DCLC
Durham Community Legal Clinic
& Access to Justice Hub

Written Submissions to:

Standing Committee on Justice Policy

of the

Legislative Assembly of Ontario

Re: Bill 207, *Moving Ontario Family Law Forward Act, 2020*

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ABOUT THE CONTRIBUTORS

The **Durham Community Legal Clinic** (DCLC) is a community legal clinic, primarily funded by Legal Aid Ontario (LAO). It was founded in 1985, and provides legal services, information, education, and representation for historically marginalized and low-income residents of Durham Region. DCLC also engages in advocacy and law reform activities, in particular to ensure that our laws properly consider the perspectives of historically marginalized and low-income Ontarians. The main legal areas of service DCLC provides includes housing law, social benefits, employment, human rights, and workplace safety. DCLC does not provide legal advice in the area of family law directly, but instead can provide legal information and referrals to community resources. One example of these types of resources is Luke's Place, a non-profit organization in Durham Region focusing on improving the safety and experience of women and their children fleeing abusive relationships. DCLC is also authorized to issue 2-hour domestic violence certificates, as funded by LAO.

In early 2019, DCLC established the **Durham Access to Justice Hub®** (the "Hub) with the assistance of LAO. This inter-agency and inter-disciplinary initiative intended to provide legal services beyond the income thresholds and subject matter of LAO, and other social, financial, and psychological services. These cooperative relationships seek to foster better client-centered services, reduce administrative barriers and silos, and improve efficiency of services that are funded or subsidized by taxpayer dollars. Some techniques used to achieve these goals include recruitment of volunteers to contribute towards improving access to justice, and by embedding students into workflows and innovative projects through experiential education. One example of these projects includes a Family Law Triage project, which seeks to direct families in separation to free or affordable resources in the community that would assist with family dispute resolution (see Appendix "A"). The COVID-19 pandemic has disrupted many of these innovative programs and plans, but DCLC still intends to use the Hub in this manner to foster systemic change in the years to come.

Omar Ha-Redeye is a lawyer and the Executive Director of Durham Community Legal Clinic. He holds a JD from Western University, and an LLM from Osgoode Hall. He has been involved in several innovative access to justice initiatives in family law, including the ground-breaking television show, *Family Matters with Justice Harvey Brownstone*, and helping to develop the first free and accurate with-child Spousal Support Advisory Guidelines (SSAG) calculations through MySupportCalculator.ca. He has received numerous awards and recognitions for his efforts in law reform and advocacy on behalf

of historically marginalized populations, including the Queen Elizabeth II Diamond Jubilee Medal, and the inaugural OBA Foundation Award.

Anna Toth graduated from Western Law in June 2019 and was called to the Ontario Bar this year. She is a volunteer family lawyer at the Durham Community Legal Clinic, and a junior associate at Carpenter Family Law. She was recently empanelled for family law certificates with Legal Aid Ontario (LAO), and under the mentorship of Geoffrey Carpenter, is already managing case files and working directly with clients. As a proponent of access to justice and empathetic advocacy, Anna believes in the power of alternative dispute resolution, and would like to one day become a certified mediator / arbitrator.

Faye Shamshuddin is a first-year student at Osgoode Hall Law School. She graduated from the University of Toronto in spring 2020, earning an Honours Bachelor of Arts, majoring in Philosophy and Ethics, Society and Law with a minor in Bioethics. She has previously worked as a research assistant at the University of Toronto's Centre for Ethics. Her interests in law include family law, as well as labour and employment law. She is currently taking part in a placement at the Durham Community Legal Clinic through Pro Bono Students Canada (PBSC), assisting with the Hub's Family Law Triage Project.

Catherine O'Connor is a first-year law student at Osgoode Hall Law School, and up until the COVID-19 pandemic was a resident of Durham Region. She completed her undergraduate degree at the Schulich School of Business at York University, where she specialized in International Business and Operations Management. Throughout 2019, she took part in a climate action project within the Durham Region through Youth Challenge International. She is passionate about access to justice and hopes to be a part of the solution, in whichever area of law she eventually practices. She is currently taking part in a placement at the Durham Community Legal Clinic through Pro Bono Students Canada (PBSC), assisting with the Hub's Family Law Triage project.

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EXECUTIVE SUMMARY

1. Bill 207 is the proposed *Moving Ontario Family Law Forward Act, 2020* which would amend the following seven statutes: the *Change of Name Act*; *Child, Youth and Family Services Act, 2017*; *Children's Law Reform Act*; and *Courts of Justice Act*; *Family Law Act*; *Family Responsibility and Support Arrears Enforcement Act, 1996*; *Police Record Checks Reform Act*, 2015.

2. Our submissions will focus on the necessary reasons for this change, and how it can be effective in promoting out-of-court dispute resolution, thereby saving taxpayers a significant amount of money.

3. It will then address how these changes might allow the justice system to better address family violence, especially if it is addressed in an intersectional manner.

4. Finally, these submissions will explain how a presumption of joint decision-making may be defined as within the best interests of the child, and how it may also be effective in promoting dispute resolution and preventing high-conflict disputes from developing.

5. DCLC supports the changes proposed in Bill 207, as changes that are likely to improve the family dispute process. These improvements are therefore likely to benefit

Ontarians, especially those who are historically marginalized or from low-income communities.

INTRODUCTION

6. Family law is in a crisis in Ontario. It was in a crisis for many years, even before the COVID-19 pandemic.[1] The process was too complex, too expensive, and to conflict oriented. More importantly, it did not provide adequate or even satisfactory results for the parties, and the best interests of the children was rarely the primary outcome of any court-based process.

7. Between 2011-2012, 64% of all family law applications in Ontario were self-represented. In two Toronto courts, this number rises to 73-74%.[2] Since that time, self-representation rates have only increased. These self-represented parties typically have worse outcomes than parties who have representation.[3]

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[1] Lorne Wolfson and Hillary Linton, "The Family Court "Crisis" and Why Dispute Resolution Matters," Family Dispute Resolution Institute of Ontario (FDRIO), May 5, 2017, available at: <https://www.fdrio.ca/2017/05/the-family-court-crisis-and-why-dispute-resolution-matters>.

[2] Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, at 33, available at: <http://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>.

[3] Justice Annemarie Bonkalo, "Family Legal Services Review," Minister of the Attorney General, Dec. 31, 2016, available at: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/>; Adam N. Black, "The irony of representing yourself in family law litigation: It can cost you more than hiring a lawyer," Financial Post, Jan. 16, 2019, available at: <https://financialpost.com/personal-finance/the-irony-of-representing-yourself-in-family-law-litigation-it-can-cost-you-more-than-hiring-a-lawyer>; Marge Bruineman, "Self-represented litigants face challenges," *Law Times*, Jun. 20, 2019, available at: <https://www.lawtimesnews.com/news/legal-analysis/self-represented-litigants-face-challenges/266854>.

8. The main reasons for self-representation is the lack of affordable representation, the inability to obtain legal aid, and the ineffectiveness of court-based dispute resolution.[4] Self-representation is not a choice, and is often the result of depleted assets as a result of spending on legal fees for court-based legal representation at the outset.[5] This same amount of money spent on collaborative dispute resolution models would invariably provide superior outcomes.

