April 15, 2024

British Columbia Law Institute
The University of British Columbia
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Via email: consultations@bcli.org

Re: Joint Submission of West Coast LEAF and Rise in Response to the BC Law Institute's Consultation Paper on Parentage

Introduction

The BC Law Institute ("BCLI") seeks public input on its Consultation Paper on Parentage (the "Consultation Paper"),[1] which reviews BC's parentage regime in Part 3 of the *Family Law Act* ("*FLA*")[2] and sets out tentative recommendations for reform. West Coast LEAF Association ("West Coast LEAF") and Rise Women's Legal Centre ("Rise") make this joint submission in response to the Consultation Paper.

West Coast LEAF is a BC-based advocacy organization that uses legally rooted strategies (litigation, law reform and public legal education) to dismantle gender-based discrimination and move toward gender justice. West Coast LEAF aims to transform society in collaboration with those most affected and most marginalized by overlapping systems of oppression, including colonialism, patriarchy, racism, white supremacy, ableism, and capitalism.

Rise Women's Legal Centre ("Rise") is a *pro bono* community legal centre providing accessible legal services that are responsive to the unique needs of self-identifying women and gender diverse clients. Rise provides limited legal services to clients, who are often self-representing in their family law matters in BC. Rise clients include people who are economically disadvantaged, members of marginalized groups, and people seeking protection from family violence. In addition to providing direct service to clients, Rise conducts original research into family violence and the legal system and provides support and training to provincial advocacy programs.

[1] British Columbia Law Institute, "Consultation Paper on Parentage: A Review of Part 3 of the *Family Law Act*" (February 2024) [Consultation Paper].
[2] *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*].

West Coast LEAF and Rise respectfully acknowledge that our offices are located on traditional, ancestral, and unceded Coast Salish homelands, including the territories of the xwməθkwəy̓əm (Musqueam), Skwxwú7mesh (Squamish), and səl̓ílwətaʔɬ/Selilwitulh (Tsleil-Waututh) Nations (colonially identified as the City of Vancouver). Our organizations strive to center decolonial practices to recognize and uphold Indigenous self-determination and the rights and interests of Indigenous people and communities.[3]

Background

Parentage describes the legal relationship between a parent and child.[4] In Canada's colonial legal systems, parentage is understood as a lifelong and immutable status that forms the basis of a child's identity, lineage, citizenship, and inheritance rights.[5] It is also a gateway through which parental responsibilities are granted, allowing a parent to take care of and make decisions about their child.[6] The concept of parentage (i.e., the question of who is a parent) has evolved to reflect social and technological changes. Historically, within colonial law, parentage was regarded as a proprietary interest (as children were regarded as property or as possessions) and linked to concepts of legitimacy.[7] The emphasis of parentage today is child-centered.[8] By promoting secure and stable parent-child relationships, parentage is seen as essential to the social, physical, and emotional health of children.[9] The concept of parentage has also expanded to recognize non-biological parents and/or families that do not conform to the heterosexual nuclear family paradigm (i.e., married, opposite-sex parents who live together with their children). Despite these changes, 2SLGBTQIA+, polyamorous, non-conjugal, single parent, and multiple-parent families continue to face unequal access to the benefits and protections of parentage law, including here in BC.

In BC, Part 3 of the *FLA* ("Part 3") establishes comprehensive rules for determining a child's parentage. It essentially creates two parentage regimes: one that applies to children conceived through sexual intercourse, and one that applies to children

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[3] Myrna McCallum and Haley Hrymak, "Decolonizing Family Law Through Trauma-Informed Practices" (2022) Rise Women's Legal Centre and "Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare" (2019) West Coast LEAF.
[4] Consultation Paper, supra note 1 at xvii.
[5] Consultation Paper, *supra* note 1 at 59.
[6] Consultation Paper, *supra* note 1 at 60.
[7] Consultation Paper, *supra* note 1 at 72, citing Manitoba Law Reform Commission, "Assisted Reproduction: Legal Parentage and Birth Registration" (April 2014), at 1.
[8] Consultation Paper, *supra* note 1 at 75.
[9] Movement Advancement Project, "Relationships at Risk: Why We Need to Update State Parentage Laws to Protect Children and Families" (June 2023) online: www.mapresearch.org/2023-parentage-report [MAP Paper] at 1.

conceived through the use of assisted reproduction.[10] Where a child is conceived through sexual intercourse, the only basis for parentage is genetic connection.[11] In other words, as described in s. 26 of the *FLA*, the child's parents are their "birth mother" and "biological father."[12] On the other hand, where a child is conceived through assisted reproduction, Part 3 recognizes the intention to be a parent as a basis for parentage.

