as a pacifier when there's bad legislation being forced through the legislature: "Okay, it's problematic; but don't worry, we'll fix it in regs."

I want you to win. I want you to have a halo that illuminates all of Willowdale. I'm doing my best, but you keep knocking it off. Every time I place it up there, you knock it off. You just won't co-operate, Mr. Zimmer.

The Chair: Any further comments or questions?

Mr. Kormos: A recorded vote, please.

Ayes

Dhillon, Duguid, Matthews, Rinaldi, Zimmer.

Nays

Kormos, Yakabuski.

The Chair: That's carried.

Shall section 1, as amended, carry? All those in favour? All those opposed? That's carried.

Shall section 2 carry? All those in favour? All those opposed? That's carried.

Mr. Zimmer, section 3.

Mr. Zimmer: Thank you, Madam Chair, and to the members of the committee.

Mr. Yakabuski: What amendment are we at?

The Chair: Page 8.

Mr. Zimmer: I move that section 24 of the Children's Law Reform Act, as set out in subsection 3(1) of the bill, be amended by adding the following subsection:

"Same

"(5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse."

The Chair: Comments or discussion?

Mr. Zimmer: Yes, if I may speak to that. Madam Chair and members of the committee, this motion responds to a concern voiced by METRAC and by the YWCA on Monday of this week. What it does is amend the Children's Law Reform Act to ensure that when the court considers domestic violence or abuse as a factor in determining custody of a child, actions in self-defence are not to be considered.

Mr. Kormos: I'm sympathetic to your amendment, because I appreciate the concerns that it responds to, and I'm going to reluctantly support it. I say "reluctantly" for this reason, Mr. Zimmer: We heard the concerns. Basically, what we were being told was that there is a gender distinction to be made around violence. You don't have to be a rocket scientist to understand that it's women who tend to be victimized, who tend to be the subjects of abuse and violence. Let's make this very clear: There are men who are going to avail themselves of this provision. Putting it crudely, "Yeah, I knocked her out because she was coming at me with a butter knife." Look, you've heard that stuff. You've been in the same types of law offices as I have and in the same kinds of courtrooms. So let's understand that there's going to be manipulation of this provision. I can't, quite frankly, suggest a better wording that doesn't then become so restrictive that it loses its utility.

The other issue, of course, is "self-defence." I don't know what standard of self-defence, because you don't use qualifying language like "reasonable." Again, I don't know: Do you expect the courts to import the criminal definition of self-defence? I don't know, because this appears to be stand-alone. I suppose at the end of the day it will be those high-priced lawyers and the public judges—right?—who will have to unravel this and provide further clarification. I appreciate what you're doing. I agree with you and I support the submissions made that prompted this. However, I'm saying that the word "self-defence," without qualifying it—is it subjective self-defence? Is it objective self-defence? You understand what I'm saying.

Also, although we're attempting to address the gender disparity around violence by being so polite as to not use gender language, we're sort of—dare I say it?—skirting the issue, at least a little bit. We know what we're saying and we know what we're addressing, but we don't want to be bold enough to spit it out.

I'm going to support the amendment, with some concern. Once again, like you, I'll be reading those ORs, looking forward to what judges have to say about it.

The Chair: Any further comments?

Mr. Zimmer: Just let me point out for the record that the OBA specifically endorses this amendment. You have copies of that letter.

The Chair: Any further comments or questions? Seeing none, all those in favour of the amendment? All those opposed? That's carried.

Shall section 3, as amended, carry? All those in favour? All those opposed? That's carried.

Mr. Zimmer, you have the next motion, page 9.

1130

Mr. Zimmer: I move that section 4 of the bill be struck out and the following substituted:

"4(1) Paragraph 2 of the schedule to section 21.8 of the Courts of Justice Act is amended by striking out 'separation agreement or paternity agreement' and substituting 'separation agreement, paternity agreement, family arbitration agreement or family arbitration award'.

