

Early Dispute Resolution in Family Law Disputes

Comments on Proposed Provisions

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Thank you for the opportunity to comment on the proposed provisions related to Early Dispute Resolution under provincial statutes dealing with support, property division and custody and access. The proposals promote the mandatory use of alternative dispute resolution (ADR) prior to or after the filing of pleadings as well as greater use of arbitration and parenting coordinators. The apparent objective is to encourage early resolution outside the court system and thereby reduce conflict and costs for parents, children, and courts.

Our comments will not address all of the proposals comprehensively but will rather focus on their potential impact on access to justice for low income disputants and those affected by intimate partner violence and abuse. Regarding the latter, we have questions regarding how an exemption for interpersonal violence will be interpreted and applied, as to whether training on DV issues will be mandated and how confidentiality will be maintained.

A. Access to Justice for Low Income Disputants

The proposed provisions would require that parties certify or provide proof of participation in an ADR process before pleadings are filed or immediately after the close of pleadings. If proof is not provided, there are significant consequences. The claim can be struck or the claimant prevented from making submissions, among other possibilities, as per s (3) and (4). The hope is that resort to ADR could narrow the issues between the parties and encourage early resolution. Mandatory ADR is being proposed as a “cost effective alternative to full court proceedings.”

In terms of facilitating access to justice for persons living on low incomes, the proposals raise a couple of concerns. First, it is not clear whether or how legal advice will be provided to parties. Will they be required to attempt settlement of the issues without having the benefit of legal advice if they are self-represented or cannot afford to obtain a lawyer? Mediators do not provide legal advice and will typically, at least in Saskatchewan, confer with parties independently of family lawyers. It is not clear the extent to which mediators will be expected to provide legal information if ADR is made mandatory¹ and whether mediators who are not lawyers will be expected to receive training in legal norms.

In the absence of legal advice, the parties may end up giving up legal entitlements or otherwise exposing themselves to unanticipated risks in the course of settlement. Many of the legal norms in the family law context were intended to protect vulnerable parties through presumptions of equal division and support

*The research in this submission was supported in part by a grant from the Social Sciences and Humanities Research Council (SSHRC) for the project Domestic Violence and Access to Justice Within and Across Multiple Legal Systems (Koshan et al).

¹ See e.g. Amy G Applegate & Connie JA Beck, “Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room” (2013) 51:1 Fam Ct Rev 87 at 98.

obligations, and to protect children through norms such as the best interests of the child. These entitlements are important in terms of equalizing power imbalances that may arise where parties have unequal financial status or are victims of serious domestic violence or abuse. They provide an important benchmark against which interests can be assessed and are more important for women on average.² In the absence of full legal advice, parties may also end up running risks they had not contemplated. For example, an agreement about custody may have implications for the amount of child support payable that can impact both parties. The proposals do not tell us how participants will be protected in this process. Nor do they address the role of children in these processes.³ Are children to be involved? If so, to what extent and what protections should be put in place for them?

In terms of costs, mandatory ADR may well have the effect of reducing overall costs both to the parties and the court in some cases by, for example, reducing the inflammatory impact of affidavits, and the length of proceedings. Whether these measures ultimately reduce costs will depend on the intensity of conflict and how effective the particular type of ADR is in resolving conflict compared to conventional settlement negotiations between lawyers (that presumably will not qualify as ADR initiatives) or self-representation.

However, unless ADR services (including mediators, collaborative lawyers and parenting coordinators) are publicly funded or subsidized to a substantial extent, these provisions will impose an immediate additional financial cost on parties. Low income parties may be unable to afford the costs of ADR, or as a result of these added costs, may be forced into self-representation as their only viable option. Further, where ADR is inappropriate and the parties are entitled to an exemption, the cost of applying to a court or “a prescribed person” will also impose costs both in financial and personal terms, as discussed below. Unless high quality services are publicly funded, the proposals may impede rather than facilitate access to justice for low income parties.

Other jurisdictions have funded mediation services for family law disputes. Quebec generally mandates parenting and mediation information sessions prior to a court action but provides five hours of free mediation for those in the process of separating.⁴ Ontario does not mandate mediation prior to a court action but the Ministry of the Attorney General does fund wholly or substantially the provision of mediation services out of court houses for all families.⁵ British Columbia allows a party to require the other to participate in mediation in some circumstances and funds it for low income parents in some cases.⁶ In the US, Arizona has had a free court-based program since the 1980s.⁷ In 2006, Australia

² Wanda Wieggers & Michaela Keet, “Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities” (2008) 46:4 Osgoode Hall LJ 73 [Wieggers & Keet].