In the context of assisted reproduction, Part 3 legislates three pathways to parentage:

- Generally, the parents of a child conceived through assisted reproduction are the "birth mother" and the "birth mother's" spouse (regardless of who provided the human reproductive material or embryo).[13] Interrelatedly, s. 24 of the *FLA* confirms that a donor of human reproductive material or an embryo is not a parent by reason alone of their donation.[14]

- Section 29 of the *FLA* authorizes surrogacy arrangements under which the intended parent(s) and the surrogate agree that the surrogate will not be a parent.[15]

- Finally, s. 30 of the *FLA* enables other parentage arrangements, including circumstances in which there are more than two legal parents, where there has been a written pre-conception agreement. More specifically, it permits a child's parents to be (a) the "birth mother" and the intended parent or parents or (b) the "birth mother" and their spouse along with a donor.[16]

In 2020, the Ministry of Attorney General asked the BCLI to review and recommend reforms to Part 3, with the goal of modernizing the legislation.[17] To support this work, the BCLI subsequently convened the Parentage Law Reform Committee (Committee"), comprised of legal, medical, and public policy experts.[18] The Committee drafted the Consultation Paper to obtain public input on its 34 tentative recommendations for

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[10] Consultation Paper, *supra* note 1 at 83, citing *British Columbia Birth Registration No 2018-XX-XX5815*, 2021 BCSC 767 *[Birth Registration Case*] at para. 18.
[11] Consultation Paper, *supra* note 1 at 83.
[12] *FLA, supra* note 2, at section 26(1). Please note that Part 3 was not drafted using gender-neutral language and it uses the terms "birth mother" and "biological father" to describe a child's biological parents. As discussed later in this submission, West Coast LEAF and Rise support the Committee's tentative recommendation to redraft Part 3 in gender-neutral language.
[13] *FLA, supra* note 2, at section 27.
[14] *FLA, supra* note 2, at section 24.
[15] *FLA, supra* note 2, at section 29.
[16] *FLA, supra* note 2, at section 30.
[17] Consultation Paper, *supra* note 1 at 2.
[18] Consultation Paper, *supra* note 1 at 3.

reform.[19] The tentative recommendations primarily seek to: (1) expand the legal recognition of diverse families and pathways to family formation; (2) improve processes and procedures for establishing parentage; and (3) close small legislative gaps to better achieve Part 3's goals. The tentative recommendations also address other important issues connected to parentage law, including (1) donor-conceived people's access to identifying information about their donor(s) and (2) the parentage of a child conceived as a result of sexual assault.

West Coast LEAF and Rise's joint submission on the Consultation Paper arises from their shared interest in inclusive and accessible parentage law that promotes the substantive equality of children, parents, and families. In particular, we support the creation of fair, effective, and accessible pathways for recognizing parent-child relationships in 2SLGBTQIA+, polyamorous, non-conjugal, single parent, and multiple-parent families.

The Importance of Recognizing Diverse Families and Pathways to Family Formation

As it stands, Part 3 is not inclusive of and accessible to all families in the province, with disproportionate adverse impacts on 2SLGBTQIA+, polyamorous, non-conjugal, single parent, and multiple-parent families. The following paragraphs expand on the ways in which the current law fails to recognize the diversity of families and pathways to family formation.

First, Part 3 uses gendered language, including the terms "birth mother" and "biological father," to describe parents and other people involved in the conception and birth of children.[20] This language is exclusionary, out of synch with BC's human rights protections, and creates uncertainty around the scope of Part 3's application to transgender and non-binary parents and their families.[21]

Second, Part 3's rules on the parentage of children conceived through sexual intercourse reflect and reinforce heteronormative assumptions about which types of families have children through sexual intercourse. In particular, Part 3 does not enable a child conceived through sexual intercourse to have a parent who does not share a genetic connection (or presumed genetic connection) with them, and it does not enable a child to have more than two parents.[22] In the *Birth Registration* case, the BC Supreme

[19] Consultation Paper, *supra* note 1 at xvii.
[20] Consultation Paper, *supra* note 1 at 265-268.
[21] Consultation Paper, *supra* note 1 at 265-268.
[22] *FLA*, *supra* note 2 at section 26.