"(2) The schedule to section 21.8 of the act is amended by adding the following paragraph:

"5. Appeals of family arbitration awards under the Arbitration Act, 1991."

The Chair: Mr. Zimmer, did you want to elaborate?

Mr. Zimmer: This motion corrects an omission in the amendment to the schedule to section 21.8 of the Courts of Justice Act in section 4 of the bill. The schedule to section 21.8 defines jurisdiction of the Unified Family Court. The bill now provides that family arbitration appeals are to be heard by the Family Court. The motion to amend adds reference to family arbitration agreements and family arbitration awards to paragraph 2 of the schedule under section 21.8.

The Chair: Comments or questions?

Mr. Kormos: Help me, please, Mr. Zimmer, how that changes, with specificity, the existing bill.

Mr. Zimmer: It corrects a drafting oversight.

Mr. Kormos: Okay.

Mr. Zimmer: As you know, there's a distinction between the Unified Family Court and the Family Court, and it clarifies that.

The Chair: Further comments or questions? Seeing none, all those in favour of the amendment? All those opposed? That's carried.

Shall section 4, as amended, carry? All those in favour? All those opposed? That's carried.

Mr. Yakabuski, you have the amendment on page 10.

Mr. Yakabuski: I do believe that amendment number 10—I guess I've got to read it first?

The Chair: Yes, you do.

Mr. Yakabuski: I move that clause (b) of the definition of "family arbitration" in section 51 of the Family Law Act, as set out in subsection 5(7) of the bill, be struck out and the following substituted:

"(b) is conducted in accordance with the law of Ontario or of another Canadian jurisdiction and is compatible with the values entrenched in the Canadian Charter of Rights and Freedoms;"

I do believe that this is just supporting language to make it consistent with the amendments we asked for earlier on section 1. It's to support the first amendments that we did, and I'll have to go back there. I think it makes the clauses consistent with the changes we asked for earlier, which were to deal with the amendment that was asked for by the Canadian Jewish Congress. It just makes the language in further sections consistent with that, I believe.

Ms. Matthews: I think we debated this one adequately when the previous amendments were proposed, and they were defeated.

Mr. Yakabuski: Oh, you mean we don't get to speak for an hour on this?

The Chair: I'm here to make sure that you—

Mr. Yakabuski: No, I have every confidence, Madam Chair, that the government is going to be as co-operative on these amendments as they were on the first. I therefore am not going to go into a long request for them to support us on this, but would point out again that I think they were in error earlier and I suspect they'll be in error again.

The Chair: Any further comments or questions? Seeing none, all those in favour of the amendment? All those opposed? That's lost.

Mr. Yakabuski, you have the next amendment.

Mr. Yakabuski: I move that paragraph 2 of section 3 of the Arbitration Act, 1991, as set out in subsection 1(3) of the bill—

The Chair: I think you're on the wrong page. Page 11.

Mr. Yakabuski: Oh, my God, I am. I'm sorry. I had gone back to the others. Thank you very much, Madam Chair.

The Chair: You were trying to confuse me, but we're paying attention.

Mr. Yakabuski: I appreciate that. Now, if we can get back on track.

Mr. Lou Rinaldi (Northumberland): Let the government help.

Mr. Yakabuski: Yes, I appreciate that.

I move that subsection 59.2(1) of the Family Law Act, as set out in subsection 5(10) of the bill, be struck out and the following substituted:

"(1) When a decision about a matter described in clause (a) of the definition of 'family arbitration' in section 51 is made by a third person in a process that is not conducted in accordance with the law of Ontario or of another Canadian jurisdiction or is not compatible with the values entrenched in the Canadian Charter of Rights and Freedoms,

"(a) the process is not a family arbitration; and

"(b) the decision is not a family arbitration award and has no legal effect."

Again, I believe this amendment is one that speaks to the earlier amendments we put forward; the second amendment. I'm suspicious that the—I'm not really suspicious; that's not a very nice word. I'm doubtful that the government is going to change its tune at this stage of the game.

The Chair: Further discussion?