³ Robin HE Ballard et al, “A randomized controlled trial of child-informed mediation” (2013) 19:3 Psychology, Public Policy, & L 271 at 271-81.

⁴ See “Duration and cost of mediation online” *Quebec Minister of Justice*, online:

<<https://www.justice.gouv.qc.ca/en/couples-and-families/separation-and-divorce/family-mediation-negotiating-a-fair-agreement/duration-and-cost-of-mediation/>>; *Code of Civil Procedure* CQLR c C-25.01 (the session is mandatory unless a certificate is filed attesting to fact that assistance has been sought from a Victim’s Assistance Association for help as a victim, at s 417).

⁵ See Ontario Ministry of Attorney General “Family Justice Services” online:

<https://www.attorneygeneral.jus.gov.on.ca/english/family/family_justice_services.php#fms>.

⁶ *Law and Equity Act*, RSBC 1996, c 253, s 68; *Notice to Mediate (Family) Regulation*, BC Reg 296/2007, ss 13, 23.

⁷ Connie JA Beck et al, “Divorce Mediation With or Without Legal Representation: A Focus on Intimate Partner Violence and Abuse” (2010) 48:4 Fam Ct Rev 631 at 641 [Beck et al].

required that family law litigants attempt family dispute resolution before going to court but between 2006 and 2008 also established a network of community family resolution centres that offer free services and can issue certificates allowing a case to proceed.⁸

If dispute resolution services are only available to families with wealth, these proposals will increase the gap between the realities of impoverished families and the objectives of family law.

B. Access to Justice and Victims of Domestic Violence or Abuse

It is well known that a higher proportion of people separating or divorcing experience domestic violence than in the population at large. In the US, interpersonal violence or abuse is one of the main reasons for seeking a divorce and at least one party in more than 50% of divorce mediations report having experienced it.⁹ In particular, the period of separation can be a time of enhanced risk for more severe and frequent partner violence including lethal outcomes against female partners.¹⁰ Saskatchewan has the highest rate of police-reported domestic violence of all provinces in Canada and we have recently witnessed the murders of both wives and children in the context of actual or impending separation.¹¹

It is also widely known that domestic violence and abuse, particularly coercive controlling violence, can have long term negative effects on abused parties, affecting their physical well-being and psychological health, their self-esteem and sense of self-efficacy.¹² Intimate partner violence and abuse also increases risks to children. Coercive domestic violence in particular, as opposed to isolated instances of minor violence, is correlated with negative parenting and child abuse.¹³ The abuse can continue and indeed escalate post-separation. Parents who have experienced domestic violence may also agree to custody

⁸ *Family Law Act 1975* (Cth), s 607. Even where a mediator or conciliator is state-funded, however, there may be concerns that he or she will act as an “agent of the court whose job is to settle disputes and reduce caseload congestion rather than an agent of the parents whose job is to facilitate communication and cooperation”, Barbara Glesner Fines, Book Review of *Divorced From Reality: Rethinking Family Dispute Resolution* by Jane C Murphy & Jana B Singer, (2016) 54:3 Fam Ct Rev 525 at 527.

⁹ Amy Holtzworth-Munroe, “Controversies in divorce mediation and intimate partner violence: A focus on the children” (2011) 16:4 Aggression & Violent Behavior 319 at 319 [Holtzworth-Munroe]; Studies in Australia suggest that the majority of separating or divorcing clients are affected by family violence or abuse in some form, “[i]t is the normative experience, not the exception”, Helen Cleak & Andrew Bickerdike, “One way or many ways: Screening for Family Violence in Family Mediation” (2016) 98 Family Matters: <<https://aifs.gov.au/sites/default/files/fm98-hcab.pdf>> [Cleak & Bickerdike].