Court identified this legislative gap in relation to a polyamorous family and relied on its inherent jurisdiction to grant legal recognition to the child's third non-biological parent.[23] Part 3 also does not recognize the intended parents of a child who was conceived by sperm donation via sexual intercourse, meaning that a child's parents in these circumstances would be the "birth mother" and the donor (i.e., the "biological father"). There are many reasons why individuals may choose to form a family in this manner, including the many barriers associated with assisted reproduction, (e.g., cost, logistical issues, delay, restrictions imposed by fertility clinics, and the impacts of systemic discrimination in the health care system on marginalized families).[24]

Third, Part 3 does not recognize the parentage of a person who dies before their child is conceived and who is not genetically linked to the child. In other words, if a couple creates an embryo with the assistance of a donor and the non-biological parent dies prior to the embryo's implantation, Part 3 does not enable the non-biological parent to be recognized as a legal parent.[25]

Fourth, Part 3's more expansive approach to the parentage of children conceived through assisted reproduction is still unduly restrictive. According to the BC Government's section notes on Part 3, s. 30 provides "an exception to the rule that a donor may not be a parent."[26] It thus primarily contemplates parentage arrangements where a couple along with a birth mother wish to parent together (as an alternative to surrogacy), or a couple and a donor wish to parent together.[27] A prototypical scenario is described in *Cabianca v. British Columbia (Registrar General of Vital Statistics)*, where the petitioners - a lesbian couple and the person who provided the sperm for the petitioners' two children- sought a court declaration that the "donor" was the children's third legal parent.[28] While s. 30 could be interpreted to apply to a polyamorous triad[29] or a non-conjugal family (such as a birth parent and their platonic friend who seek to parent a child together)[30] in certain circumstances, it does not clearly contemplate such scenarios. Moreover, s. 30 does not appear to allow parentage arrangements with more

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[23] *Birth Registration Case, supra* note 10 at para. 68.
[24] Consultation Paper, *supra* note 1 at 120.
[25] *FLA, supra* note 2 at section 28.
[26] "Family Law Act Section Notes, Part 3," found at: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part3.pdf [Section Notes] at 4.
[27] Section Notes at 4. See also Fiona Kelly, "Multiple-Parent Families under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting," 2014 47-2 *UBC Law Review* 565 ["Multiple-Parent Families"] at 567.
[28] *Cabianca v British Columbia (Registrar General of Vital Statistics)*, 2019 BCSC 2010.
[29] *Birth Registration Case*, *supra* note 10 at para. 22.
[30] In a 2017 decision that garnered international attention, an Ontario court recognized Lynda Collins as a legal parent of her platonic friend's biological child. See Lynda M Collins, "Are You My Mother? Parentage in a Nonconjugal Family," (2018) 31:1 *Canadian Journal of Family Law* 105.

than three legal parents (such as a four-parent family made up of the birth parent, the birth parent's spouse, the donor, and the donor's spouse).[31]

Based on their shared interest in inclusive and accessible parentage law, West Coast LEAF and Rise support the Committee's tentative recommendations to redraft Part 3 in gender-neutral language.[32] We also support the tentative recommendations that would expand Part 3's recognition of parentage through:

- Enabling children conceived through sexual intercourse to have more than two parents (without restrictions on who can be an intended parent or the number of parents);[33]

- Recognizing sperm donation by sexual intercourse;[34] and

- Recognizing the parentage of a person who dies prior to their child's conception through assisted reproduction, regardless of genetic connection.[35]

West Coast LEAF and Rise largely agree with the Committee's analysis underpinning the above expansions. We emphasize that 2SLGBTQ+, polyamorous, non-conjugal, single parent, and multiple-parent families have always existed and represent functional and valuable models of raising children.[36] Their substantive equality requires equal access to the benefits and protections of parentage law.

While the Consultation Paper makes tentative recommendations that would broadly recognize diverse family structures in the context of a child conceived through sexual intercourse, it does not propose parallel reforms to s. 30 of the *FLA*. West Coast LEAF and Rise recommend that the BCLI update or clarify its recommendations to ensure the equal treatment of diverse families regardless of how a child was conceived. More specifically, s. 30 should clearly enable the legal recognition of polyamorous, non-conjugal, and multiple-parent families with no limits on who can be an intended parent or the number of parents.

The Importance of Fair, Effective, and Accessible Processes

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[31] *FLA, supra* note 2, at section 30.
[32] To read the Committee's discussion of this tentative recommendation, see Consultation Paper, *supra* note 1, at 265-269.
[33] To read the Committee's discussion of this issue, see Consultation Paper, *supra* note 1, at 87-105.
[34] To read the Committee's discussion of this issue, see Consultation Paper, *supra* note 1, at 117-124.
[35] To read the Committee's discussion of this issue, see Consultation Paper, *supra* note 1, at 185-205.
[36] Multiple-Parent Families, *supra* note 27 at 569.

Expanding the scope of parentage law will not in and of itself promote substantive equality. The processes and procedures for establishing parentage through a parentage agreement must also be fair, effective, and accessible. West Coast LEAF and Rise have considered two guiding principles when assessing the Committee's tentative recommendations with respect to Part 3's processes and procedures. These principles are described below.

Processes and procedures under Part 3 must have a strong policy justification and be minimally burdensome.