Mr. Zimmer: I think we've debated this issue at length on the previous amendments.

The Chair: Further comments or questions? Seeing none, all those in favour of the amendment? All those opposed? That's lost.

Mr. Yakabuski, you have one more.

Mr. Yakabuski: When Mr. Runciman gave me the huge responsibility of replacing him here for the last bit of this clause-by-clause, I thought I might get one through just because—

The Chair: It's not over yet.

Mr. Duguid: Just because we like you better.

Mr. Yakabuski: It just doesn't work that way, I guess.

The Chair: Page 12.

Mr. Yakabuski: Yes, I know. I have to take a look at this. I hadn't got this far, to be honest with you.

The Chair: You do need to read it into the record, at least, to begin with.

Mr. Yakabuski: Okay, let me read it into the record.

I move that subsection 5(10) of the bill be amended by striking out sections 59.4 and 59.5 and paragraph 1 of section 59.7 of the Family Law Act.

I have to do some thinking on this one, Madam Chair. I hadn't got this far, so I'm not sure what we're asking here. This might be something to do with legislative counsel who deal with making things consistent, because I'm not sure that it speaks to any kind of amendment that we were asking about.

The Chair: Would you like us to vote on it now, Mr. Yakabuski?

Mr. Yakabuski: I have no doubt that I'm not going to be—

The Chair: Hold on. Mr. Zimmer?

Mr. Zimmer: We understand what you would say if you were going to say it, so we can just go to a vote.

Mr. Yakabuski: Sure.

The Chair: All those in favour of the motion? All those opposed? That's lost.

Mr. Zimmer, you have the next amendment.

Mr. Zimmer: This motion adds a summary enforcement mechanism for family arbitration awards to respond to concerns from the lawyers who spoke—

The Chair: Mr. Zimmer, could I ask you to read the amendment before you describe what it does?

Mr. Zimmer: My apologies.

I move that subsection 5(10) of the bill be amended by adding the following as section 59.8 of the Family Law Act:

"Enforcement

"59.8(1) A party who is entitled to the enforcement of a family arbitration award may make an application to the Superior Court of Justice or the Family Court to that effect.

"Application or motion

"(2) If there is already a proceeding between the parties to the family arbitration agreement, the party entitled to enforcement shall make a motion in that proceeding rather than an application.

"Notice, supporting documents

"(3) The application or motion shall be made on notice to the person against whom enforcement is sought and shall be supported by,

"(a) the original award or a certified copy;

"(b) a copy of the family arbitration agreement; and

'(c) copies of the certificates of independent legal advice.

"Order

"(4) If the family arbitration award satisfies the conditions set out in subsection 59.6(l), the court shall make an order in the same terms as the award, unless,

"(a) the period for commencing an appeal or an application to set the award aside has not yet lapsed;

"(b) there is a pending appeal, application to set the award aside or application"—

The Chair: Mr. Zimmer, could I ask you to read (a) again, because you said "lapsed" instead of "elapsed." We want to make sure we get it accurately.

1140

Mr. Zimmer: I'm sorry.

"(a) the period for commencing an appeal or an application to set the award aside has not yet elapsed;

"(b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity; or

"(c) the award has been set aside or the arbitration is the subject of a declaration of invalidity.

"Pending proceeding

"(5) If clause (4)(a) or (b) applies, the court may,

"(a) make an order in the same terms as the award; or

"(b) order, on such conditions as are just, that enforcement of the award is stayed until the period has elapsed without an appeal or application being commenced or until the pending proceeding is finally disposed of.

"Unusual remedies

"(6) If the family arbitration award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may,

"(a) make an order granting a different remedy, if the applicant requests it; or

"(b) remit the award to the arbitrator with the court's opinion, in which case the arbitrator may award a different remedy."

This motion adds a summary enforcement mechanism for family arbitration awards to respond to the concerns from the lawyers who spoke to us on Monday. You will recall Mr. Bastedo in particular urging that without speedy enforcement, arbitration became nearly meaningless.