¹⁰ Linda C Neilson, “At Cliff’s Edge: Judicial Dispute Resolution in Domestic Violence Cases” (2014) 52:3 Fam Ct Rev 529 at 537-39 [Neilson]; Jacquelyn C Campbell, “Commentary on Websdale, Lethality assessment approaches: Reflections on their use and ways forward” (2005) 11:9 Violence Against Women 1206; Molly Dragiewicz & Walter DeKeseredy, “Study on the Experiences of Abused Women in the Family Courts in Eight Regions in Ontario” (2008) Oshawa, ON: Luke’s Place Support & Resource Centre for Women & Children at 11.

¹¹ Marta Burczykca “Police-reported family violence in Canada – An Overview” in *Family Violence in Canada: A Statistical Profile, 2015* (Ottawa: Statistics Canada, 2017) online: <<http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14698/02-eng.htm>>. Four hundred eighty people out of 100,000 reported family violence to police in Saskatchewan compared to 150 per 100,000 in Ontario. Saskatchewan had the highest rate of intimate partner violence (at 660 per 100,000) and the highest rate of violence against children (at 465 per 100,000). Burczykca notes that this likely underestimates the incidence of family violence since, according to self-reported data from the 2014 General Social Survey, 70% of spousal violence victims and 93% of child victims of physical and/or sexual abuse “never spoke to police about their experiences.”

¹² Neilson, *supra* note 10 at 540.

¹³ *Ibid* at 539.

or access for many reasons, even where there are child safety issues.¹⁴ They may be anxious to terminate contact as soon as possible or experience pressure to ‘cooperate’ and settle by professionals who are unaware of the dynamics of domestic violence and its impact on children.¹⁵ They may also experience intimidation, psychological vulnerability, cultural or financial pressure, or simply lack awareness of the potential dangers.¹⁶

The use of mediation or ADR in cases involving domestic violence or abuse is controversial because it has the potential to raise concerns regarding safety, intimidation, revictimization, and inequitable outcomes, particularly where there is severe violence or a pattern of coercive control.¹⁷ According to Linda Neilson, “the potential for psychological harm from renewed contact with an abuser, expanded opportunities for violators to maintain contact, to intimidate and to control or to delay final decisions; and the potential for suppression of concerns about domestic violence and safety are surfacing repeatedly in evaluation literature.”¹⁸ The opportunity to exert control may influence outcomes to the prejudice of abused parties and their children.

However, the alternative to ADR is litigation and there is controversy as to whether litigation produces better outcomes in such circumstances than settlement.¹⁹ In both litigation and mediation, victims can have positive experiences if they feel they are believed, heard, respected and safe and negative experiences if they feel judged, blamed, disbelieved, minimized or dismissed.²⁰ The latter may be more likely in collaborative processes that refuse to acknowledge blame or deal with the past and expect compromise and cooperation. A court process can also focus on fact finding and thereby potentially reduce the risk of devaluing claims, as well as provide more ready access to protective orders or the variation of orders.²¹ However, it can also exacerbate conflict through the exchange of affidavits and while there is insufficient empirical evidence as to the long term legal consequences of mediated agreements for victims, particularly those who are self-represented,²² there is little evidence of significantly better outcomes in litigation.²³ Noel Semple argues that judges and family justice system workers (at least in Ontario) are also aggressively pursuing a “settlement mission” with fewer of the precautions currently used by mediators and even less sensitivity to the risks of domestic violence.²⁴ In

¹⁴ Neilson, *supra* note 10 at 532. Some studies suggest agreements on child custody for families who have or have not experienced IPV do not “consistently differ on variables of potential importance to child safety and well-being,” Holtzworth-Munroe, *supra* note 9 at 323.

¹⁵ Neilson, *supra* note 10 at 541.

¹⁶ *Ibid* at 546, 560.

¹⁷ Michael P Johnson, “Conflict and control: Gender Symmetry and Asymmetry in Domestic Violence” (2006) 12:11 *Violence Against Women* at 1003; Evan Stark, *Coercive Control: How men entrap women in personal life*. (New York: Oxford University Press, 2007).

¹⁸ Neilson, *supra* note 10 at 532.

¹⁹ Holtzworth-Munroe, *supra* note 9 at 320.

²⁰ Echo A Rivera, Chris M Sullivan & April M Zeoli, “Secondary Victimization of Abused Mothers by Family Court Mediators” (2012) 7:3 *Feminist Criminology* 234 [Rivera, Sullivan & Zeoli]; Lesley Laing, “Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System” (2016) *Violence Against Women* 1-22 [Laing] (a study of 22 domestic violence survivors negotiating parenting arrangements in the Australian family law system).