Parentage law has developed such that family structures based on genetic connection enjoy maximum legal recognition and minimal state intervention. Conversely, some family structures based on intention are not legally recognized at all, while others face stringent and inaccessible legislative requirements to establish parentage. Such requirements may stem from discriminatory assumptions and stereotypes, as well as the mere opportunity to regulate some families and pathways to family formation more than others.

To support the legal recognition and self-determination of diverse families, processes and procedures that create certainty and clarity around parentage will often be justified. Parent-child relationships based on genetic connection can generally be established through the rebuttable presumptions set out in s. 26 of the *FLA*, and any dispute can be resolved through genetic testing. On the other hand, intentions around parentage may lack clarity or be misunderstood, and may be more difficult to prove in the event of a parentage dispute. Where parties seek the assistance of the court system to resolve a parentage dispute, ambiguity and uncertainty around intention may lead the court to privilege biology over intended family relationships.[37] This could manifest in scenarios where the court fails to recognize the parentage of a non-biological parent, or recognizes an intended donor as a parent.[38] Such an approach may be reinforced by discriminatory assumptions and stereotypes in the court system about different family types and pathways to family formation. For example, lesbian couples and single mothers by choice have historically struggled to protect the integrity of their family unit where a sperm donor seeks to be recognized by the court as a legal parent.[39] Underpinning this bias is the pernicious perception that women-led families are

[37] Fiona Kelly, "Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families" (2013) 64 University of New Brunswick Law Journal 253 [Equal Parents, Equal Children].
[38] Equal Parents, Equal Children, *supra* note 37 at 255-256.
[39] Equal Parents, Equal Children, *supra* note 37 at 255-256.

incomplete and that it is in the child's best interests to know and be connected to their biological father.[40]

Processes and procedures with a protective purpose must be grounded in clear and cogent evidence of an extraordinary risk of harm. This approach will ensure that Part 3 does not reflect or reinforce discriminatory assumptions or stereotypes about the risk of abuse or exploitation in different family structures or pathways to family formation. Moreover, it will ensure that Part 3 does not take a paternalistic approach to "protecting" some people and families more than others just because it can. Regrettably, vulnerability, abuse, and exploitation are problems affecting all family types and pathways to family formation. However, Part 3 does not regulate every parent-child relationship to protect against these problems. Where a child is conceived through sexual intercourse, Part 3 provides automatic legal recognition to a child's biological parents without consideration of the family's circumstances, including the presence of vulnerable parties, abuse, and/or exploitation. This is the case even where the child was conceived as a result of sexual assault. Instead of denying parentage outright to a perpetrator of sexual assault, the *FLA* has chosen to rely upon the concepts of guardianship, parental responsibilities, and parenting time to protect vulnerable parents and children.[41] The Committee does not propose to change this approach.[42]

To promote substantive equality and avoid state overreach, procedural requirements with a strong policy rationale must also impose minimal additional burdens on families who must establish parentage through a parentage agreement. In other words, they must not exceed the level of regulation required to achieve their objectives.

Processes and procedures under Part 3 must embed access considerations.

Processes and procedures under Part 3 raise numerous access considerations. There is no doubt that Part 3 is a complex and potentially confusing regime to lawyers and lay people alike, especially as it applies to parentage outside of the heterosexual nuclear family paradigm. In this context, stringent procedural requirements risk non-compliance, including because of misunderstandings or oversights. This has disproportionate impacts on low-income and/or marginalized families, who may not have access to legal assistance and/or the support of a clinical setting. Any costs or logistical challenges associated with a procedural requirement only raise additional barriers to compliance.

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[40] Susan Boyd et al, *Autonomous Motherhood?: A Socio-Legal Study of Choice and Consent* (Toronto: University of Toronto Press, 2015) at 103.
[41] Consultation Paper, *supra* note 1 at 105-110.
[42] Consultation Paper, *supra* note 1 at 113.

In the event of non-compliance with a procedural requirement, families will be forced to either turn to a complex and costly court process for a parentage declaration under s. 31 of the *FLA,*[43] or raise children without legal recognition of their parentage arrangement. Beyond the problem of non-compliance, inaccessible procedural requirements may stymy the formation of certain families or family structures altogether, disproportionately affecting low-income and marginalized people.[44]

The accessibility of legislated procedural requirements must also be considered in the context of external barriers to conceiving a child through assisted reproduction. While the province has recently committed in Budget 2024 to funding one round of in vitro fertilization for BC residents, barriers will no doubt persist. These barriers include cost, logistical challenges, delays, additional requirements imposed by fertility clinics, and the exclusion and alienation of marginalized families from the clinical setting, often due to systemic discrimination. We recognize that ensuring access to assisted reproduction is outside the scope of the BCLI's project, however, we believe it is important context for the purpose of revising parentage laws in BC. We suggest that BCLI consider recommending that the province look at the barriers to assisted reproduction access more generally to ensure that the legal protections being addressed in the project will have equitable uptake.