9. As of 2011, approximately 1.2 million separated or divorced Canadians have minor children. Approximately 38% of all separating couples at that time had a child together at the time of separation or divorce.[6] The impacts of a dysfunctional family law system does not end at the time of separation or divorce, and can often continue for many years, having long-term effects over the duration of a child's life.

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[4] Bonkalo, *ibid*; Macfarlane, *supra* note 2; Rachel Birnbaum et al., "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants," *The Canadian Bar Review 91:67* (2013) at 78, 80, 81, 87, available at: <https://cbr.cba.org/index.php/cbr/article/view/4288>
Michael McKiernan, "The Going Rate" Canadian Lawyer Magazine, Jun. 2, 2014; available at: <http://www.canadianlawyermag.com/5151/The-going-rate.html>.

[5] Macfarlane, *supra* note 2 at 83, 121; CBC Radio, "More Canadians are acting as their own lawyer because they don't have a choice," Mar. 23, 2018, available at: <https://www.cbc.ca/radio/sunday/the-sunday-edition-march-25-2018-1.4589621/more-canadians-are-acting-as-their-own-lawyer-because-they-don-t-have-a-choice-1.4589633>; Diane Grant, "Representing yourself in court is popular but costly and risky," CBC News, Dec. 31, 2015, available at: <https://www.cbc.ca/news/canada/representing-self-court-lawyers-1.3375609>.

[6] Maire Sinha, "Parenting and Child Support After Separation or Divorce," Statistics Canada, February 2014, at 5, available at: <https://www150.statcan.gc.ca/n1/en/pub/89-652-x/89-652-x2014001-eng.pdf?st=QbbPQp_K>.

10. The situation in Ontario is so bad that people publicly protest our family justice system.[7] Given that the family court system is the only significant interaction that many Ontarians will have with the justice system, either directly or through a friend or family member, these perceptions are directly tied to the public confidence of the justice system as a whole.

11. Diminished confidence in the justice system leads to lower adherence to laws, rules, regulations and by-laws, and a general rise in anti-social behaviour.[8] The situation in

[7] Omar Ha-Redeye, "2012 Opening of the Courts in Toronto," Slaw, Sept. 16, 2012, available at: <http://www.slaw.ca/2012/09/16/2012-opening-of-the-courts-in-toronto>.

[8] Lawrence W. Sherman, "Trust and Confidence in Criminal Justice," Fels Center of Government, July 2001, available at: <https://www.ncjrs.gov/pdffiles1/nij/189106-1.pdf>; Steven Van de Walle, "Confidence in the Criminal Justice System: Does Experience Count?," *British Journal of Criminology 49(3)*, December 2008; Angus Reid Institute, "Confidence in the justice system: Visible minorities have less faith in courts than other Canadians," Feb. 2018, available at: <http://angusreid.org/justice-system-confidence/>; Judy Perry Martinez,
"How lawyers and judges can help rebuild public trust and confidence in our justice system," *ABA Journal*, Aug. 9, 2018, available at:
<https://www.abajournal.com/news/article/how_lawyers_and_judges_can_help_rebuild_public_trust_and_confidence>; Julian V. Roberts, "Public Confidence in Criminal Justice: A Review of Recent Trends 2004-05," Public Safety Canada, November 2004, available at:
<https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pblc-cnfdnc-crmnl/index-en.aspx>; "Reducing Racial disparity in the criminal Justice System: A Manual for Practitioners and Policymakers" at 3, available at:
<https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf>; Jennifer Rubin et al.,
"Interventions to reduce anti-social behaviour and crime: A review of effectiveness and costs," Rand Europe, 2006, available at:
<https://www.rand.org/content/dam/rand/pubs/technical_reports/2006/RAND_TR448.pdf>;
Motz et al, "Does contact with the justice system deter or promote future delinquency? Results from a longitudinal study of British adolescent twins," *Criminology 58:2*, May 2020, available at:
<https://onlinelibrary.wiley.com/doi/full/10.1111/1745-9125.12236>. See also for notions of the justice system in disrepute, especially for minorities, *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 SCR 265 at para 33; *R. v. Calder*, 1996 CanLII 232 (SCC), [1996] 1 SCR 660 at para 34.

Ontario's family justice system therefore is directly connected to many broader societal issues, and it requires immediate attention.

12. The problems with our family law system are not limited to resources alone, and cannot be solved by increasing funding, including increases to family law certificates. What is needed is a transformative culture change. DCLC believes that Bill 207 can help initiate and facilitate this culture change, especially if it is reinforced and followed-up on by the legislature through other means, the regulator of the legal professions (the Law Society of Ontario), and further changes by the Family Rules Committee.

13. The COVID-19 pandemic has only exacerbated the need for legislative reform in family law.[9] The need for greater reliance on out of court resolution, cooperation by the parties, and responsibility by lawyers to facilitate these goals, has never been higher.[10]

[9] Kathryn Kendrikx, "Increase in Ontario family law cases: An anecdotal account," The Lawyer's Daily, Oct. 9, 2020, available at: <https://www.thelawyersdaily.ca/articles/21397/increases-in-ontario-family-law-cases-an-anecdotal-account>; Aidan Mcnab, "COVID-19 increasing complexity in family law mediation," Law Times, Sept. 21, 2020, available at: <https://www.lawtimesnews.com/practice-areas/adr/covid-19-increasing-complexity-in-family-law-mediation/333495>; Graham Slaughter, "COVID-19 custody battles present tricky challenge for overwhelmed courts," CTVNews, Sept. 11, 2020, available at: <https://www.ctvnews.ca/canada/covid-19-custody-battles-present-tricky-challenge-for-overwhelmed-courts-1.5102015>. An increase in material change applications alone are expected to flood the court following the economic impacts of the pandemic.

[10] Geoff Carpenter, "Family law must reform to reduce hostilities," Canadian Lawyer, Sept. 15, 2020, available at: <https://www.canadianlawyermag.com/news/opinion/family-law-must-reform-to-reduce-hostilities/333309>.

14. Bill 207 is the first but necessary step for Ontario to address the long-standing problems plaguing the family law system in this province.

PART 1: LEGISLATIVE BACKGROUND

15. Under s. 91 *The Constitution Act, 1867*,[11] the federal government has the legislative authority for marriage and divorce. However, the provinces have the exclusive legislative power for "The Solemnization of Marriage in the Province" under s. 92.

16. In Ontario, this means that the federal *Divorce Act*[12] governs divorce and corollary relief, such as what used to be termed as custody, as well as child and spousal support. The provincial statute, the *Family Law Act*,[13] provides the method for property division following the breakdown of the marriage, and also includes child and spousal support obligations in Part III. What used to be termed as custody of children is governed provincially by the *Children's Law Reform Act*.[14] The *FLA* does not explicitly address jurisdiction, and instead uses a common law test of a "real and substantial connection" to determine whether courts in Ontario properly have jurisdiction.[15]

[11] 30 & 31 Vict, c 3.
[12] RSC 1985, c 3 (2nd Supp).
[13] RSO 1990, c F.3 [the "*FLA*"].
[14] RSO 1990, c C.12 [the "*CLRA*"].
[15] *Wang v. Lin*, 2013 ONCA 33 at para 19; *Knowles v. Lindstrom*, 2014 ONCA 116 at para 16. Both rely on the Court's decision in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (CanLII), [2012] 1 SCR 572.