²¹ Wieggers & Keet, *supra* note 2 at 756.

²² Beck et al, *supra* note 7.

²³ Neilson, *supra* note 10 at 532.

²⁴ Noel Semple, “Mandatory Family Mediation and the Settlement Mission: A Feminist Critique” (2012) 24 *Can J Women & L* 207, and see Laing, *supra* note 20, who found that in Sydney, Australia following the 2006 family law

the ADR context at least, there appears to be a growing consensus that systematic screening of cases should be undertaken in order to exclude some cases of intimate partner violence and abuse from joint sessions or modify the process in some way.²⁵

The introduction of mandatory mediation is also very controversial, even where jurisdictions allow for the right to opt out if domestic violence is identified, as is the case in Quebec and British Columbia.²⁶ One concern is that this will provide abusive partners with one more forum in which to harass and control, on top of multiple motions or refusals to disclose information or negotiate, and will ultimately add to both the financial and emotional costs of the violence. Mandatory mediation can also render either participation in mediation or disclosure involuntary. Unwilling victims must disclose intimate partner violence and comply with whatever evidentiary requirements exist or be forced to participate in a process with an abusive party. The Honourable Donna Martinson and Margaret Jackson argue that:

...making [mediation] mandatory is a barrier to women's access to the courts. Instead, participating in mediation should be a matter of choice, informed by effective legal representation and an understanding of the disadvantages and advantages in their particular circumstances. An exemption does not address the core problem, the complexity of family violence and its impact, and the need for effective legal representation to help women navigate the complexities of the legal processes involved.²⁷

Victims who would prefer to avoid or minimize direct contact with an abuser or who feel that such an attempt would be futile are thus forced to disclose their personal histories in order to proceed with their claims. However, disclosure is difficult for victims of abuse and may be inhibited by a fear of retaliation and escalated violence, a fear of other legal consequences (deportation, criminal or child protection proceedings),²⁸ lack of a trusting relationship with the ADR professional and a fear of being judged or re-traumatized and shamed. According to a study by Cleak and Bickerdike, about one-third of the victims in their Australian study chose not to disclose.²⁹ As Neilson indicates, "Mandatory disclosure could force a targeted party to choose between honesty to the JDR judge or mediator, and safety."³⁰ Disclosure requirements can in some circumstances put victims at greater risk.

There may be instances where victims themselves wish to mediate and force an abusive partner into mediation. However, there are questions as to how often such situations arise and as to whether a

reforms, "when women in this study challenged the imperative to remain silent and tried to raise concerns about the risks to their children of exposure to domestic violence, they encountered a climate of disbelief. The women found that their motives in raising violence became the center of focus, rather than the allegations and the potential risks to children. Vindictive and fallacious rather than protective motives were attributed to their efforts to raise issues affecting the safety of their children" at 10.

²⁵ N Ver Steegh & C Dalton, "Report from the Wingspread Conference on domestic violence and family courts" (2008) 46:3 Fam Ct Rev 454.

²⁶ Janet R Johnston and Nancy Ver Steegh "Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices" (2013) 51:1 Fam Ct Rev 63 at 64.

²⁷ The Honourable Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30:1 Can J Fam L 11 at 39.

²⁸ For a review of the dilemmas experienced by abused women navigating multiple legal systems, see Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners" (2015) 32:2 Windsor Yearbook of Access to Justice 149 [Mosher].

²⁹ Cleak & Bickerdike, *supra* note 9.

³⁰ Neilson, *supra* note 10 at 536.

consensual-based ADR process would ultimately be of much benefit to victims in most such cases. It also raises the question as to what constitutes participation, and what should be done if a party refuses to negotiate within the session.

Assuming, however, that the Ministry chooses to proceed with the mandatory requirements subject to an exemption for victims of intimate partner violence and abuse, the following sub-sections raise questions regarding the scope of and process for establishing an exemption. In defining the scope of an exemption, it should be acknowledged that the consequences for someone seeking an exemption on the grounds of domestic violence can be far more serious than the consequences for the other party in not having access to mediation in advance of litigation. The consequences of being forced into mediation or obtaining an exemption can also be distinguished from situations where substantial proprietary rights or third party rights are at issue, as in the residential tenancies context.