This motion creates a new section, 59.8, of the Family Law Act. The section requires the person seeking enforcement to demonstrate that all the requirements of the Arbitration Act, 1991, and the Family Law Act have been met. Once these requirements are met, the court must enforce the award. There is no opportunity to reopen the issues decided by the arbitrator and start the case over again in the courts, which is the very thing that the lawyers, and particularly Mr. Bastedo, were concerned about.

The new section mirrors section 50 of the Arbitration Act. For example, enforcement is not automatic until all appeal periods have passed and any appeals have been decided. I am told that the Ontario Bar Association family law section, through its chair, Kelly Jordan, who we heard from on Monday, thinks this meets the bar's concerns, and in fact you have a letter to that effect.

Mr. Kormos: The OBA may be satisfied, but I've got to tell you, Mr. Zimmer, I'm still a little anxious. Let me tell you why; a couple of things.

One, language that is used, for instance, in subsection (1): "A party who is entitled to the enforcement of a family arbitration award." I would ask, why is the word "entitled" there? Shouldn't any party to an arbitration which culminates in an award be allowed to have that

award converted into a judgment? I think this is what your section does here. It permits a court to summarily turn an arbitration award into a judgment. I don't know why "entitled" is there. If you're a party to the award, it seems to me that, for whatever reasons, good or bad—litigators love this language because that means somebody else can say, "No, you're not entitled to the enforcement." What does entitlement mean? I'm just worried about it. It's language that seems to me to serve no purpose, yet at the same time, even if it's mere pettifoggery, to create a climate wherein there's litigation. That's presumably what we're trying to avoid.

I appreciate the supporting documents. I appreciate the language, and I suggest that some of your colleagues pay attention to language like "declaration of invalidity." That's what we were talking about before. I presume that means that when an award is not made in compliance with Ontario law, it's invalid, so you're asking a court to declare it invalid. So you see, it's not an appeal; you're seeking a declaration from the court. We spent a lot of time on that a little while ago, trying to make this distinction between what's appealable and what is merely declared invalid.

I'm concerned most, though, I suppose, about subsection (6). I appreciate the indication around jurisdiction, because a court is not going to make a judgment around which it does not have jurisdiction, but I don't know what the words "would not grant in a proceeding based on similar circumstances" mean. I'm worried they mean that a court can then interject its own views on an otherwise valid arbitration.

It seems to me that it would be enough to say "does not have jurisdiction to grant," and then with the two remedies. But to go further and say "or would not grant in a proceeding based on similar circumstances," once again, is the court being invited to usurp the arbitrator and his or her award? I don't know. If that language is imported from other legislation where it has a clear meaning, please say so. Are you not at all concerned about that particular phrase? That's my strongest concern here: "would not grant in a proceeding based on similar circumstances." Yikes. That seems to me an invitation to a judge to say, "I wouldn't have made this award, and I'll tell you what I'm going to do: I'm going to replace it with my own ruling." It goes well beyond what is or isn't ultra vires, right? The "would not grant in a proceeding based on similar circumstances": Can you help me with that, sir?

Mr. Zimmer: Going back to the earlier provisions, the discussion is about maintaining the right to appeal on questions of law, so the grounds of the appeal are narrow and confined to those questions of law. There isn't the possibility of a judge, as you know, substituting his or her own opinion in a whimsical manner here.

With respect to your first comment on 59.8, on who is entitled, obviously any party to the proceeding, or a child and so on who is the beneficiary of the award, is entitled.

Mr. Yakabuski: With respect to Mr. Zimmer's position there, he used the word "obvious." I'm not a lawyer, but I do believe that in law, nothing is obvious, and Mr. Kormos has pointed that out. He seized on one word and probably could have spoken for an hour or two on the consequences of one word in any particular section of law, but he's speaking on this one in the amendment. So we can only surmise as to how long lawyers in an adversarial situation might argue that point.