The Requirement of Written Parentage Agreements

West Coast LEAF and Rise agree that where parties seek to establish parentage through a parentage agreement, the requirement of a written parentage agreement is an important regulatory intervention because it creates clarity and certainty around intention and minimizes the risk of a parentage dispute. This in turn protects the autonomy and self-determination of diverse families. In contrast, verbal parentage agreements carry the risk of ambiguity or misunderstandings about intention, and they may lack sufficient documentation to establish the parties' intentions in the event of a dispute. For these reasons, there is a strong policy justification to discourage the use of verbal parentage agreements.

Despite the policy advantages of requiring a written parentage agreement, such a requirement should not preclude the possibility of establishing parentage through a verbal parentage agreement in certain circumstances. Parties to a verbal parentage agreement can still apply for a parentage declaration under s. 31 of the *FLA.* As discussed in more detail below, West Coast LEAF and Rise support the Committee's

[43] *FLA*, *supra* note 2 at section 31.
[44] Multiple-Parent Families, *supra* note 27 at 570.

tentative recommendation that would clarify the court's jurisdiction under s. 31 to recognize a parentage arrangement in cases where there has been non-compliance with a legislated requirement.[45]

The Timing of Written Parentage Agreements

The timing of written parentage agreements (i.e., whether they are made pre-conception, pre-birth, or post-birth) is a critical issue in the modernization process. West Coast LEAF and Rise agree that there is a meaningful policy tension between (1) providing families with more autonomy and flexibility when arriving at parentage agreements and (2) protecting families through requiring them to clarify and confirm their intentions as early as possible. Both approaches may support self-determination. Flexible timing requirements are more accessible, minimize the risk of non-compliance, and are less likely to stymy the formation of some families (such as in the case of a couple who would like to include their donor as a parent, but do not pursue this parentage arrangement because they did not enter into a pre-conception parentage agreement). Flexibility may be especially important to families who have unplanned pregnancies or who conceive their children at home (whether through sexual intercourse or at-home insemination) and thus do not access the support of a more structured clinical setting. Strict timing requirements, on the other hand, encourage early decision-making around intention and may reduce the risk of parentage disputes and the possibility that a judge will be the ultimate arbiter of parentage.

The Consultation Paper also addresses another policy concern with respect to the timing of parentage agreements in the context of sperm donation by sexual intercourse- the possibility that a person will try to contract out of parentage (and parental support obligations) after conception.[46] More specifically, the Committee raises the specter of a biological father using violence or coercion to force his partner into signing a parentage agreement that changes his status from parent to sperm donor.[47]

While a written pre-conception parentage agreement has some policy advantages, West Coast LEAF and Rise recommend that Part 3 permit written pre-birth parentage agreements wherever it requires a parentage agreement outside of the surrogacy context. Permitting a pre-birth parentage agreement is significantly more accessible, and it will still achieve the goal of creating clarity and certainty around intention in most cases. In the specific context of assisted reproduction, while many parties will opt to enter into a parentage agreement prior to conception, the Committee has not identified

[45] Consultation Paper, *supra* note 1 at 217-223.
[46] Consultation Paper, *supra* note 1 at 121.
[47] Consultation Paper, *supra* note 1 at 123.

a strong policy rationale to *require* this timing (especially since it proposes to permit pre-birth parentage agreements in relation to children conceived through sexual intercourse who have more than two parents). Any distinction between the timing of parentage agreements in the context of sexual intercourse and the timing of parentage agreements in the context of assisted reproduction should not rest on the assumption that assisted reproduction necessarily involves a clinical setting (that would thus promote the use of a pre-conception agreement). At-home insemination is a common form of assisted reproduction due in part to the many external barriers to accessing assisted reproduction in clinical settings as identified earlier in this submission.

With respect to the context of sperm donation by sexual intercourse, West Coast LEAF and Rise are concerned that the risk of a parent using violence or coercion to "contract out" of parental obligations lacks sufficient evidence at this time to be a determinative consideration. We recommend that Part 3 clarifies that in cases where a parentage agreement was made under coercion or duress, the court has the jurisdiction to set the agreement aside.

West Coast LEAF and Rise also recommend that the Committee further explore the possibility of post-birth parentage agreements in some circumstances. The Consultation Paper did not address post-birth parentage agreements, perhaps because of their potential interactions with BC's adoption laws.[48] However, West Coast LEAF and Rise note that in the United States, several states enable post-birth parentage agreements (Voluntary Acknowledgements of Parentage, or VAPs) that are signed at or shortly after birth.[49] We recommend that the Committee consider resources from the United States about the use and impacts of VAPs, as well as further consult with members of the 2SLGBTQIA+ community and other affected people about timing requirements that best reflect their experiences, priorities, and practical considerations.

