

**UNOFFICIAL TRANSCRIPT OF SENATE OF CANADA LEGAL AND
CONSTITUTIONAL AFFAIRS COMMITTEE MEETING JUNE 6, 2019**

EXCERPTS OF BRIAN LUDMER'S TESTIMONY

The Chair: Thank you very much. Mr. Ludmer, please go ahead next. If you're able to be as succinct as Ms. Beavers, it will be much appreciated.

Brian Ludmer, Advisory Counsel, Canadian Association for Equality: I will try. I have a stopwatch going.

I would also like to thank the committee. I would like to thank Ms. Hogan for the hard work in organizing this for the benefit of the committee. Ms. Hogan has a brief on behalf of the organization I represent.

I'm going to give the committee a completely different perspective than what we have heard yesterday and today. I have a practice that spans Ontario, and I consult around the world. I published a book on high-conflict divorce. That process led me to be a co-founder of Lawyers for Equal Shared Parenting.

I drafted the operative language of Bill C-560 in the last Parliament, which was an attempt to bring in the rebuttable presumption of equal parenting. It's important to understand that such a concept is not equal parenting for all; it's a rebuttable presumption. There is always to be the ability of the court, on substantial evidence, if the needs of the children would be substantially enhanced by a parenting plan that is unequal, to do so. It is that misconception, where people drop the language "rebuttable presumption," that leads to some of the conclusion.

When I testified before the House of Commons committee and had the opportunity to meet certain of the members of the committee, we were successful in convincing the Conservative members of the house committee to move that amendment as they did, and they were outvoted. This is our attempt to expand that analysis to a broader audience.

In the presentation I prepared, this debate can basically be summarized as the battle between myths and facts. The primary myth is that the current system actually works and actually does what it says it does, which is trying to advance the best interests of children. The current system is a complete failure in doing so. There have been judicial reviews of the system, a full-page article in the *National Post* by a learned family law counsel, former treasurer of the Law Society of Ontario, which clearly makes the point that the current system is not working and not meeting the needs of the children it's meant to protect. Why is that? Because it's built on a failed foundation of assumptions as to how it actually works.

When you actually practice in the trenches and see how it works, those cracks in the foundation, those missing pillars of the foundation become apparent. We have an overwhelming body of science that children's outcomes from divorce are substantially improved when you have two primary parents as opposed to one parent and somebody whom you go to visit from time to time.

Entirely missing from the debate yesterday is where is the Canadian public on this? We have decades of public opinion polls in Canada that show that over 80 per cent of decided participants are in favour of equal parenting. That cuts across almost any demographic: age, region, political affiliation, and yes, indeed, gender. The women of Canada overwhelmingly want equal parenting. My clients who are women want equal parenting because when you get to see how the system works in practice, see the cost, the trauma, the delay, the uncertainty, and indeed, the results that quite often don't make sense but are never empirically tested — we don't take families who have come through the system and track them three, five or seven years out afterward and see how they did. Was the decision in their best interests?

There are many other flawed assumptions upon which this system, which is merely aspirational, is based. Number one, a judge will get it right. That assumes you have two parties and two lawyers and an unlimited time for a trial. Over half of family law litigants are self-represented. They are not going to be able to marshal the arguments, the case and the law to advance their view of the best interests of the children. When a self-represented litigant goes up against a lawyer, you are not going to get a result that advances the best interests of the children. When there are two self-represented litigants, the trial is very unwieldy, indeed often chaotic, and usually you are not going to get the right answer.

Further, the vast majority of cases don't get to a trial. People don't have the money. People can't wait. They settle or someone abandons the pursuit of a parenting plan that they truly believe is in the best interests of their children because the other side is better funded or is prepared to fight it out, and they are just not of that mindset. The paper I have goes on about many of the other assumptions on which today's system is based that are not reality-based, and therefore, we get the output that we do.

I mentioned the science. The science overwhelmingly tells us that the closer we get to two primary parents, the better the outcome. When we interview children during divorce and after divorce, they say, "The best thing I want is my family to get back together." If they can't have that, they want their two parents. But we don't listen to the children.