1. How to define violence or abuse for the purposes of an exemption

Proposed grounds for an exemption from the ADR requirement include situations involving a “history of interpersonal violence,” in addition to situations involving restraining orders or child abduction. One assumes that the term “interpersonal violence” is intended to be interpreted in accordance with *The Victims of Interpersonal Violence Act*.³¹ Section 2(e.1) of that Act defines interpersonal violence as (i) any intentional or reckless act or omission that causes bodily harm or damage to property; (ii) any act or threatened act that causes a reasonable fear of bodily harm or damage to property; (iii) forced confinement; (iv) sexual abuse; (v) harassment; or (vi) deprivation of necessities. This is a relatively narrow definition relative to definitions in the civil protection legislation of other jurisdictions which have included references to emotional, psychological and financial abuse.³²

In this context, where the central issue is whether one can participate in a process safely and effectively, a broader definition of violence should be adopted. For example, in Australia, where mediation was made mandatory in 2008, concerns regarding the safety of parents and children resulted in an expanded statutory definition of family violence or abuse in 2011. It included behavior that was controlling or caused a family member to be fearful.³³ The amendments specifically included, verbal, emotional, psychological and economic abuse “(d) repeated derogatory taunts; ... (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; ... (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; ... (i) preventing the family member from making or keeping connections with his or her family, friends or culture; ... (j) unlawfully depriving the family member, or any member of the family member’s family, of his or her liberty.”

It is widely known that emotional or psychological abuse can be as, if not more, painful and destructive than physical abuse.³⁴ A pattern of coercive control and demeaning abuse, without actual or threatened

³¹ *The Victims of Interpersonal Violence Act*, 1994 SS c V-6.02, s 2(e.1) [*Victims of Interpersonal Violence Act*].

³² Jurisdictions such as British Columbia, Manitoba, Newfoundland Labrador, Yukon, Northwest Territories and Nunavut.

³³ *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), s 4AB(1) (2).

³⁴ D Follingstad, “The role of emotional abuse in physically abusive relationships” (1990) 5:2 J of Family Violence 107.

physical violence, can still profoundly affect one's ability to participate in a negotiation effectively. This is recognized by screening mechanisms such as the Mediator's Assessment of Safety Issues and Concerns (MASIC), which screen for psychological abuse and control in addition to actual or threatened physical or sexual violence.³⁵ Coercive control is identified through an examination of patterns established over the history of the parties' relationship; restricting one's assessment to discrete incidents of actual or threatened physical violence will underestimate the risks and severity of harm.³⁶

2. How the exemption should be established

Under section (5), a court or "prescribed person" is able to grant an exemption. The consequences of failing to participate or failing to establish an exemption are significant. Such a party may be unable to take further steps in the proceedings or make submissions; they may have the pleadings struck out or be ordered to participate or pay costs, as per sections (3) and (4). For a potential victim, these consequences could lead to serious hardship including an inability to divide property, obtain support or deal with custody and access. Refusal to grant an exemption can amount to a denial of a substantive legal entitlement vital to the economic survival and well-being of parents and children.

One issue is what kind of proof, if any, should be required to establish the exemption. Physical abuse may be capable of being documented through medical or police records but only if victims have visited a hospital or reported the violence. Coercive control or psychological abuse is extremely difficult to document unless behavior that is belligerent or controlling is witnessed before or during the mediation, and even then, this provides relatively little information as to the depth and extent of coercion and control experienced in the relationship.

There are many potential ways of dealing with the establishment of an exemption based on domestic violence and abuse. Recent amendments under residential tenancy legislation allow victims of interpersonal violence to end their leases before the expiry of their term.³⁷ The amendments here in Saskatchewan require a certificate of a person appointed by the Minister who must be satisfied that "there is a risk from a cohabitant to the safety of the tenant or a cohabitant of the tenant" if the tenancy continues. The tenant must also provide a copy of a court order (an emergency intervention order, victim's assistance order, restraining order, peace bond or any other similar court order) OR alternatively, a statement from a professional indicating that in his or her opinion the tenant or a cohabitant of the tenant has been the subject of interpersonal violence. Persons able to make such a statement under s 12.4(4) include registered social workers, psychologists, doctors, practicing nurses, psychiatric nurses, a police officer or "(g) a person approved by his or her employer to provide statements pursuant to this section and who is employed: (i) by an agency or organization to assist persons for whom the agency or organization provides accommodation in an emergency or transitional

³⁵ Amy Holtzworth-Munroe, Connie JA Beck & Amy G Applegate, "The Mediator's Assessment of Safety Issues and Concerns: A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain" (2010) 48:4 Fam Ct Rev 646 and Connie JA Beck & Chitra Raghavan, "Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control" (2010) 48:3 Fam Ct Review at 555.

