

November 15, 2018

Domestic Violence and Alternative Dispute Resolution in Family Law Disputes

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Legislation Commented On: Bill 98, [*The Miscellaneous Statutes \(Family Dispute Resolution\) Amendment Act*](#); Bill C-78, [*An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*](#)

Access to justice in the family law sphere has received a lot of attention in recent years. One recurring theme is the large number of self-represented litigants and the need to explore mandatory out-of-court dispute resolution. Alberta does not yet mandate any type of alternative dispute resolution (ADR) for family law or child welfare matters (see [here](#)), but some other jurisdictions do. One issue that arises in this context is whether ADR is appropriate in cases involving domestic violence. In Saskatchewan, [Bill 98](#), *The Miscellaneous Statutes (Family Dispute Resolution) Amendment Act*, will amend the *Queen's Bench Act, 1998*, [SS 1998, c Q-1.01](#), to require parties to participate in family dispute resolution (s 44.01(3)), but the parties may be exempted from that requirement if there is a history of interpersonal violence between them (s 44.01(6)(c)). We submitted a brief to the Saskatchewan Ministry of Justice in August 2017, prior to the enactment of Bill 98, which discussed the importance of considering domestic violence in this context (see [here](#)). The issue is once again alive as Parliament debates [Bill C-78](#), *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*. In its current iteration, Bill C-78 would amend the *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#), to create duties (1) on parties to “try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process” (proposed s 7.3) and, (2) on legal advisers to encourage their clients to use family dispute resolution processes (proposed s 7.7(2)(a); Bill C-78 defines “legal adviser” as “a person who is qualified, in accordance with the law of a province, to represent or provide legal advice to another person” in any proceeding under the *Divorce Act*). Although the amendments recognize that the duties may not apply where “the circumstances of the case are of such a nature that it would clearly not be appropriate to do so,” they do not explicitly exempt cases involving domestic violence at present.

In our brief to the Saskatchewan government, we made the following recommendations, which we believe are also relevant to the proposed federal amendments to the *Divorce Act*:

We would respectfully ask the Ministry to consider the following recommendations:

1. That instead of making ADR mandatory, the Ministry encourage and wholly or substantially fund access to ADR professionals and to legal information and advice prior to the closing of pleadings or immediately thereafter;
2. That, if the Ministry chooses to proceed with mandatory ADR, the following measures be undertaken:
 - a. The Ministry ensure that parties can access information and advice as to their legal entitlements prior to such sessions;
 - b. The Ministry consider what role children should play in the mediation process and how their interests can be protected;
 - c. That an exemption from mandatory ADR for domestic violence be more broadly defined to include not only actual or threatened physical or sexual harm, stalking or confinement, deprivation of necessities but also emotional, psychological and financial abuse including coercive control;
 - d. That certification by a victim of sexual or domestic violence or abuse be sufficient to establish an exemption;
 - e. That all ADR professionals, arbitrators and parenting coordinators be required to obtain training in the dynamics of intimate partner violence and abuse and related issues;
 - f. That all ADR professionals, arbitrators and parenting coordinators be required to screen for intimate partner violence and abuse;
 - g. That the legislation provide explicitly for confidentiality of disclosures and negotiations subject to clearly defined limits which are disclosed in advance to participants;
 - h. That protocols be established to ensure that information that could compromise safety for partners and children is not released to abusive partners.

Although Alberta is not yet considering a law that would require parties to participate in ADR in family disputes, there are provisions in the *Family Law Act*, [SA 2003, c F-4.5](#), (s 5(1)(b)) and *Child, Youth and Family Enhancement Act*, [RSA 2000, c C-12](#), (s 3.1) that encourage out-of-court resolution of disputes. In addition, the *Arbitration Act*, [RSA 2000, c A-43](#), permits arbitrations to be used in the family law context in Alberta. There are no requirements under these Acts for mediators, arbitrators or other dispute resolution professionals to obtain training on or to screen for domestic violence, and we recommend that the Alberta government consider implementing such requirements. This issue is especially important in light of a recent report from the [Calgary Domestic Violence Collective](#), which found that screening for domestic violence is an important protective factor, yet also found there is a low prevalence of screening by lawyers and mediators. The report enumerates several barriers to screening, including the lack of legislated obligations for screening and training on domestic violence (see Katrina Milaney

and Nicole Williams, [Examining Domestic Violence Screening Practices of Mediators and Lawyers](#)).

The following examples illustrate jurisdictions that do have requirements for training and screening for ADR professionals:

- British Columbia mandates “at least 14 hours of family violence training, including training on identifying, assessing and managing family violence and power dynamics in relation to dispute resolution process design” for mediators, arbitrators and parenting coordinators (see *Family Law Act Regulation*, [BC Reg 347/2012](#), ss 4-6). BC also requires mediators to undertake “a screening process for power imbalance, domestic violence and abuse” and assessment of “whether mediation is appropriate in the circumstances determined from that process” (see *Notice to Mediate (Family) Regulation*, [BC Reg 296/2007](#), s 13).
- Ontario requires family arbitrators to screen for domestic violence and power imbalances (see *Family Arbitration*, [O Reg 134/07](#)), and that they obtain at least 14 hours of training in this area (see the Attorney General’s requirements for family arbitrators [here](#)). The [Family Dispute Resolution Institute of Ontario](#) requires 21 hours of such training to become a Certified Specialist in Family Arbitration, Family Mediation or Parenting Coordination.
- Quebec stipulates that mediators must take training of “at least 6 hours to promote awareness regarding domestic violence, particularly spousal abuse” (see the *Regulation respecting family mediation*, [CQLR c C-25.01, r 0.7](#), s 2).

The research in this post was funded by the Social Sciences and Humanities Research Council (SSHRC) and the Law Foundation of Ontario’s Access to Justice Fund.

This post may be cited as: Wanda Wiegers, Jennifer Koshan and Janet Mosher, “Domestic Violence and Alternative Dispute Resolution in Family Law Disputes” (November 15, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/11/Blog_JK_FV_ADR_Nov2018.pdf

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