However, the *CLRA* does not rely on the same factors, and uses "ordinary residence" and "habitual residence" as the applicable jurisdictional tests.[16]

17. There are three different courts that deal with family law in Ontario. There are 17 Family Courts of the Superior Court of Justice locations across Ontario. These unified Family Courts deal with all family law matters, including divorce, custody, access, division of property, adoption and child protection. Elsewhere in Ontario, including in Durham Region, family law matters are dealt with by either the Superior Court of Justice or the Ontario Court of Justice.

18. The Superior Court of Justice has jurisdiction over requests that consist of divorce only, requests for divorce and what used to be termed custody, access or support as part of the divorce request, and any other matters related to the division of family property. The Ontario Court of Justice has jurisdiction over requests that are related to support and what used to be termed custody or access, adoption, and child protection matters.

[16] *Wang v. Lin*, *Ibid*, at para 46-47; *Dovigi v. Razi*, 2012 ONCA 361 at paras 9-13. This could be described as a "presence-based" jurisdiction. The court may also exercise its *parens patriae* jurisdiction, which is preserved in s. 69 of the *CLRA*.

PART 2: A NECESSARY RESPONSE TO BILL C-78

19. This legislation is necessary for the purposes of harmonizing family legislation in Ontario, to ensure that Ontarians are largely governed by the same law around family separation, whether they are married or not.

20. Substantial changes in family law are pending at the federal level. On June 21, 2019, Bill C-78,[17] which amends the *Divorce Act*, received Royal Assent. Although Bill C-78 was originally scheduled to come into force on July 1, 2020, its coming-into-force date was postponed to March 1, 2021, in response to the COVID-19 pandemic. Bill 207 proposes to amend both the *FLA* and *CLRA*, with the changes to the latter being more important for the purposes of harmonization with the *Divorce Act*.

21. Many courts across the country are currently hearing only urgent family law matters, and governments are focused on addressing pandemic-related urgencies and priorities. All of this has made it impossible to undertake the necessary steps for implementation. The changes to the *Divorce Act* are highly anticipated by family law professionals, provincial and territorial partners, and Canadians affected by separation and divorce. However, our partners throughout the family justice system

[17] *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* (Bill C-78 in the 42nd Parliament)

need enough time to implement the legislative changes, including by adjusting their own laws and regulations. [18]

22. Although this delay has been met with disappointment by many, this is an important opportunity for provincial legislatures to take action and catch up with these federal changes. Many family law matters involve issues that require reference to both federal and provincial legislation. If provincial legislatures are slow to adapt to federal amendments, families will suffer as legal professionals attempt to straddle the obligations imposed by both levels of government.

23. Bill-C78 had been drafted with four primary objectives in mind:[19]

    a. to promote the best interests of the child;
    b. to address family violence;
    c. to help reduce child poverty; and
    d. to make Canada's family justice system more accessible and efficient by streamlining processes and reducing the need for court intervention.

[18] Department of Justice Canada, "Government delays Divorce Act amendments coming into force in response to requests from justice partners due to COVID-19 pandemic," Government of Canada, June 5, 2020, available at: <https://www.canada.ca/en/department-justice/news/2020/06/government-delays-divorce-act-amendments-coming-in-to-force-in-response-to-requests-from-justice-partners-due-to-covid-19-pandemic.html>.

[19] Government of Canada, "The *Divorce Act* Changes Explained," June 5, 2020, available at: <https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div2.html>; Justyna A. Waxman, "Bill C-78 – The Long-awaited Overhaul of the Federal Divorce Act," Torkin Manes, Sept. 6, 2019, available at: <https://www.torkinmanes.com/our-resources/publications-presentations/publication/bill-c-78-the-long-awaited-overhaul-of-the-federal-divorce-act>.

These objectives, and changes to the *Divorce Act*, were widely supported by many lawyers, judges, academics, mediators, mental health professionals.

24. Significant changes introduced through Bill C-78 include replacing contentious and adversarial terms such as "custody" and "access" with "decision-making responsibility" and "parenting time," respectively. These terms are commonly misunderstood and conflated by parties, and fail to properly encompass a child-focused approach towards cooperative problem-solving.[20] The former is formally defined as "significant decisions about a child's well-being," which include health, education, culture, language, religion and spirituality, and extracurricular activities, which are in the best interests of the child. The common law had long interpreted custody in this manner,[21] but a statutory definition provides further clarity, especially for self-represented parties.

25. Bill 207 replaces all references of "custody" to "decision-making responsibility" and "access" with "parenting time," "parenting order" or "contact order," in the *CLRA*, *FLA*, as well as the *Child, Youth and Family Services Act, 2017*[22] and *Police Record Checks*

[20] *Ibid*; Omar Ha-Redeye, "Terminology in Family Law Fuelling Conflicts," Oct. 4, 2020, available at: <http://www.slaw.ca/2020/10/04/terminology-in-family-law-fuelling-conflicts/>.
[21] *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 SCR 3 ["Young"] at paras 25-26, 151-152, 226-227; *Kruger v. Kruger et al.*, 1979 CanLII 1663 (ONCA). See also, *S.S.L. v. J.W.W.*, 2010 BCCA 55 at paras 16, 30; *Graham v Bruto*, [2007] OJ No 656 (Ont SCJ) at 667, aff'd at 2008 ONCA 260; *Hildinger v. Carroll*, 2004 CanLII 13456; *Caufield v. Wong*, 2007 ABQB 732; *V.K. v. T. S.*, 2011 ONSC 4305; *Stav v. Stav*, 2012 BCCA 154; *R.E.Q. v. G.J.K.*, 2012 BCCA 146; *Wilson v. Wilson*, 2015 ONSC 479.
[22] SO 2017, c 14, Sch 1.

Reform Act, 2015.[24] These changes are intended to encourage more child-centered behaviour, and with the hopes that parties do not perceive these terms as mutually exclusive or possessive to any one party.[25]

26. Although these changes in Bill 207, mirroring the changes in Bill C-78, may appear to be relatively minor, they signal an important shift and legislative intent to compel significant change in the family justice system, in particular by promoting greater reliance on out of court dispute resolution. Not only does this provide better outcome to the parties involved, and better promotes the best interest of the child, but it also saves an enormous amount of tax-payer dollars, which are otherwise spent on an ineffective and inefficient court-based system.

PART 3: PROMOTION OF ALTERNATIVE DISPUTE RESOLUTION

27. Although family separation is technically a subset of a civil dispute under the law, family disputes are typically distinguishable from other forms of civil litigation in many ways. This is not a disagreement between strangers, neighbours, or business partners. Unlike criminal or other civil matters, family disputes revolve around, or at least heavily involve, individuals' fundamental needs for love, safety, and security. Inadequate resolution of these disputes, or a resolution that leaves the parties in a

[24] 2015, SO 2015, c 30.
[25] Government of Canada, *supra* note 19.

permanently antagonistic state, have long-standing implications well after the formal legal dispute may be over, including on any children from the relationship.