³⁶ Linda Neilson, "Assessing mutual partner abuse claims in child custody and access cases" (2004) 42:3 Fam Ct Rev 411; Mosher, *supra* note 28 at 153-57.

³⁷ *The Victims of Interpersonal Violence Act*, *supra* note 31 at ss 12.1-12.5; *The Residential Tenancies Act*, 2006 SS 2006 c R-22.001, ss 64.1-64.3.

shelter because of homelessness or abuse; or (ii) to provide support for victims of interpersonal violence” as well as any other person approved in the regulations.”

Ontario’s law is more liberal in that it requires only that the victim complete and sign a form that includes a statement about sexual or domestic violence and abuse that has caused bodily harm or fear for one’s personal safety or that of one’s child.³⁸ This process is more accommodating of victims and would be even more appropriate in the context of dispute resolution where, unlike the *Residential Tenancies Act*, no third party rights are at issue.

We would argue that where an alleged victim discloses a history of intimate partner violence and abuse and does not want to participate in ADR, that disclosure should itself provide an automatic exemption from the process. Requiring a person to participate in a process that is experienced as unsafe or abusive is likely only to be counter-productive, if not dangerous. Fear on the part of the victim has repeatedly been verified as one of the most reliable predictors of risk.³⁹ Even if the allegations are contested, according to Neilson, “targeted intimate partners are usually best able to assess their own ability to participate fully, as well as the violator’s likelihood of negotiating and adhering to agreements and orders in good faith.”⁴⁰ Moreover, “cases that involve major disagreement over facts or that require major findings of credibility are seldom good candidates for settlement processes.”⁴¹

For victims who cannot provide documentary evidence of their history, a more onerous process for an exemption may also expose them to “secondary revictimization.”⁴²

3. What qualifications or training of ADR personnel, arbitrators and parenting coordinators should be required

In all ADR settings, even where victims wish to proceed with ADR, screening should be undertaken to identify cases where joint mediation is clearly inappropriate or to identify whether modifications to the process should be implemented. Ensuring a safe, equitable process depends upon the knowledge, skill and discretion of the person screening and the efficacy of the screening instrument.

Available empirical studies suggest that in practice many mediators fail to detect or underestimate the severity or impact of intimate partner violence or abuse.⁴³ Even if screened, the victim’s experience may eventually be marginalized or discounted. There are concerns that ADR personnel will act dismissively of abuse allegations where there is no independent evidence of abuse, treating the allegations as simply “she said/he said” allegations, as mutual violence, as irrelevant or simply too complicated to deal with.⁴⁴

Effective screening at the outset and on an ongoing basis could prevent or minimize these impacts but requires personnel with an accurate understanding of the dynamics of domestic violence, an ability to take both physical and psychological abuse seriously and an ability to distinguish coercive violence from

³⁸ See *Residential Tenancies Act 2006* SO 2006, c 17, ss 47.1-47.3.

³⁹ Neilson, *supra* note 10 at 541.

⁴⁰ *Ibid* at 541.

⁴¹ *Ibid* at 539.

⁴² See Rivera, Sullivan & Zeoli, *supra* note 20; Laing, *supra* note 20.

⁴³ See sources cited by Wieggers & Keet, *supra* note 2 at 750.