So where is this sort of advice coming from? Usually overwhelmingly from those who make their money from the system or who simply advise the system. When you go to the public opinion polls and see the people who have lived through the system and see how it actually works, it is inescapable. This system doesn't work and is harming our children.

Some myths that we heard yesterday, the maximum contact principle we've just heard should be dispensed with. That was brought in at the outset of the modern divorce legislation. It was featured in *Young v. Young* in the Supreme Court of Canada in 1979. We have 40 years of cases interpreting the maximum contact principle.

So to suggest that it's a meaningless clause or that it doesn't express fundamental Canadian values or that it doesn't express today's understanding of the science is simply untrue. To suggest we should just have a blank canvas dominated by one factor or by a list of factors and let people figure it out is to condemn our children to the continued cost and uncertainty. It is also to condemn Canadian taxpayers to the massive cost of this system.

All equal parenting is — and it's a rebuttable presumption — is an enhanced version of maximum contact. At the house committee, I was asked the question, "What's the difference? Why do we need it?" The answer is equality of justice right across Canada because you have 10,000 cases interpreting maximum contact. Those answers vary based on who the judge is and what their background is. Is it a rural setting where there aren't a lot of judges or a major urban setting where there are lots of judges and they are interacting? It varies by province.

So this inconsistency is not fair to our children. It shouldn't make a difference if your parents are getting separated and you live in a small town in rural Ontario or in Montreal, where I'm originally from, you should get the same result. But it doesn't happen today because maximum contact, while it puts some bookends around the blank canvas, doesn't go far enough and it's interpreted differently.

If we want to end the disaster that the current family system is, we need to make a fundamental change. There is a lot that's laudable in Bill C-78, such as the technical amendments and the modernization — as everybody said, the statute hasn't been touched in 30 years — but will it actually make a difference to the Canadian public, the 80 per cent who know that we need a rebuttable presumption of equal parenting? Bill C-78 will make zero difference in the actual application of today's system of helping families restructure. So the voice that was unheard yesterday and unheard until now is the voice of the Canadian public. We ask you to listen to them. Thank you.

RESPONSE TO QUESTIONS POSED BY COMMITTEE MEMBERS

Mr. Ludmer: My answer to the issue of domestic violence and parenting plans is the same one I gave to the House of Commons committee. We have had 30 years or more of experience with the maximum contact principle that lives harmoniously with issues of domestic violence. The current statute handles it. Provincial legislation handles it. Where appropriate, and the facts are shown, the best interests of the children will prevail in that paradigm.

If the maximum contact principle could live harmoniously for 40 years dealing with concerns over domestic violence, logically, a rebuttable presumption of equal parenting,

which is just an enhanced version, can live harmoniously with concerns about domestic violence. You leave all the existing provisions that you are adding in Bill C-78 and then you have, in effect, absent that — because the vast majority of cases don't involve domestic violence, but they do involve four years of litigation, bankrupting the family, bankrupting the system and harming the children who are triangulated. We say, for those families, with two normal parents who both have pluses and minus, the needs of the children can be met by equal parenting. Those two concepts live harmoniously. They are not mutually exclusive. The harm and the damage is in — if I take Ms. Hogan as an example and she separates, some judge says the kids should be with you 37.2 per cent of the time. There is no science to that. Presumably Ms. Hogan is safe or else we wouldn't say that. If she's a safe, normal parent, she should have her kids half of the time. That's what we are saying. Two concepts live harmoniously.

La sénatrice Dupuis: Je pense déceler dans la présence des trois témoins des différences fondamentales d'opinion sur la situation actuelle. Cela m'amène à faire la remarque suivante : j'ai entendu de la part de l'un d'entre vous, monsieur Ludmer, que ce que la population veut en majorité... Vous vous faites le porte-parole de la population canadienne, de ce qu'elle veut en majorité. Je ne sais pas si on a lu les mêmes documents, mais ici au Comité sénatorial des affaires juridiques, on a entendu des positions qui sont opposées, mais on n'a pas entendu, sauf aujourd'hui, que le principe du partage égal entre les époux devrait prévaloir et dépasser le principe de l'intérêt de l'enfant.