The Requirement of Independent Legal Advice

West Coast LEAF and Rise agree with the Committee that parties signing agreements under Part 3 benefit from receiving Independent Legal Advice ("ILA"); everyone deserves a lawyer's assistance with their legal matters, especially those with profound impacts on family life and wellbeing. However, we do not agree with the Committee's tentative recommendation that ILA be required prior to entering into agreements under Part 3 for the following reasons.

[48] Consultation Paper, *supra* note 1 at 62.
[49] MAP Paper, *supra* note 9 at 5.

First, while we agree and acknowledge that all parties entering into agreements under Part 3 could benefit from ILA, the reality remains that requiring ILA will place a burden on those who cannot afford to secure ILA, or for whom appropriate ILA services are simply not available. A requirement that parties seek out ILA without any consideration of parties' access to legal services and advice will limit those who seek out parentage agreements under Part 3. The number of lawyers in BC who have the expertise required to give adequate ILA on Part 3 to clients is limited, particularly in rural and remote communities where there are fewer lawyers in general. Parentage agreements are not something every family law lawyer will have experience with, and drafting such agreements requires specialized knowledge to ensure proper agreement clauses. Due to the limited number of lawyers practicing in this area, clients will most likely struggle to find available legal assistance, and those lawyers who are available may charge higher fees due to the complexity of the issues involved. As a result of many factors, parties may face significant delays and additional costs to receive ILA. This requirement thus poses a burden that, in the current environment, will prioritize recognition of diverse family arrangements for only those potential parents who can bear the expense of seeking ILA. This would be a regrettable outcome of a modernization process that seeks to increase the recognition of family diversity.

Second, even where ILA is a legislative requirement, many people will continue to sign parentage agreements without ILA, or without meaningful ILA, and the validity of parentage agreements made without ILA will be uncertain. As identified by the Committee, there are many people who risk falling through the cracks of this requirement, for example parties using sperm donors by sexual intercourse.[50] If ILA becomes a requirement of the legislation, we encourage drafters to consider the potential unintended negative consequences of non-compliance on parties and children. For many, they will continue with their intentions without seeking ILA as they have been permitted to do since 2013.

Third, a requirement that parties seek ILA prior to entering into an agreement under Part 3 does not, in and of itself, ensure that people will be able to access to meaningful, appropriate ILA. Signing a certificate of ILA is intended to provide assurance that parties have an understanding of their rights, obligations, and legal consequences. However, courts often find that ILA did not provide parties with these understandings. Agreements where parties had the benefit of ILA are frequently set aside in court after expensive litigation. Courts have commented that ILA itself is not necessarily meaningful, but it

[50] Consultation Paper, *supra* note 1 at X.

depends on the **quality** of the ILA.[51] Courts have also explained that while ILA can mitigate harms to parties, it does not always do so. [52] As highlighted above, there is a limited pool of lawyers with the specialization required to offer ILA on these agreements in a meaningful way.

Rather than require ILA without regard for the practicality of ensuring adequate ILA services will be accessible and available, West Coast LEAF and Rise recommend that the government encourage parties to seek ILA by funding a free ILA service, with a remote access option, for families who cannot afford to hire a lawyer. This will ensure that the benefits of ILA are available equitably to people regardless of their socio-economic status or location in the province. We cannot speculate on the cost of the ILA for one of these agreements, but presumably it would take a lawyer with specialization in this area at least a few hours to meet with the client, review the agreement, and to then provide ILA. This is well beyond the budget of many people in BC. Further, when considering multiple-parent families within one household, this is a significant expense for everyone to receive ILA. To our knowledge there are currently no free services that could take on providing ILA to clients. As an example, there are currently no lawyers with the required expertise at Rise to provide ILA on Part 3 agreements.

We recognize that the provincial government has opted to invest significant resources to assist parties in resolving their family law matters outside of court. Providing a free ILA service for people with low incomes would align well with existing out of court resolution services offered by the government. As the parentage agreements under Part 3 are a collaborative endeavor, where parties agree on how to create a family, funding ILA for these agreements allows for continued investment in pre-emptive legal supports that will ultimately provide clarity for families, while reducing the likelihood of future costly involvement within the legal system. For parties who do not qualify for the proposed free service and pay for the ILA out of pocket, perhaps there can be considerations of how this payment can be part of an eligible taxable rebate like other expenses related to fertility.