1150

I would certainly say that I'm pleased that the government has addressed the concern—I don't know that they've addressed it, because I'm not a lawyer; I can't decipher this language and say that I'm satisfied with it or not. I'm going to take the government at their word for the time being. But it really strikes me as kind of curious that only after the submissions the other day by people like Mr. Bastedo have they considered this kind of amendment with regard to enforceability. It would seem to me that the original intent of this bill on the part of the government was really to make the arbitration process disappear, null and void in this province, because if a process has no meaning and is not enforceable, it certainly ceases to exist in any meaningful way.

I am pleased that they at least addressed the problem. I can't speak to whether or not they solved it, because I don't have the luxury of legal counsel beside me telling me whether this is good or bad, and at that, of course, it's only an opinion; I'm sure that someone like Mr. Kormos could probably argue very well any section of law that exists. I am pleased that they have at least made an attempt here to address it.

The Chair: Mr. Kormos.

Mr. Kormos: To two of the same issues, and I appreciate Mr. Zimmer's response around subsection (1). I would support the proposition that, for instance, a child who is the subject matter of an award be entitled to unilaterally enforce that award. You could think of any number of circumstances; for instance, an award that ordered support for post-secondary education, or even child support, should the child be of an age beyond 16 or 18, where that kid is no longer in the control or in the home of one of the parents.

But I'm not sure, and if there are people here who know better, please say so: I'm interpreting "party" as being party to, as being a litigant: "A party who is entitled to the enforcement...." If "party" has a small "P"—in other words, a person "who is entitled to the enforcement of a family arbitration" to me seems much clearer, isn't it? I'm concerned here that "party" clearly means the parties to the litigation, the plaintiff and the defendant; there might be more than one or two. I'm concerned about that. If it does what you say it does, then I say, "Bang on," because it's important.

I agree that, for instance, a child, or let's say a grandparent—this whole arena of grandparents' access. A grandparent may not be a party to the litigation, to the arbitration, but the court may rule that grandparent Jones is entitled to have access to his or her grandchild. So it would be important for that grandparent—I agree with you—to have enforceability powers, even though he or

she wasn't a party. I hear you, and I'm listening as hard as I can, but I'm still concerned about that.

Let's get down to subsection (6), though. Clearly the "or" there, Mr. Zimmer, is an exegetical "or," isn't it?

Mr. Zimmer: Sorry?

Mr. Kormos: It's clearly an exegetical "or," right? So you've got a stand-alone "would not grant in a proceeding based on similar circumstances...." This isn't an appeal. It can't be an appeal. This is an enforcement mechanism. I understand that we have no business calling upon a court to enforce something that the court can't enforce. What do you lawyers call it? Ultra vires? Something that's ultra vires of the court, Mr. Yakabuski?

Mr. Yakabuski: If you say so.

Mr. Kormos: Well, Mr. Zimmer told me it was. You can't expect a court to make a judgment around something that is beyond—maybe you can, but I'm appreciating the purpose here. But the second part of that sentence has nothing to do with jurisdiction, nor does it have anything to do with appeal: "or would not grant in a proceeding based on similar circumstances...." That seems to me to provide an opportunity, because there are no checks or balances on it—it simply "would not grant in a proceeding based on similar circumstance"—in terms of the law, in terms of the interpretation of the facts, in terms of the fairness of it. It doesn't qualify in any way, shape or form. It simply invites that judge to say, "No, I wouldn't have done this. I think the arbitrator is out to lunch, so I'm going to replace that arbitrator's decision, or this part of that arbitrator's decision, with what I would have done had I been hearing this case."

That's pretty dramatic stuff, isn't it? I appreciate that you want court supervision, in this respect, of the award, to the extent of jurisdiction. I gave you the Chief Justice Dickson article, didn't I, Mr. Zimmer—

Mr. Zimmer: Yes.