28. Unlike corporate or commercial law, individuals cannot hide behind the corporate veil. Litigating one's separation, divorce, property equalization, and parenting schedule involves usually means disclosing one's most intimate and private details. Financial statements, private photos, videos, and text messages are all potentially relevant during the proceeding. For parties engaged in family litigation, there is nowhere to hide. This process is traumatic enough for adults, but it can be even more damaging for children.

29. Children with litigating parents are frequently subjected to interviews by psychologists, support workers, legal professionals, and other strangers. Although some parents at least attempt to shield their children from the shrapnel of litigation, others intentionally drag their children into the battle with them. Many children feel as though they are constantly under the microscope and consequently close up as a method of coping.

30. As courts are backlogged, it is not uncommon for proceedings to last five years or more. The damage this prolonged litigation causes cannot be understated.

31. Although lawyers are regulated and governed by various rules of professional conduct,[26] there is currently nothing in place that clearly deters counsel from assisting their clients in prolonging litigation. There is no shortage of vengeful spouses out there with money to burn. If clients instruct their lawyers to exhaust every motion available to them, lawyers can advise courts that they are only pursuing their client's interests. This has become a business model for some lawyers practicing in the area of family law.[27]

32. It is not uncommon for parties with significant assets to spend $100,000 - $300,000 each, before a trial can even take place. This means that families have all of their existing assets dissipated before they attempt to start their new life, or even worse, they begin the separation process deeply in debt.

[26] See, for example, Rule 3.1-1(c)(v),(vi),(viii) of the *Rules of Professional Conduct*, which defines a "competent lawyer" as implementing the "appropriate skills," including negotiation, alternative dispute resolution, and problem-solving. Rule 3.2-4 requires a lawyer to "advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis," and they must "discourage the client from commencing or continuing useless legal proceedings." This language is mandatory and not permissive. However, after the Supreme Court of Canada's decision in *Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII), [2018] 1 SCR 772, the ability of the regulator to control discipline lawyers in light of these professional responsibilities may in fact be limited, especially where concerns can be responded to by an "honest but mistaken understanding of the law [para 21]" or the role of a lawyer in a dispute. Consequently, the courts may be the only remaining body ability to discourage the commencement of inappropriate litigation or litigation conducted unreasonably, especially as empowered by the legislature through statutory amendments such as Bill 207, and further changes to the *Family Law Rules*, O Reg 114/99, in particular Rule 24.

[27] Carpenter, *supra* note 10.

33. The ability of parties who belong to low-income populations and have no significant assets are significantly impaired in terms of properly utilizing the court system, which necessarily entails the use of outside experts, assistance, and professionals. The impacts of separation on these families can be financially devastating.

34. Family separation is one of the main causes for middle-class families transitioning into low-income families. This is not exclusively due to the fact that limited assets are somehow now supposed to support two separate households. It also is related to the exorbitant costs of family law litigation, the emotional, psychological, and physical strains on the parties due to litigation, the continuing conflict that typically occurs even after a family law trial. The court system is highly ineffective at resolving the underlying problems between parties, and usually exacerbates their inability to communicate with each other, their poor cooperation with regards to the best interest of the child, and their difficulties identifying and pursuing practical options that are best for everyone involved.

35. Nobody truly “wins” in court-based family litigation. Even if the final order favours one party, the time and money spent often dwarf the remaining assets to be distributed. The psychological and emotional costs are unquantifiable, and rarely anticipated by

the clients.[28] These are just a few reasons why alternative dispute resolution (ADR) should be attempted by all parties. On its own, ADR is by no means a complete and perfect solution, but it is a method far less expensive and invasive than litigation.

36. ADR encompasses arbitration and open and closed mediation. Open mediation means that both parties have provided permission to preserve and disclose the contents of the mediation. Typically, the mediator will write a report which can later be used as evidence if litigation is still required. Closed mediation is the opposite. Whatever is discussed in closed mediations is confidential and protected by privilege.

37. A meditator's job is to facilitate settlement, but a mediator cannot force a settlement or bind the parties. Resolutions can only be reached if both parties consent to the terms. In contrast, arbitrators have authority to bind the parties. Mediations and

[28] The impact of the litigation system itself creating trauma on the parties, and ultimately on the children, is increasingly being recognized, with terms like "post-litigation stress" being explored. See, for example, Omar Ha-Redeye, "Impact of Litigation on Your Client's Health," Slaw, Mar. 15, 2015, available at: <http://www.slaw.ca/2015/03/15/impact-of-litigation-on-your-clients-health>; Michaela Keet et al., "Anticipating and Managing the Psychological Cost of Civil Litigation," *Windsor Yearbook of Access to Justice 34: 1* (2018), available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3148000>; Trevor C. W. Farrow et al., "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report," Canadian Forum on Civil Justice, 2016, available at: <https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>; Michaela Keet and Heather Heavin, "Assessing Client Interests and Process Costs in a Litigation Risk Analysis," In Trevor C.W. Farrow & Lesley A Jacobs (eds.), The Justice Crisis, at 287-303; Heather Heavin and Michaela Keet, "Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement," *Journal of Arbitration and Mediation (forthcoming)*, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3148676>.

arbitrations are faster, cheaper, and less invasive than litigation. These ADR methods are also more flexible, and the process can be customized to the needs of the parties, to an extent. In ADR there is room for emotion, compromise, creativity, and empathy.

38. It is still important for parties employing ADR to retain counsel. The flexible nature of ADR means that power imbalances can go unchecked and further entrench injustice. Parties still need to know their legal entitlements or have counsel that do, to ensure mediation agreements or arbitration awards are fair.

39. The legal profession has been calling for ADR to be the primary basis for family dispute resolution for many years.[29] The existing statutory scheme, and other systemic impediments, have not allowed for this to properly occur. Better use of technology, and appropriate triage out of the court system, are also essential to the efficacy of ADR in family law.[30]

40. Bill C-78 formally introduced definitions for "family dispute resolution process" and "family justice services" to s. 2(1) of the *Divorce Act*, both of which were conspicuously absent from the previous version of the act. This introduction signals a clear intent by

[29] Canadian Bar Association, "Reaching equal justice: an invitation to envision and act," Report of the CBA Access to Justice Committee, November 2013, at 76-77, available at: <https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf>.
[30] *Ibid* at 76, 86. See also, Robert Shawyer, "Reforming Ontario's Family Law Justice System," Slaw, July 22, 2019, available at: <http://www.slaw.ca/2019/07/22/reforming-ontarios-family-law-justice-system/>.

the legislature that these processes are intended to be relied upon for "any matters in dispute," through the use of processes that include "negotiation, mediation and collaborative law." These additional services also signal clearly that there are public and private services available outside of the justice system that may be more effective than court-based litigation.

41. The new *Divorce Act* amendments also include new duties for parties and legal professionals involved in a family separation. Parties to a proceeding under s. 7.1 must exercise time, responsibility or contact with a child consistent with their best interests, and this is further elaborated upon with other duties such as protecting a child from conflict under s. 7.2, to utilize a family dispute resolution process under s. 7.3, provide complete, accurate, and up-to-date information under s. 7.4, and comply with court orders under s. 7.5. All parties to a proceeding must complete a formal statement at the pleadings stage to certify they are aware of these new duties.