To supplement a free ILA service, we also recommend the creation of accessible educational materials, and fillable templates that people can use, developed in consultation with experts. In light of the Committee's findings that people are frequently relying on unenforceable agreements, including from the United States, we recommend an expansive response to this. There are well-recognized limitations to replacing legal

[51]Consultation Paper, *supra* note 1 at 256. See, for example, *Young v Sherk,* 2019 BCSC 312, at para. 78.
[52] *Dhaliwal v Dhaliwal,* 2021 BCCA 72, at para. 19.

advice with legal information and templates. However, the reality is that some people will not be able to access ILA and will rely on resources that are available to them. Therefore, we view the creation of these resources as a measure to limit the potential harm to those relying on materials from outside of BC. Additionally, these resources may serve as a helpful source for family planning at all stages of the process, including when families are imagining what is possible. The proposed free ILA services and resources should be developed in consultation with directly affected communities to ensure that they are accessible and provide meaningful assistance.

Other Procedural Requirements and Conditions

West Coast LEAF and Rise agree with the Committee's tentative recommendations against attaching additional procedural requirements or conditions to parentage agreements, such as the requirement that agreements be witnessed[53] or that parties attend psychosocial counselling prior to entering into the agreement.[54]

Policy rationales underlying a requirement that a parentage agreement be witnessed (such as, for instance, authenticating signatures and providing some measure of safeguard against coercion and duress) are tenuous and of limited practical value to many families. Moreover, they do not outweigh the implications of non-compliance and the possibility that a common oversight (failing to have an agreement witnessed) will undermine a family's intentions.

A requirement of counselling is highly inaccessible because of factors including the cost of counselling, logistical issues, delay, and the limited accessibility of specialized counselling services. Moreover, such a requirement is unfair and paternalistic given that heterosexual couples are not required to attend counselling before conceiving a child through sexual intercourse. It may imply that some families, by reason only of their family type or pathway to family formation, require psychological help to be successful.[55]

The Availability of Court Relief in the Event of Non-Compliance

As an overarching accessibility measure, it is critical that Part 3 provides a remedy to families who agree on parentage but did not comply with one or more of Part 3's requirements. There is currently some uncertainty in the case law about the scope of the court's jurisdiction under s. 31 of the *FLA* to recognize a parentage agreement in cases of non-compliance (such as where the parties made a verbal parentage

[53] To read the Committee's discussion of this issue, see Consultation Paper, *supra* note 1, at 247-250.
[54] To read the Committee's discussion of this issue, see Consultation Paper, *supra* note 1, at 259-264.
[55] Consultation Paper, *supra* note 1 at 261.

agreement instead of a written agreement). This is because s. 31 of the *FLA* only authorizes the court to make a parentage declaration where there is a dispute or uncertainty about whether a person is or is not a parent. Where the parties agree about who is a parent (and the only issue is seeking a remedy for non-compliance), it may be difficult to meet these conditions. West Coast LEAF and Rise thus agree with the Committee's tentative recommendations to remove conditions from the court's jurisdiction under s. 31[56] as well as confirm the court's jurisdiction under its *parens patriae* power to make parentage declarations.[57]

Donor Children's Access to Information

West Coast LEAF and Rise agree that donor-conceived people should have access to identifying information about their donors. The *FLA* currently provides no right to information about genetic origins for donor-conceived people. The Committee's proposal that BC enact legislation to allow donor-conceived people access to identifying information about their donors would bring BC in line with the trend towards openness adopted in 18 other international jurisdictions as well as with Québec's recent legislation.[58] Further, this change would be consistent with the adoption system in BC. This approach centers on the health and wellbeing of the donor-conceived person.

While this recommendation favors the rights of donor-conceived people, we recommend that the creation of this legislation and the open-access system require further consultations with directly affected people to ensure the implications to intended parents, donors, and donor-conceived people are reflected.

The Parentage of Sexual Assault Perpetrators

West Coast LEAF and Rise share a commitment to advocating for the rights and interests of sexual assault survivors in the family law context. Moreover, Rise has provided direct family law services to many survivors of violence who conceived a child as a result of sexual assault. Many of these survivors do not want to have anything to do with their perpetrator. However, the *FLA* regime does not allow survivors the choice to be disconnected from the person who sexually assaulted them. Perpetrators can bring applications for guardianship, parenting arrangements, and in many cases use the family law process to continue to abuse the mother survivor through litigation abuse and harassment. Survivors have almost no option to be separated from their abuser in cases where the perpetrator wants to be a guardian and play an active parenting role.

[56] To read the Committee's discussion of this issue, see Consultation Paper, *supra* note 1, at 217-224.
[57] To read the Committee's discussion of this issue, see Consultation Paper, *supra* note 1, at 211-217.
[58] Consultation Paper, *supra* note 1 at 155-158.

This is a significant problem that West Coast LEAF and Rise have grappled with, and it deserves meaningful consideration and analysis.