Mr. Kormos: —in the law society gazette from 1994, where Chief Justice Dickson seemed to be advocating court-supervised dispute resolution? He didn't seem to be a fan—granted, it was only 1994—in many cases, not all, of the complete separation: private courts versus public courts. For instance, he talked about child custody as an area in which there should be public supervision and public oversight of judgments. So he would seem to say that at least some cases of child custody shouldn't be done in private in alternative dispute resolution modes. Again, there's a whole spectrum of opinion on this. There are the hard-core anti-settlement people like Professor Fiss, and then there's Chief Justice Dickson who, in my view, has a very balanced view on the matter. He was one of our great Canadians; a westerner too, by the way.

But what are you doing here? If the judge would not grant that same remedy, he or she can impose their own. I don't think you're going to oppose your own amendment. I suspect it's going to pass. I'm just stating a concern about it. Can you help me? Am I beyond help?

Mr. Zimmer: Just by way of comfort to you, Mr. Kormos, the unusual remedies you're speaking about here would not grant in a proceeding based on similar circumstances that whole issue. I should point out that that language is taken from the current Arbitration Act, which, as you know, has been in existence and well used and so forth for many, many years. Secondly, to point out again, we're talking about an appeal based on law, not on fact. As you know, on appeals on law, it's a very narrow: Did the original decider get the law wrong, as opposed to a judge saying, "Well, that's not the decision I would have made on that particular fact situation. I don't like that, and I'm going to substitute my own decision"? We are talking about an appeal on law, not fact. As a lawyer, you appreciate that distinction.

With respect to entitlement, the word "entitlement" was also taken from the current Arbitration Act, so ditto my previous comments. I would also observe that "entitlement" is a broader category than "party to the proceedings."

Mr. Kormos: As I say, I have concerns in the context of family litigation. Here you are: This is the "neither fish nor fowl" that I've had occasion to speak about, and I'm going to speak about that just before we wrap up in the closing comments. Does section 59.8 also provide the interlocutory powers, the interim order powers that are readily enforceable, and if so, how have you addressed the concern about the need to make interim orders that are readily enforceable immediately, like today; for instance, a violent spouse out of the house today or orders restraining for the disposition of family assets? Is this part of 59.8?

Mr. Zimmer: As you know, the rules of procedure and so on tend to make a difference between final orders and interlocutory orders by way of limiting the review of the order. So sometimes interlocutory orders are or are not; final orders usually always are. This uses the more generic "order." It's a broader concept.

Mr. Kormos: But once again, is this section that you're moving by way of amendment now the one from which an arbitrator will derive his or her power to make interim orders that are immediately enforceable?

Mr. Zimmer: This amendment does not break it down and talk in terms of final orders or interlocutory orders generally.

1200

Mr. Kormos: What you're telling us is that when you contemplate awards here, you're talking about interim awards, interim rulings as well as the final award which is to be regarded as a domestic contract, because you haven't deleted the portion of the bill that still permits a party to enforce the award by virtue of litigating it as a domestic contract. You've retained that section. You've provided an option here, of which I endorse the intent, but what I'm saying once again is that this is what's to provide the interim relief powers.

Mr. Zimmer: Yes.

Mr. Kormos: Mr. Zimmer said yes.

Mr. Zimmer: It's orders, broadly speaking. I haven't broken it down and sort of split it down into interlocutory orders and orders; that's more in the nature of the

language that you find in the court system. We're talking about arbitrations here—orders and arbitrations.

Mr. Kormos: Highly regulated arbitrations.

Mr. Zimmer: Orders and arbitrations, and the general idea in an arbitration/mediation. There's a certain flexibility there that perhaps you don't find in the rules of practice in a criminal procedure or a civil procedure.

The Chair: Any further comments or questions on this amendment? Seeing none, all those in favour? All those opposed? That's carried.

Shall section 5, as amended, carry? All those in favour? All those opposed? That's carried.

Shall section 6 carry? All those in favour? All those opposed? That's carried.

Shall section 7 carry? All those in favour? All those opposed? That's carried.

Shall the title of the bill carry? All those in favour? All those opposed? That's carried.

Shall Bill 27, as amended, carry? All those in favour? All those opposed? That's carried.