42. A legal professional representing or advising a party in family proceedings therefore cannot ignore the duties that are placed directly on the parties by statute. The new amendments to the *Divorce Act* introduce new duties to these advisers to communicate the possibility of reconciliation under s. 7.7 where appropriate, to formally discuss and inform family dispute resolution where it is appropriate, and to advise the party specifically of the duties that a party has under the act. An adviser

must also fill a certification under this provision that they have complied with this section.

43. Although many of these duties may have existed informally through the common law or regulatory rules of conduct, the creation of statutory provisions in this manner shifts the burden directly onto the parties and lawyers involved to demonstrate meaningful and concerted efforts to consider and employ ADR. It also provides the judiciary with a basis for scrutinizing these efforts, and for directing parties to utilize them further where the record does not demonstrate adequate efforts in that respect. The clear message from the legislature is that ADR is no longer simply an optional avenue for family law disputes, and it must be considered by every family undergoing family separation.

44. Bill 207 introduces a similar provision under s. 33.1(3) of the *CLRA*, within the context of the best interests of the child, and s. 47.2 of the *FLA*. Where appropriate, ADR is required by the parties to attempt to resolve matters that may be the subject of a family law order. This is considered in the best interest of the child, and is in addition to other measures that involve protection of the child from conflict, providing complete, accurate and up-to-date information, and complying with court orders. A certification is also required under the new *CLRA* and *FLA* provisions to indicate that a party is aware of these responsibilities.

45. While Bill 207 differs from Bill C-78 by tying these responsibilities directly to the best interests of the children, the practical effect should be the same. Given that the best interest of the child is the only factor for a parenting order under s. 24(1), the connection of the parties' responsibilities directly to these interests in this way may actually bolster the ability to promote ADR.

46. Bill 207 also mirrors Bill C-78 in that it creates formal duties for legal advisers under s. 33.2 of the *CLRA* and s. 47.3 of the *FLA*. A certificate by the advisor is also required in this context. One notable difference is that provisions in both acts define a "legal adviser" as "a person authorized under the *Law Society Act* to practise law or provide legal services to another person." This definition differs slightly from the federal definition, of "any person who is qualified, in accordance with the law of a province, to represent or provide legal advice to another person in any proceeding." While both refer to the provincial legislation to describe who this advisor may be, in Ontario this is likely to include the anticipated Family Legal Services Provider (FLSP), currently under development.[31] The scope of this new license, and whether it will include matters under the *Divorce Act*, is still yet to be determined.

[31] Law Society of Ontario, "Family Legal Services Provider Licence," Family Law Working Group, June 2020, available at: <https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2020/flsp-consultation.pdf>.

47. The promotion of ADR through these statutory mechanisms is an important step, and cannot be underemphasized. However, it will require further statutory and regulatory change to ensure proper implementation, a commitment from all parties and legal professionals for it to be used effectively, and the imposition of consequences by the bench when it is not.

48. One area where ADR may not be appropriate is where there are significant power imbalances that cannot be rectified through legal counsel, or where there is a pattern of historic and ongoing family violence. Bill 207 introduces amendments relevant to these considerations as well.

PART 4: ADDRESSING FAMILY VIOLENCE

49. The previous *CLRA*, like the previous version of the *Divorce Act*, failed to properly define in statute what family violence means. In evaluating what used to be called custody or access, s. 24(4) examines any history of violence and abuse against the spouse, any child, or other person in the household. While past conduct of violence and abuse is only considered under s. 24(3) in assessing a person's ability to act as a parent, the ambiguity of these provisions provides ample room for misunderstanding, especially by the parties.

50. Family violence is not limited exclusively to acts of physical violence. More properly referred to as coercive control or power imbalances by family law professionals and practitioners, these dynamics can exist across a wide range of psychological, economic, cultural, emotional, and other factors.

51. Bill 207 attempts to provide this more expansive definition, in s. 18(1) of the *CLRA*, including "a pattern of coercive and controlling behaviour," and also including subjective perspectives of fear for safety, and direct or indirect exposure of this behaviour to a child. The Bill goes even further in s. 18(2) to clarify that "family violence" need not constitute a criminal offence, and includes a wide range of behaviours, as follows:

> (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect oneself or another person;
> (b) sexual abuse;
> (c) threats to kill or cause bodily harm to any person;
> (d) harassment, including stalking;
> (e) the failure to provide the necessaries of life;
> (f) psychological abuse;
> (g) financial abuse;
> (h) threats to kill or harm an animal or damage property; and
> (i) the killing or harming of an animal or the damaging of property.

52. While these factors already existed in common law, codifying this in statute provides greater clarity, creates greater objectivity in the minds of the parties, many of whom are self-represented, and will ultimately benefit the victims of family violence. Even

more importantly, it may provide an opportunity for parties locked in a cycle of family violence to better identify problematic behaviour, address it with resources found outside the justice system, and prevent these behaviours from escalating or continuing altogether.

53. Family violence is a highly gendered phenomenon in Ontario, and across Canada.[32] This is in large part due to historic and deeply entrenched patterns, roles, and perceived responsibilities, informed by culture, tradition, faith, or broader societal forces.

54. Given the highly gendered nature of this phenomenon, DCLC strongly supports the creation and funding of dedicated and specialized resources for women facing these issues. For example, DCLC works closely with Luke's Place, a non-profit organization located in Durham Region, devoted exclusively to improving the safety and experience of women and their children as they proceed through the family law process after fleeing an abusive relationship. This approach, and the provision of specialized funding in support of this approach, is consistent with statutory provisions found in s. 14 of the Ontario *Human Rights Code*,[33] and s. 15(2) of the *Canadian Charter of*

[32] Marta Burczycka, "Police-reported intimate partner violence in Canada, 2018," Statistics Canada, Dec. 12, 2019, available at: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00018/02-eng.htm>. See also, Elizabeth Reed, "Intimate partner Violence: A Gender-Based Issue," *American Journal of Public Health (98:2)*, February 2008 at 197-198.
[33] RSO 1990, c H.19.

Rights and Freedoms.[34] It is also consistent with Canada and Ontario's obligations under international law.[35]

55. Despite this recognized need for special programs and resources to address systemic problems of this nature, an equity-oriented and human rights approach towards family violence must also incorporate intersectionality.[36] This approach may give rise to unexpected examples of power imbalances, coercive control, and behaviour meeting the definition of family violence under Bill 207. Some illustrative examples include:

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[34] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [the "*Charter*"]; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at 169; *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497; *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 SCR 950; *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483, paras 16, 37, 40-41 48-49, 52-54; *R. v. Cunningham*, 2010
See also, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 for an example of cross-referencing between the *Charter* and human rights jurisprudence.