The Consultation Paper contains two problematic assumptions with respect to parentage as a result of sexual assault. Firstly, the paper refers to the use of "deemed" allegations of sexual assault as part of a litigation strategy, citing a decision from Ontario. [59] A recent decision from the BC Court of Appeal, where Rise represented the appellant, confirms that trial judges must guard against relying on myths and stereotypes about family violence.[60] Approaching allegations of family violence on the assumption that such allegations were made to gain an upper hand in the family law proceedings is impermissible.[61] We were concerned to see this myth present within the Consultation Paper.

Secondly, on the basis of a case law analysis, the Consultation Paper concludes that "pregnancies in such cases generally result in abortion or adoption."[62] Respectfully, there is no basis for this assertion, and in the context of this paper which involves such rich analysis of complex topics, this observation appears out of place. The case law analysis conducted for this section of the Consultation Paper appears to have relied on cases where a child was conceived by sexual assault. The case law will only reveal the experiences of those who have disclosed or reported the violence they experienced, and whose experiences made it through the legal process to the point of a written judgment. However, statistics show that most people do not report the violence they experience. A case law analysis of reported decisions cannot speak to the experiences of survivors who will never report, and those whose story will never be part of a written judgment. Survivors of violence have the right to make choices about their pregnancies, and it is important to not make presumptions about the decision-making processes of survivors of sexual assault when they learn they are pregnant. Moreover, for people seeking an abortion in BC, there are only 11 abortion providers in the province. [63] Medical abortions have improved accessibility. However, surgical abortions are only provided in the Lower Mainland, Kelowna, Kootenays, and Vancouver Island. Clearly, not all sexual assault survivors (or indeed all pregnant people) in BC have timely access to an abortion in BC even if that would be their preference.

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[59] Consultation Paper, *supra* note 1 at 108, footnote 230: "At times the court has deemed allegations of sexual assault as part of a litigation strategy." citing *Verma v Di Salvo*, 2020 ONSC 850 88.
[60] *KMN v SZM,* 2024 BCCA 70 [*KMN*].
[61] KMN, *supra* note 60 at paras. 120 and 127.
[62] Consultation Paper, *supra* note 1 at 108.
[63] Options For Sexual Health, Abortion Clinics in BC, online: https://www.optionsforsexualhealth.org/facts/abortion/abortion-providers.

Despite the above concerns with the Committee's analysis, West Coast LEAF and Rise ultimately agree with the Committee's tentative recommendation against a pathway to deny parentage. At this juncture we are concerned that such a pathway would not achieve its policy objectives because of well-known limitations in the legal system when it comes to proving sexual assault and supporting the rights and safety of survivors. That said, we think this topic of protecting sexual assault survivors in the family law system deserves greater attention.

When this issue is addressed in the future, it will require thoughtful and meaningful consultations, including on how sexual assault will be determined in this context considering the barriers many survivors face in reporting, and being believed in criminal and family proceedings. The siloed nature of this discussion from the related discussion of child support and parenting/contact issues makes it difficult to meaningfully address. There is no simple solution. However, as it stands, the *FLA* frequently fails those who conceive a child through sexual assault. Many people will never report the sexual assault they experience to the police and are in relationships where sexual coercion is a constant.

The BCLI's Consultation Process

As discussed above, the Committee that drafted the Consultation Paper is made up of professional experts and does not include lay people with lived experience or the community organizations that advocate on their behalf. While the Consultation Paper is intended to solicit public input on its expert- generated proposals, it is complex, technical, and likely not accessible to most non-lawyer audiences. Moreover, while we appreciate the option for people to provide feedback in several ways online, including through the available survey and by email, these methods (which all require access to a computer and the ability to provide feedback in writing) may still pose barriers to some people.

To ensure meaningful public input, West Coast LEAF and Rise recommend that the BCLI make proactive efforts to consult with lay people with lived experience, including members of the 2SLGBTQ+ families, polyamorous families, non-conjugal families, single parent families, and multiple-parent families, before finalizing its recommendations. Further, it should do so through a wider variety of methods, including round tables, focus groups, and phone calls. This approach will ensure that when navigating the policy tensions identified in the Consultation Paper, the BCLI centers the priorities and practical considerations of those most affected by their recommendations.

West Coast LEAF and Rise also note that the Committee did not meaningfully address the interaction of Part 3 with Indigenous laws and self-determination. We thus also recommend that the BCLI proactively consult with Indigenous people, nations, and communities before finalizing its recommendations. As outlined within United Nations *Declaration on the Rights of Indigenous Peoples (UNDRIP),* any legislation or administrative measure adopted by BC must take place in consultation with Indigenous peoples.[64]

Sincerely,

Raji Mangat
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West Coast LEAF

Vicky Law
Acting Executive Director
Rise Women's Legal Centre

[64] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, refworld.org/docid/471355a82.html. In BC, the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44 requires laws to be brought in line with *UNDRIP.*