Shall I report the bill, as amended, to the House?

Mr. Kormos: Chair?

The Chair: Mr. Kormos.

Mr. Kormos: I'm not going to be lengthy. I say this after having had an opportunity, along with my caucus colleagues and with the assistance and support of staff—both our caucus staff as well as staff made available to us here through the Legislative Assembly—to look at the bill and to examine the issues. I want to repeat—and I speak for the NDP when I say this—our regard for Ms. Boyd and the work she did on this issue. I think it's important that nobody try to trivialize the work that she did or the recommendations that she made. I regret that, from time to time, statements that she made have been misquoted, to be quite candid, because she was very cautious in what she said.

Having said that, it's regrettable that the NDP here at Queen's Park could not endorse the Boyd recommendations. I say it's regrettable because she's a friend of ours. She was a very capable, competent, good and outstanding Attorney General, the first Attorney General that I'm aware of who was not a lawyer and, of course, a strong feminist and—I'll go one further—a progressive feminist. I want to state that very clearly. Her role in this debate has not, in my view, been diminished by virtue of her recommendations not being adopted 100%, because there are elements of Boyd in this legislation.

Having said that, quite frankly, New Democrats are of the view that family law matters have sufficient societal importance that they should be resolved by public courts applying public law. That's our position; that's the conclusion that we reached. That does not mean that people can't have access to arbitration or other forms of ADR, alternative dispute resolution; it's just that, don't expect the public courts to enforce anything other than public law that has been litigated in public courts under the supervision of a public judge. That, of course, takes us to what this bill doesn't address, and that is, in my view, what the real issue is and what the real concern is.

We accept that there are those—and primarily it's women and children; let's not fudge things around this—in some cultures and in some faith cultures who are not accorded the same—I'm being very, very careful here because I think it's important not to be judgmental. New Democrats have been very clear that people are entitled to believe in anything they want. If people believe freely in things that I find perhaps not to be suitable, God bless; that's their right. You heard some of this in terms of state interference in the religious and spiritual affairs of people, and there's validity to that argument.

Caleb Carr, the writer, wrote that all cultures are equally valid. Be very careful, because I've had occasion to say that. He's the son of Lucien Carr—do you remember, Mr. Zimmer?—and an interesting writer. Caleb Carr wrote, "All cultures are equally valid." I've had occasion to use that phrase and have come under attack. "What do you mean, 'All cultures are equally valid'? What about cultures that endorse certain practices that we find reprehensible?" That's not what Carr said when he said cultures are valid. He didn't say, "All cultures should be applauded and their standards should be accepted as just standards, or standards that are consistent with our western, liberal sense of human rights and values." He said, "All cultures are equally valid."

One of the concerns that I have about this whole debate is how, from time to time—indeed, more frequently than anybody would wish—it stooped into racism, and it nurtured as well as exploited that culture of anti-Islamic thought that, all said, I think has strong roots in the United States, and the whole propaganda machinery. I really regret that.

That's why we've been very careful not to identify this as a religious issue or as a feminist issue, but rather as a broader justice issue that affects all people. Yet, having said that, you can't disguise the fact that it was the sharia law furor that gave rise to this whole exercise. There was not a furor around the application of rabbinical law by rabbinical courts. There may well have been criticism of them by parties who didn't share their values or by parties who felt they were victimized by out-of-date standards or standards that weren't consistent with our sense of civil liberties and human rights. But there was no furor, for sure. Ms. Boyd had occasion to canvass other faith areas.

Let's understand this. As I've had occasion to say a couple of times over the last couple of days, it seems to me that the same coercive factors that force a woman into a faith-based decision-making process that results in decisions that aren't consistent with broader Canadian values and senses of fairness are going to force that woman to comply with the award, to comply with the order—the cultural forces.

I come from a cultural background where, for instance, married women add a suffix to their name, the possessive, to indicate they are the property of a spouse, and they still do it. Not in Canada, but they still do it in places in Europe, for instance. They do it just because, but its origins had better be very clear.