⁴⁴ See Rivera, Sullivan & Zeoli, *supra* note 20 at 242 and David Greatbatch & Robert Dingwall, “The Marginalization of Domestic Violence in Divorce Mediation” (1999) 13 Intl JL Policy & Family 174; Sara Cobb, “The Domestication of Violence in Mediation” (1997) 31 L & Society Rev 397.

resistant violence and isolated, minor violence.⁴⁵ There are a wide variety of screening mechanisms that have been employed in the context of mediation including DOVE (Domestic Violence Evaluation),⁴⁶ DOORS (Detection of Overall Risk Screening)⁴⁷ and MASIC (the Mediator’s Assessment of Safety Issues and Concerns).⁴⁸ Screening is a difficult process which entails eliciting disclosure, monitoring for more subtle forms of pressure or intimidation and also determining whether joint mediation is appropriate or what modifications may be required. Modifications to the process may include staggered arrivals and departures, phone mediation, shuttle mediation (separate sessions), a gender balanced mediation team, etc. There are no empirically established or widely validated guidelines that can be used in determining whether joint mediation is appropriate or whether other procedural modifications are required.⁴⁹ Thus a complex assessment of the forms of abuse, the severity, frequency, recency and impact of intimate partner violence is needed.⁵⁰

Training in these dynamics and related issues (such as domestic violence in the context of indigeneity, cultural difference, disability, sexual orientation, and immigration status) is encouraged or mandated by regulations in some jurisdictions. Quebec requires that mediators have at least six hours of training in domestic violence.⁵¹ In British Columbia, family dispute resolution professionals (mediators, arbitrators and parenting coordinators) must take at least 14 hours of domestic violence training, and must screen in order to determine whether the process is appropriate and safe.⁵² In Ontario, arbitrators must complete training in domestic violence and confirm their training and their use of a screening process in writing for each arbitration.⁵³

Similar requirements should be implemented here in Saskatchewan.

4. What provisions are needed to ensure confidentiality, privacy and safety

ADR agreements typically provide that communications made during the process are confidential and cannot be used in later litigation if an agreement is not reached. Provisions requiring confidentiality and

⁴⁵ Neilson, *supra* note 10 at 540.

⁴⁶ D Ellis & N Stuckless, “Domestic Violence, Dove and Divorce Mediation” (2006) 44:4 Fam Ct Rev 658.

⁴⁷ JE McIntosh, Y Wells & J Lee, “Development and Validation of the Family Law DOORS” (2016) 28:11 Psychological Assessment 1516.

⁴⁸ Fernanda S Rossi et al, “Detection of Intimate Partner Violence and Recommendation for Joint Family Mediation: A Randomized Controlled Trial of Two Screening Measures” (2015) 21:3 Psychology, Public Policy, & L 227.

⁴⁹ Holtzworth-Munroe, *supra* note 9 at 322.

⁵⁰ Cleak & Bickerdike, *supra* note 9.

⁵¹ *Regulation Respecting Family Mediation*, CQLR c C-25.01, r0.7, s 2(4).

⁵² The *Family Law Act Regulation*, BC Reg 347/2012, ss 4-6, dictates that all family law mediators, arbitrators, and parenting coordinators are required to take domestic violence training. Section 8 of the *Family Law Act*, SBC 2011, c 25, Part 2 [*Family Law Act*] requires family dispute resolution professionals to assess whether family violence may be present. See also the *Notice to Mediate (Family) Regulation*, BC Reg 296/2007, which applies to proceedings under the *Family Law Act* and *Divorce Act*, and states that in pre-mediation settings, mediators must screen for domestic violence (s 13), and parties need not attend pre-mediation settings if granted a protection order under the BC *Family Law Act* or a peace bond under the *Criminal Code*, RSC 1985, c C-46, s 23.

⁵³ *Arbitration Act, 1991*, SO 1991, c 17, s 58; O Reg 134/07, ss 2-4. The adequacy of the training should also be monitored.

maximizing privacy are important in this context, as in other contexts such as amendments to residential tenancies legislation.⁵⁴ These obligations should be made explicit in the legislation.

As indicated, disclosure for victims is difficult and often accompanied by shame and embarrassment. These effects should be minimized. The limits of confidentiality, for example, where there are child protection concerns or imminent harm, should also be clearly identified for parties involved in the process. Further, protocols should be established so that information about victims and children that can compromise their safety (including residential and employment addresses and screening information that could provoke retaliation) are not released to abusive partners.⁵⁵

Conclusion / List of Recommendations:

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.**

⁵⁴ See eg *The Victims of Interpersonal Violence Act*, s 12.5.

⁵⁵ Neilson, *supra* note 10 at 536.