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Ontario's Review of Family and Civil Legislation, Regulations, and Processes: The Need to Prioritize Domestic Violence

By: Janet Mosher, Jennifer Koshan and Wanda Wiegers

Matter Commented On: Ontario Ministry of the Attorney General, Review of Family and Civil Legislation, Regulations, and Processes

On July 9, 2019, the government of Ontario announced that the Parliamentary Assistant to the Attorney General, Lindsey Park, was undertaking a review of family and civil legislation, regulations, and processes. According to the news release, "The review will explore ways to simplify family and civil court processes, reduce costs and delays, and encourage the earlier resolution of disputes." More specifically, the Ministry of the Attorney General is seeking to:

- direct family law matters out of a combative court process, where possible;
- reduce the cost of the process to families and taxpayers; and
- streamline the processes to shorten the time to resolution.

Park will be consulting members of the legal community and the public in Ontario and also sought written submissions that were due a mere three weeks following the call, on July 31, 2019. What follows is our brief to the Attorney General, in which we submit that domestic violence should be a key consideration in its review of family and civil legislation. As we commented on here with respect to recent changes to family dispute resolution in Saskatchewan and under the *Divorce Act*, RSC 1985, c 3 (2nd Supp), alternative dispute resolution (ADR) may not be appropriate in cases involving domestic violence, and explicit exceptions are necessary to any mandatory requirements. Provisions for training and screening for domestic violence are also key for dispute resolution professionals, as are supports for survivors.

This is also an opportune time to note that in Alberta, the Court of Queen's Bench recently issued a Notice to the Profession indicating that it would be lifting the suspension on the mandatory ADR provisions of the *Alberta Rules of Court*, Alta Reg 124/2010, for a one-year pilot period commencing September 1, 2019. Mandatory ADR will now apply to civil and family litigation in Alberta, although for family cases it appears that the only requirement will be participation in judicial dispute resolution (JDR). While there are some exceptions, there are no explicit exemptions for cases involving domestic violence. A more detailed post is to come discussing this development in Alberta family law and procedure.

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Dear Lindsey Park,

Re: Review of Family and Civil Legislation

We write to provide a submission regarding the review of Family and Civil Legislation announced July 9. Given the very short time period for the receipt of submissions, our submission is, by necessity, brief. We would, however, be pleased to expand upon any of the points outlined in our submission should you wish additional information. We have also included a short bibliography of references.

We are law professors whose research addresses how various areas of law respond to domestic violence. Currently the three of us – Professors Koshan (University of Calgary), Mosher (Osgoode Hall, York University) and Wiegers (University of Saskatchewan) – are engaged in a major research project funded by the Social Sciences and Humanities Research Council examining the multiple access to justice gaps that survivors of domestic violence experience within and across various legal domains. The areas of law and their intersections that we are examining include family, criminal, child welfare, social assistance, residential tenancies, social housing, and immigration. A unique feature of domestic violence cases is that the parties are often required to simultaneously or sequentially navigate multiple areas of law and various legal processes. This feature of such cases raises particular concerns regarding costs, delay, lack of consistency in definitions of domestic violence, variable knowledge among legal actors, and contradictory expectations placed upon the parties. A new and growing literature has begun to document the particular access to justice issues that arise in such cases and to suggest innovative solutions (see, for example, the report of the Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, "Making the Links in Family Violence Cases," as well as reports by Justice Bonnie Croll and Justice Donna Martinson).

We have completed a mapping of all statutes and regulations that address domestic violence in every jurisdiction across the country. We have also completed an extensive review of family law decisions in Ontario, Saskatchewan and Alberta. We are also very familiar with the research and literature on domestic violence, family law, and dispute resolution processes. Based on our collective knowledge and experience there are three key points that we would suggest are highly relevant to your review:

1. Domestic violence is present in a very substantial number of family law cases.
2. While cost savings and efficiency are important, they must never come at the cost of the safety of survivors of domestic violence (who are overwhelmingly women) and their children.
3. Supports for domestic violence survivors in the family law system are crucial.

1. The Presence of Domestic Violence

The number of family law matters involving domestic violence is not known with certainty, in large measure because screening by legal professionals is neither routinely nor consistently undertaken (Luke's Place, 2018). In a recent Canadian survey lawyers reported family violence as an issue, on average, in 21.7% of their cases, while judges reported it as an issue in 25.3% of cases (Bertrand et al., 2016). It is fair to assume that these percentages underestimate the total number of cases involving domestic violence given the inadequacy of current approaches to screening and the prevalence of a narrow understanding of domestic violence as isolated

incidents of physical violence. Research in both the United States and Australia indicates that more than 50% of family law cases involve domestic violence. Given the very substantial percentage of cases involving domestic violence, a family law system needs to be designed that assumes such cases are the norm and not the exception.