I was concerned when I heard comments about marriage and family having their roots in religion, because I'm not sure that's the case. I'm sure there are faiths that would want to make claim to that because, let's face it, marriage and children had their origins in property rights. They were the property.

Hard is the fortune of womankind
Always mistreated, always confined
Controlled by her parents until she's a wife
Controlled by her husband the rest of her life.

That's an old Child's ballad from Britain, but it spoke of the reality: Women were chattels; children were chattels. And there are places in the world where I believe that concept is still far more dominant than we wish it was.

As I say, it is those regrettable beliefs and those belief systems that I call regrettable—but acknowledging that all cultures are equally valid—that we're attempting to address here. I don't think we've done it with this legislation. I say that in all sincerity.

I wish the government well in implementing this, because I also have regrets. I'm a fan of ADR. I'm a fan of arbitration. I think arbitration is a wonderful tool, but of course, as we've said, for it to be arbitration, it has to be parties willingly participating and not coerced into participating, because it's no longer an arbitration then. I feel that what the government has done here has created—because there has been more than a little bit of reliance on the fact that our courts are backlogged, that it's time-consuming and indeed expensive and risky to resolve a family matter in the public courts. That's right. People with means are going to avail themselves of arbitration.

My constituents, just like yours, lined up in those provincial court family divisions that Judge Lloyd Budgell down in Welland, who handles a court docket and has staff—these people work incredible hours, and it's like a sausage factory. The single moms who are being beaten and their kids who use these courts—because you can use these courts without a lawyer; they can't afford a lawyer. If they can't get a legal aid certificate, they can't find a lawyer to represent them. These people are not going to be helped by any arbitration process because they don't have the means.

The real problem, in my view, in terms of women who are new Canadians, who perhaps have language barriers and cultural barriers, is that the real justice to be done for them is not to regulate the arbitration process that they're going to be compelled to participate in anyway, but to provide broader access to our public court system so that they get protection and remedies in that public court system. We've missed the bull's eye; we've missed the target entirely here.

I do not think this solves the problem. I respect and understand the point of view that it puts forward, but I don't think it solves the problem. As well, I think it erodes arbitration of family matters for those people who, bona fide, can utilize it with just consequences, with just results, because it fetters it.

We are looking forward to third reading debate in the Legislature.

I want to thank the Chair and the staff once again: Mr. Kaye, Ms. Schuh, legislative counsel. Do you realize what kind of pressure we put them under when we compress these hearings—two days of public hearings and then one day of clause-by-clause? They've got to produce all this stuff overnight. That's why I'm a big fan of unions.

Mr. Zimmer: Sorry, a big fan of?

Mr. Kormos: Unions, so that people can at least be protected from bad bosses who make them work into the late hours of the night. But no, I thank the staff. In these compressed hearings, it's very difficult. And I thank committee members for having engaged, by and large, in a healthy exchange over the course of the last three days.

Ms. Matthews: My remarks will be briefer, but they are as heartfelt as those expressed by Mr. Kormos.

I want to take a minute and thank Marion Boyd for the tremendous work she did on this very, very difficult issue. She is a woman and a fellow Londoner for whom I have enormous respect, and I think she took on a very difficult challenge. She made recommendations, many of which are included in this legislation, and I think it's important that we acknowledge the tremendous work she did do to produce her report.

I also do want to express my thanks to all the staff who led us through this and lent us their expertise and their guidance, and it is very, very much appreciated. I too look forward to third reading debate.

The Chair: Good. Shall I report the bill, as amended, to the House? All those in favour? All those opposed? That's carried.

This concludes this committee's consideration of Bill 27. I'd like to thank everyone on the committee for their work on the bill. This committee also thanks the staff and the members of the public who contributed to the committee's work.

The committee now stands adjourned until Wednesday, January 25, 2006, when we commence public hearings on Bill 206.

The committee adjourned at 1210.

CONTENTS

Wednesday 18 January 2006

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