[35] *International Covenant on Civil and Political Rights* (ICCPR), December 19, 1966, [1976] Can TS No 47, Arts 2, 26; *International Covenant on Economic, Social and Cultural Rights* (ICESCR), (1976) 993 UNTS 13, Art 2(2); *Convention on the Rights of the Child*, November 20, 1989, [1992] Can. T.S. No. 3 (entered into force 2 September 1990), Art 2; *Convention on the Elimination of All Forms of Discrimination against Women*, Can TS 1982 No 31; *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, Can TS 2010 No 8 (entered into force 3 May 2008, ratified with reservations by Canada 11 March 2010) (CRPD), Arts 5-6. See also, generally,
Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, Arts 1, 2, 7; *American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights*, San José, Costa Rica, 22 November 1969, OASTS No 36; 1144 UNTS 123, Art 24;
European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, Art 14;
Constitution of the United States of America, 5th and 14th Amendments.

[36] Ontario Human Rights Commission, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims," Oct. 9, 2001, available at: <http://www.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf>

a. A heterosexual cis-gendered relationship, where the woman is not racialized, and the man is racialized, and the woman uses threats of unwarranted police involvement in order to obtain concessions from the man.
Despite an increased awareness and attention to the difficult and often strained relationships between law enforcement and minority communities, and specifically for Black men, the nature and role of this power imbalance, where a woman is the one exerting the influence and control improperly, remains frequently overlooked. This type of dynamic could be described as a form of psychological control, but could also be considered as threats of physical abuse or bodily harm, despite being the potential threat being inflicted or imposed by a third-party (i.e. law enforcement) in a position of authority. This power dynamic can also play itself out generally in family law disputes, with invocation of the pervasive stereotypes and biases against racialized men within the justice system as a tool or form of leverage.
A corollary example of this type of power imbalance, relying on the extrinsic power systems outside the dynamics of the relationship, include where one partner has formal legal immigration status, and the other does not, which very easily can occur across both genders in heterosexual cis-gendered relationships. Complex intersections of language, literacy, and familiarity with the justice system can also arise in these contexts.

b. Power imbalances based on race, culture, religion and other minority status can also arise in same-sex relationships, where the non-minority partner similarly refers or relies on threats of outside power structures and institutions as a basis to impose control or leverage over the other party. This can also include threats of outing or going public via the litigation process about the partner's sexual orientation or identity, especially where that minority partner has not come out, and where they belong to a minority community that may not be as accepting about different forms of sexual orientation.
The threat seeks to alienate the other partner, and is therefore a form of psychological abuse, but can also result in forms of financial abuse due to the isolation that a minority party may face, and their inability to easily obtain supports from friends, family, and community.
Although courts in Ontario recently created a common law privacy tort in the family law context,[37] this tort relies on publicly placing a plaintiff in a *false* light. What might be more useful is the privacy tort of public disclosure of private facts,[38] which is an important tool to prevent the sharing of private and sexual information, including intimate images.[39] In this context, including in heteronormative relationships, instances of revenge porn or other forms of cyberbullying may fall into examples of family law violence, as a form of psychological

[37] *Yenovkian v. Gulian*, 2019 ONSC 7279.
[38] *Doe 464533 v N.D.*, 2016 ONSC 541; 2017 ONSC 127; *Jane Doe 725111 v Morgan*, 2018 ONSC 6607.
[39] See, for example, Natasha Chettiar, "Revenge Porn – don't press the send button! Your Options for Responding to NonConsensual Image Sharing," *27th Annual Institute of Family Law Conference*, 2018 CanLIIDocs 10844, available at: <http://www.canlii.org/t/sqw4>; Sarit K Mizrahi, "Ontario's New Invasion of Privacy Torts: Do They Offer Monetary Redress for Violations Suffered via the Internet of Things?," *Western Journal of Legal Studies*, 2018 CanLIIDocs 65, available at: <http://www.canlii.org/t/29mm>; Suzie Dunn and Alessia Petricone-Westwood, "More than "Revenge Porn" Civil Remedies for the Nonconsensual Distribution of Intimate Images," *38th Annual Civil Litigation Conference*, 2018 CanLIIDocs 10789, available at: <http://www.canlii.org/t/sqtc>.

abuse, especially where the conduct involves dissemination of private or intimate information or details.

c. The involvement of any party with a form of disability, which can include physical, but also mental or psychological disabilities, can give rise to unique vulnerabilities and power imbalances. If one party is dependent on the other for physical care due to their disability, the family separation and dispute resolution process is potentially subject to some very direct physical abuse, where care can be withheld or delayed as a result of any power imbalances. Issues of care for physical disabilities can also extend to dependents and children, as physical abuse is defined as including "bodily harm to *any* person." This form of abuse may also involve failures "to provide the necessaries of life," if the extent of the dependency includes care essential to the Activities of Daily Living (ADLs).
While mental health issues often feature prominently in family law disputes, especially in high conflict disputes, their existence alone without any evidence on the ability of a parent to provide care, is more informative of the social dynamics between the parties than any direct interests of the child.[40] Societal stigmas around mental health, and concerns that an adverse party or the court would use these conditions against a party seeking parenting input, often results in incomplete disclosure of mental health conditions, inadequate treatment and attention by health professionals, and often an exacerbation of parental conflict due to unresolved and underlying issues that affect power dynamics and communication styles between parties.
An intersectional approach towards power imbalances, coercive control, and behaviour meeting the definition of family violence in the context of disabilities should ensure that proper and appropriate supports are put in place for the parties, including social, emotional, and psychological care for parties experiencing mental health issues or distress.

56. The proper approach to intersectional issues is not to treat them as simply additive, where different protected grounds of human rights are combined in an attempt to identify heighted vulnerabilities, but rather a case-by-case analysis that properly employs the complex social dynamics of the parties involved.[41] Unfortunately the family justice system, including ancillary bodies such as the Office of the Children's Lawyer (OCL) and Children's Aid Society (CAS), lack the proper sophistication to

[40] *B.V. v. P.V.*, 2011 ONSC 2697 at para 72.
[41] Omar Ha-Redeye, "Investigating Issues of Intersectionality," Slaw, Feb. 24, 2019, available at: <http://www.slaw.ca/2019/02/24/investigating-issues-of-intersectionality/>.

properly navigate these power imbalances during family separation. External resources, especially in community-based social work, counselling, and restorative practices, are typically far better positioned to understand and address these needs.

57. One intersection present in absolutely every family dispute is that of wealth, income, and potentially poverty. This goes beyond the simple fact that a shared pool of assets or incomes must now support multiple homes. At the very worst, one or both parties experience some economic strain as a result of family separation. At the very worst, one or both parties face dissipation of all assets, poverty, debt, and even homelessness. Middle class and low-income Ontarians are therefore more susceptible to the inefficiencies and ineffectiveness of the family law system.

58. The inability to identify, address, and resolve power imbalances, coercive control, and domestic violence in a manner consistent with the best interests of a child are therefore more pronounced in circumstances where financial resources are scarcer. Private sector resources such as financial planners, counselling, treatment, therapy, and other services that can assist the separation process are unlikely to be utilized by those who do not have access and cannot afford them.

59. Properly addressing family violence during family separation, which should include as goals prevention, capacity building, and behaviour modification, is therefore better served through explicit reference and expansive definitions of family violence in the

CLRA, especially in light of the challenges and barriers low-income Ontarians confront in the family law context.