2. Safety of Women and Children

It is also critical to appreciate that research has consistently documented that separation is the most dangerous time for victims of domestic violence. Stark evidence of this is found in the reports of Ontario's Death Review Committee. In its review of cases of lethal domestic violence from 2003-2017, the Committee identified a history of domestic violence and pending or recent separation as the two risk factors most strongly correlated with instances of lethal violence (Office of the Chief Coroner, 2017). All too often it is wrongly assumed that separation signals the end of domestic violence when, in fact, domestic violence often escalates and continues after separation. This means that the family law system is being engaged at a time when victims are at risk. How the family law system responds—including procedurally—matters because it has the potential to either reduce or aggravate that risk.

Research over the past two decades has increasing made evident that domestic violence takes different forms. There is a sizeable literature on this, with attempts to develop typologies of violence, of abusers, and of victims. For the purposes of this review, the distinction drawn between "coercive controlling violence" and situations of isolated acts of violence is most pertinent. Coercive control draws attention to patterns of coercion and control, rather than focusing on isolated incidents of physical or sexual violence. The tactics of coercion and control, which often occur alongside physical and sexual violence, are multiple, and include isolation, shaming, put-downs, threats, surveillance, forced dependency, and control of decision-making. Most women report these forms of violence as more harmful than physical abuse, undermining liberty, autonomy, and self-esteem. Some jurisdictions have moved to create a criminal offence of coercive controlling violence (the UK has, for example). There is also evidence that the degree of control and coercion is more predictive of future harm (including lethal harm) than is past physical violence, as well as mounting evidence that exposure to an environment of coercive control is harmful to children's brain development and to their well-being (Schafran, 2014). Coercion control stands in contrast to situations where isolated acts of physical violence occur outside of an overall pattern of coercion and control. This violence may, in some instances, be severe and cause grave harm. However, legal actors too often focus on discrete acts of physical violence, missing the patterns of coercion and control that are equally capable of causing tremendous harm. (For an overview of topologies see Wangmann, 2011).

Moving cases out of formal legal processes and into informal and quick ADR processes raises a number of concerns for cases of domestic violence, especially those involving coercive control. Several assumptions that are commonly made about informal processes are misplaced in cases of domestic violence: that there is equal bargaining power; that past conduct is largely irrelevant; that parties enter the process voluntarily; that concessions will yield win-win outcomes; that hostilities will be deescalated; that disclosure will be made; and that children's interests will be better served. It may be that in some instances, domestic violence cases can be safely mediated and the outcomes will be equitable but this requires a mediator with deep knowledge of the dynamics of abuse, effective screening tools (including those more recently developed that

attempt to screen for coercive control, such as the MASIC – Mediator's Assessment of Safety Issues and Concerns) and practices; and substantial process modifications that are attuned to the particulars of the relationship and that prioritize safety. And this means that constructing a good process takes time and money. It also means that new legal frameworks would be required regarding the regulation of mediation and other informal dispute resolution processes and the training and monitoring of dispute resolution personnel.

Of course, adversarial adjudication comes with risks for survivors of domestic violence as well. Some of these concerns are similar to those related to informal processes: the lack of training and understanding of the dynamics of domestic violence among lawyers and judges; the discounting of the relevance of domestic violence to outcomes; and the failure to systematically and appropriately screen for domestic violence. Courts have, however, the power to compel disclosure of information, to issue restraining orders to protect survivors of domestic violence, and to control their processes.

It is this last consideration—control of their processes—that requires significant attention in the context of coercive controlling violence. The family law system gives coercive controllers opportunities to reassert their presence—and their control—in their victims' lives. Coercive controllers intentionally use the family law system to regain control, to monitor and intimidate their ex-spouses/partners, to coerce concessions, and to financially and emotionally exhaust their victims. They bring unnecessary motions, seek child custody or greater access as a means to be present in women's lives, and refuse to pay support. Perhaps the most pernicious tactic is the choice to self-represent in order to be able to personally cross-examine their victims (a tactic that forces some women to agree to unreasonable settlements or if they proceed results in re-victimization in the legal process). Sometimes called "legal bullying," "procedural stalking" or "litigation abuse," there is widespread agreement that these tactics are rarely recognized, named for what they are, and stopped. More can and should be done by judicial officers to curb this misuse of court processes. This would result in the preservation of public resources, as well as those of survivors, and would help to prevent the re-victimization of women.

3. Supports for Survivors of Domestic Violence

Many survivors are left to navigate the family court process on their own, without legal representation. This is an enormous problem, particularly given the safety concerns at play. Moreover, our research—consistent with the findings of the Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence— reveals the many complex issues at the intersection of family law, criminal law, child welfare law, and immigration law. Particularly given mandatory charging policies and the duty to report a suspicion that a child may be in need of protection, it is very common for families to be in engaged with the family, child welfare, and criminal legal systems simultaneously. Dealing with the complex interplay—how statements or evidence given in one process can be used in another, for example—requires access to specialized legal knowledge. As such, access to legal aid certificates is enormously important. So too is the preservation of the Family Court Support Worker Program, a program that plays an absolutely vital role in enhancing survivors' safety and in helping to facilitate their engagement with the family law system.

In conclusion, as you proceed with this review we urge the Attorney General to bear in mind that the family law system routinely encounters the women and children who are survivors of domestic violence, whether they have been identified as such or not. Our system of family law and the dispute resolution procedures we adopt must make their safety and well-being a top priority.

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