Mr. Ludmer: In a direct answer to the question, which was not framed about domestic violence, we are assuming it's not a domestic violence situation. The rebuttable presumption still has that tail end dealing with children's best interests. You still look at all the other factors.

The point is that when you pull it all together, if you look at the example I gave where I used our committee clerk as an example, we're proposing to simply state that if, amongst all those factors, you are in the zone where you could have two equal parents; you abandon the exercise, which is the current practice, of trying to find a primary parent. You say: I have looked at all the factors in section 16. I have two normative parents. They both have their pluses and minuses. They both love their children and are committed to taking care of them. In that circumstance, in the absence of compelling evidence that an unequal parenting plan would substantially enhance the needs of the children, we say we should go with equal parenting. We should abandon these situations where one parent gets 37.2 per cent of the time, because it's not evidence-based and it results only from four years of litigation.

Once we satisfy ourselves that we have two loving, normative parents, it should be equal parenting, because then, by definition, there is a lack of evidence that the

children's needs would be substantially enhanced — this is the language I came up with for Bill C-560 — by an unequal parenting plan.

So rebuttable presumption of equal parenting does not exclude the broader context of a best-interest analysis. That's your check and balance. If you look at all the factors and you satisfy yourself that you have two normal parents who love and are committed to their children, then it's equal parenting. If, in looking at the totality, there is a compelling reason not to have that, then best interest prevails.



Senator McIntyre: Thank you all for your presentations. You have answered a lot of my questions.

On the one hand, we have the current Divorce Act and, on the other hand, we have the proposed Bill C-78. The current Divorce Act includes a maximum contact principle. Bill C-78 includes a maximum parenting time provision. So my question is: In your opinion, does that provision appear similar to the maximum contact principle enshrined in the current Divorce Act?

Mr. Ludmer: Thank you. I wanted to mention that before. Clause 16 (6) is not new. The operative language of clause 16(6) we have lived with for 40 years. So I'm very disturbed by any comments that this is some radical change that will upset things. This is today's world, clause 16(6). We're saying it is not applied evenly or fairly or consistently or transparently in litigation across the country, and we need something more concrete. But in and of itself, clause 16(6) is not a danger and it's not going to create problems. It's what we have had for 40 years.

To echo a comment that we heard in response to the previous question, if you want to see this system at its worst, look at a non-consensual family in the first nine months after separation. One parent controls the children and forces the other parent to write out pieces of paper, "I promise I will return the child at 5:00." It's self-help. One parent declares themselves to be the dominant parent because you can't get into court and through the first case conference and get your first court order, which, under the new legislation — to the senator's point — will talk about parenting time and decision-making. But you can't get that for the first six to nine months.

The children are traumatized during that first six to nine months as each parent says, "If your father comes to school to pick you up, don't go with them. Just call me and I'll come pick you up." Or vice versa. That's the reality today in the absence of something more concrete — open warfare. We need to end that to protect the children.

The only way you can do that is by taking the 40-year-old maximum contact principle and making it more concrete so that it's a starting point, subject to the whole best interests analysis that will play out over time. There is a rebuttable presumption of equal parenting to assist the family in making that initial transition and then you'll either settle or we'll figure it out.

We don't need Bill C-78 to foster settlements. The healthier families are settling on equal parenting today. The people who litigate, who clog the systems, who cost us tens of billions of dollars, who traumatize children, can't figure it out by themselves. The best we can offer them is four to five years of litigation at immense expense and trauma.

They need rules. They need bookends to say: If you can't figure it out for yourselves — you don't have to be perfect and assuming you have two normative parents and domestic violence is a side issue — you have equal parenting because the science supports that.

To the senator's point about the public. The public isn't asking for anything consensual. They can do that today. The 2017 Nanos poll was about: Do you want a law that imposes a rebuttable presumption of equal parenting? That's where the 80 per cent-plus answer comes from consistent for two decades. Your constituents want this. They don't want to hear from the experts. They want an end to the divorce wars.

Thank you.