60. Combined with further commitments to build these resources outside the justice system, but working in conjunction with legal professionals, will inevitably be the only feasible way to provide support to separating parties who have experienced or may experience family violence.

PART 5: PRESUMPTION OF JOINT DECISION-MAKING

61. Although the two main domains in family law are financial determinations, such as property division and support, and determinations around any children, including decision-making and residency schedules, most high-conflict family law disputes are truly focused on the children. Financial claims, withholdings, unreasonable/non-cooperative positions, and allegations around financial issues are often used as a proxy for control over children, even through the settlement process.

62. The adversarial nature of court proceedings creates an erroneous perception of "zero-sum" outcomes, especially as it relates to children. For this reason, issues around control and contact of children, and how they should be addressed in family law reform, remains a highly contentious issue.

63. The *Divorce Act* (ss. 16(10),(17(9)) contains the "maximum contact" principle, which creates a rebuttable presumption that it is in that it is in the best interests of the child that they should have as much contact with each parent as possible, with considerations around what used to be called custody and variations of custody accounting for this important principle.[42]

64. The new amendments to the *Divorce Act* under Bill C-78 maintain this principle, but replace it with a new section under s. 16 that focuses explicitly on the "Best Interests of the Child." Although the primary considerations of this interest under s. 16(2) of the *Divorce Act* are the child's "physical, emotional and psychological safety, security and well-being," the new definitions of family law violence must be considered under s. 16(4) in determining this interest.

65. The federal amendments also qualify the maximum contact principle under s. 16(6), "as is consistent with the best interests of the child." While the common law previously interpreted the best interests in this manner,[43] the concern would be that the maximum contact principle would serve to override other more important considerations in the

[42] *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 SCR 27 ["*Gordon*"]; *Young*, *supra* note 21 at 117-118.
[43] *Gordon*, *ibid*, at para 24; See also, *DAF v SRG*, 2020 ABCA 25; *Ackerman v Ackerman*, 2014 SKCA 86; *M.N.K.S. v. R.T.S.*, 2002 BCSC 1247; *Chakraborty v. Chakraborty*, 2008 CanLII 56927; *Droit de la famille — 192323*, 2019 QCCS 4867; *TLMB v PJWB*, 2011 NBQB 238; *Harnett v Clements*, 2019 NLCA 53; *J.Y.P. v. R.J.L.M.*, 2007 NSCA 5; *S.L.W. v. P.D.O.*, 2009 PECA 13.

child's best interests for a parenting or contact order under ss. 16.1-16.5, or parenting plan under s. 16.6.[44]

66. This qualification of the maximum contact principle being subject to the best interests of the child and family law violence also provide important procedural abilities to the judiciary for behaviour modification of the parties. Improper conduct by a party, which can include lack of disclosure, unreasonable positions in litigation, and parental alienation, can all be used to signal to parties and the bench that this conduct in the litigation process is harmful to the child, and will not be condoned by the court.

67. Utilization of the best interests of the child by the courts by applying these statutory principles in this manner has the potential to reduce conflict, promote cooperation, and create better outcomes for the parties and the children.

[44] Several options for modifying child custody and access were evaluated in an older federal study; Brenda Cossman, "An Analysis of Options for Changes in the Legal Regulation of Child Custody and Access," (2001) Department of Justice Canada, available at: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2001_2b/intro.html>. The study considered several options, including shared parenting, but criticized the ambiguous nature of these approaches, and limitations of these types of presumptions where there is a history or risk of domestic violence, or "very disparate parenting roles." Some propose a child's right that would create presumption of frequent and predictable contact with both parents, as scheduled with the child's needs, unless there is a risk to a child's physical or emotional well-being ("Friendly Parent Rule," available at: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2001_2b/option1b.html>).Others have indicated that the needs of children will only become clearly visible when interventions are inclusive of the social, legal and political nature of needs of children; Rachel Birnbaum, "Rendering children invisible: The forces at play during separation and divorce in the context of family violence," In Ramona Alaggia & Cathy Vine (Eds.), Cruel but not unusual: Violence in Canadian families (267–324: Wilfrid Laurier University Press.

68. Bill 207 takes a different approach, and diverges from Bill C-78 in this manner. The amendments to s. 20 of the *CLRA* create a rebuttable presumption of joint decision-making.

69. Other factors are taken into consideration in the *CLRA*, including family violence and the best interests of the child. In fact, the amended *CLRA* indicates in s. 24(1) that the court shall *only* take into account the best interests of the child when making a parenting or contact order, and include as factors in this determination the child's "physical, emotional and psychological safety, security and well-being" in s. 24(2), and factors relating to family violence in s. 24(4).

70. In effect, Bill 207 should have no practical implications in the application and interpretation of the best interests of the child from the approach taken in Bill C-78, but it is possible that the jurisprudence will have to confirm the same through interpretation.

71. There are strong policy reasons to promote joint decision-making, in particular when considering the best interest of the child. A child deserves to be loved and cared for by both parents. A child also deserves to have a relationship with both parents.

72. Although it is undeniable that some parents are more capable or more inclined to parent than others, the threshold for withholding a parent from a child and vice versa

should be high. The loss of a parent-child relationship is too high a price to pay for both parties, and typically has an adverse impact on the child.

73. Approaches to parenting will differ between cultures, religions, sexes, ages, professions, and personality. Although love and care form the core of good parenting, the specific details and interpretations of what good parenting can looks like in daily life can look different to different people. Some parents are strict and express love by enforcing rules and encouraging academic success. Other parents are easy-going and express love by supporting their children, no matter where their decisions lead them.

74. Gary Chapman describes in "The Five Love Languages: How to Express Heartfelt Commitment to Your Mate",[45] that there are five love languages, which include: words of affirmation, physical touch, acts of service, quality time, and gifts. Although this book was not written specifically to address the state of family law in Ontario, it supports the proposition that love can be expressed in different ways. These different ways of expressing love, when provided in the best interest of the child, will invariably benefit that child. Each parent may express this differently, but should be able to recognize and appreciate these differences as something that is a child's right to benefit from.

[45] Gary Chapman, The Five Love Languages: How to Express Heartfelt Commitment to Your Mate, (2004) Northfield Publishing, available at: <https://archive.org/details/fivelovelanguage00chap>.

75. Creating a statutory but rebuttable presumption of joint decision-making could signal to parties the legislature's goal and intent of fostering cooperative and collaborative parenting approaches. A party seeking to displace this presumption would have to do so on their own initiative and with evidence to the court.

76. While a presumption of joint decision-making was deliberately excluded from Bill C-78 due to the concern that victims of family violence would be reluctant to challenge the best interests of the child due to potential repercussions or even resistance from the court, the inclusion of family violence as a factor directly related to the best interests of the child in the *CLRA* should alleviate this concern.

77. The use of the best interests of the child as the *only* factor for parenting or contact orders in Bill 207, despite a statutory provision creating a rebuttable presumption of joint decision-making, should still allow the bench to signal to parties that inappropriate conduct, including forms of family violence, will not benefit them and will not be tolerated by the court.

78. While on its face, Bill 207 may appear to be a simple procedural amendment to mirror changes implemented federally through Bill C-78, the practical implications of these changes are much more significant.

79. Due to the constitutional division of powers requiring the administration of the justice system to occur provincially, these changes allow Ontario to assist in fostering the necessary culture change in family law that promotes out-of-court dispute resolution as the primary means for family law disputes.

80. This shift of family law disputes out of the court will allow the courts to properly focus on those family law cases which do require judicial intervention, including where there is a history or a potential of family law violence. These changes may also assist the judiciary in enabling behavioural modification for parties who do appear before the court, and are engaging in any form of improper conduct, either in the litigation process itself, or towards the other party.

81. The shift to ADR and community-based resources will allow the provincial government to reallocate justice resources to criminal matters, where a constitutional right to greater responsiveness exists.[47] This will invariably save taxpayers significant resources and should bolster public confidence in the justice system. However, this culture shift will also require the provincial government to provide support and funding to community-based resources, especially those that demonstrate creativity,

[47] *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631; *R. v. Cody*, 2017 SCC 31 (CanLII), [2017] 1 SCR 659.

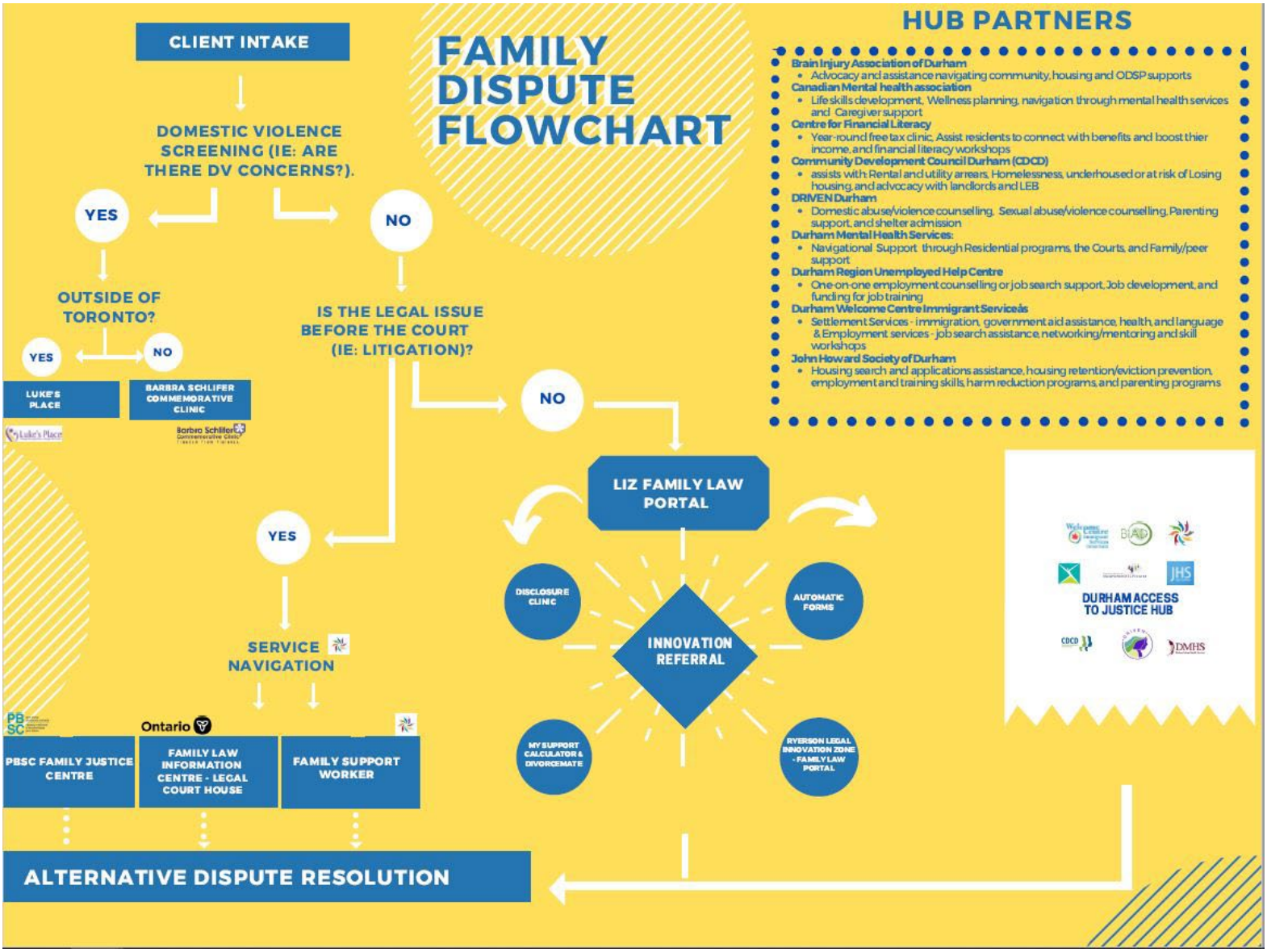
innovation, efficiency, and a willingness to try new models and incorporate new forms of technology.

82. The overriding purpose for these changes, and the need for the amendments called for in Bill 207, are to create a family law system that is solution-oriented, and not dispute-oriented. The reason for this goal is that it saves the parties time and money, but also produces better outcomes for any children involved. Children are the most vulnerable members of our society, and they have for many years been improperly served by the family law justice system and the society they live in, largely due to the inability or ignorance of parents with regards to accessing potential alternatives.

83. The public policy reasons for promoting all measures that can reasonably resolve family disputes in a collaborative manner are therefore paramount, and worthy of universal and unqualified support. For these reasons, DCLC strongly encourages the adoption of these amendments, and a commitment by this government to continue to support and fund these goals.

DCLC
Durham Community Legal Clinic

APPENDIX "A" – FAMILY LAW TRIAGE PROJECT



Notes:

1. DCLC does not provide parties any family law legal advice, though hundreds of residents in Durham Region call the clinic in regard to family law every year. In cooperation with the Durham Access to Justice Hub® (the "Hub"), the clinic can provide information, supports, and referrals to agencies and partners who do provide legal advice, and engages in public legal education and law reform as it relates to poverty, including in the areas of family law.
2. This project is still in development and was expanded in January 2020 to include several partner agencies, lawyers, and mediators in Barrie and Ottawa. These cooperative relationships are essential to continuously engage in process and quality improvement, to share benchmarks and lessons, and gather collective expertise and resources.
3. The COVID-19 pandemic directly disrupted the planning and implementation of this project, starting in March 2020. In the few months of implementation, the Hub saw dozens of interested parties who utilized referrals, resources, and information provided to them. However, a considerable amount of additional training and education materials are still needed for this project to be successful.
4. The Hub is also developing a Centre for Financial Literacy, which includes free year-round tax returns. This financial information is crucial for full and early disclosure of families in separation, which can assist in early resolution and reduction in conflict. Future materials in this Centre will include budgeting, financial planning, and other crucial skills necessary for families undergoing separation.
5. Although PBSC's program is listed here in this plan, this centre was also disrupted by the COVID-19 pandemic and will likely not be providing services until early 2021.